

First Amendment Law (PUB 2700)
Vesilind
Tuesday and Thursday, 11:20 – 12:35
Oakes 110

SYLLABUS

Overview

The First Amendment to the U.S. Constitution embodies the foundational rights that many Americans hold most dear—rights to express ourselves freely;¹ to join with others of similar beliefs or interests; to be informed by an unencumbered press; and to adopt and practice religious beliefs free from governmental restrictions or dictates. Increasingly, the Supreme Court is recontouring First Amendment speech and religion doctrines, raising uncertainties in the governance of political campaign finance; healthcare; public and private education; discrimination; labor rights; and internet content. Unfortunately, missing from all this public attention and enthusiasm for the First Amendment is an accurate, practical understanding of its applications, limits, and justifications.

In this course, you will learn how these doctrines are being tested in real-world, ongoing First Amendment disputes. We will examine how periods of social and civil unrest subject First Amendment rights to extraordinary pressures, prompting questions such as:

- Why are speech and religion protected activities?
- How should we define “speech” or “religion”?
- Is all speech, or are all religious activities, equally protected from government intrusion? Should they be?
- When are governmental interests sufficiently strong to permit regulation of speech?
- Why are some types of speech so valueless or harmful as to be unworthy of constitutional protection? What about hate speech, threats, obscenity, pornography, incitement speech, political speech, commercial speech, religious speech, and acts of expressive intent, such as displaying visual works of art?
- Does the establishment clause mandate complete division between church and state, or does it merely prevent the establishment of an official state religion?
- May government adopt a religious code as official law?
- What does it mean to “exercise” religion?
- Should the free exercise of religion permit a citizen from refusing to comply with a general law that conflicts with their religion?
- What if their professed religion is so fringe as to strain credulity?

You know there are no easy answers to these questions, but I am hopeful you will enjoy exploring these ideas as you develop a confident working knowledge of First Amendment tests and case law. No matter your ideological, political or religious persuasion, this course will equip you to recognize and analyze some of the most pressing and fascinating issues facing Americans today.

¹ See, i.e., [FREE EXPRESSION IN AMERICA POST-2020 A Landmark Survey of Americans' Views on Speech Rights](#), Knight Foundation, Jan. 2022.

Course Objectives

By the end of this course, students will be able to:

- Identify and analyze issues respecting governmental infringement on First Amendment rights;
- Articulate and apply justifications for protecting speech and expressive conduct;
- Recognize statutory language that raises concerns of vagueness, overbreadth, or impermissible regulation of speech;
- Analyze common and novel issues raised by First Amendment's religion clauses, applying doctrinal tests and first principles;
- Contribute to the development and drafting of an appellate-level brief in a First Amendment challenge;
- Prepare and deliver an oral argument in support of the brief;
- Demonstrate proficiency in multiple choice and short essay assessments similar to those students will encounter on a bar examination.

Course Materials

- CASEBOOK: Erwin Chemerinsky, Constitutional Law, 6th edition. If you previously bought the 5th edition for Constitutional Law, you can use it with substituted materials on the Canvas site. Our reading assignments track the 6th edition, but the differences between the two editions in Chapters 9 and 10 are relatively minimal.
- Supplemental required and optional materials for all will be posted on the [Canvas](#) site.
- *Do not purchase the Supplement* for the 5th or 6th editions.

Class Preparation and Participation

Prior to beginning a new assignment, read any introductory notes and discussion questions on the Canvas class site for that day. This should help you focus on the relevant doctrines and policies you will want to have in your notes.

I recognize that the material in this course necessarily raises questions of morals, ethics, faith, and ideology – all very personal topics. Every viewpoint is equally valuable; anyone who believes otherwise is missing a valuable opportunity to hone their analytical skills. I urge you to approach class discussions, in-person and online, as dispassionately as possible. I know that you will treat one another with respect. I will encourage you to take positions that are contrary to your personal beliefs. If you have concerns about the content or manner of lectures or class discussion, please share them with me, in confidence.

Office Hours and Appointments

I would like to see you outside of class, and I consider this an important part of my job. Office hours, which will be scheduled shortly after the start of the semester, are optional for “drop-in” visits, but I am also available by appointment, in-person or over Teams. My office is Waterman 305.

Attendance Policy

Come to class. It's more fun when you're here. And invariably, students who miss a disproportionate number of classes are sabotaging their success.

Under VLGS Academic Regulations, there are no “excused” or “unexcused” absences, and you do not need to seek permission to miss class. The regulations permit students to be absent from up to 20% of regularly scheduled classes. Over a semester of 28 class meetings, this comes to no more than five (5) absences before the withdrawal requirement is triggered. I will make note of attendance, but you are responsible for keeping up with your own attendance record and for all material covered in any class you miss.

Section II.A.1 - Regular Attendance

a. Students are required by Vermont Law School and by the [American Bar Association] to maintain regular and punctual attendance in all classes. Students are also required to complete all hours for clinical work, externship work, law review and journal work, and independent research and directed study projects.

b. Students who are absent from twenty (20%) percent of the regularly scheduled classes or who fail to complete required hours for other work shall be automatically withdrawn from the course with a grade of F-Wd. . . . Instructors will notify the registrar’s office of any student who misses more than the allowed classes.

Grading

Assignments: 50%

At the end of each section, you will have an opportunity to apply what you have learned to actual and contemporary First Amendment questions.

Final exam: 50%

The exam will be a combination of bar examination-styled multiple choice questions and short essay questions. It will be closed-book.

Class participation: I reserve the right to raise or lower a final grade by up to 5% based on the quality – not quantity! – or a student’s contributions to class.

Schedule of Topics

Use the Canvas site for class assignments, discussion questions, and supplemental materials.

I. FREEDOM OF EXPRESSION

A. Introduction

1. For and against an absolutist approach
2. For and against protecting free speech as a fundamental right.

B. Free Speech Methodology

1. Content-Neutral vs. Content-Based & Viewpoint-Based Speech Restrictions
 - a. When a law is Content-Based
 - b. Subject Matter Restrictions
 - c. Content-Neutral Laws
2. The Government Speech doctrine
3. Vagueness and Overbreadth doctrines

4. Prior Restraints on speech
 - a. Court orders
 - b. Government licensing schemes
 5. Compelled Speech
- C. Types of Unprotected and Lesser-Protected Speech
1. Speech to incite another to illegal action
 2. Harmful speech cases: fighting words, hostile audiences, and hate speech
 3. Unprotected sexually-oriented speech: obscenity and child pornography
 4. Lesser-protected sexually-oriented speech: profanity and “indecent” speech
 5. Violent speech: cause for an additional exception?
 6. Commercial Speech
 7. Reputation, Privacy, and Publicity Torts
 8. Conduct as Speech
- D. What places are available for speech?
1. Speech on governmental property (forums)
 2. Speech on private property
 3. Speech at school (secondary through post-graduate)
 4. Speech as a government employee
- E. Freedom of the Press
- F. Freedom of Association

II. THE RELIGION CLAUSES

- A. What is religion?
- B. Government actions that violate the Free Exercise Clause
1. The *Smith* Test
 2. Statutory Protection of Religious Freedom
 3. Post-*Smith*: Animus against religion
 4. Governmental Funding to Religious Entities: the Free Exercise Argument
- C. Government actions that violate the Establishment Clause
1. Competing Theories
 2. Government Discrimination of Religion
 3. The *Lemon* Test: RIP?
 4. Religious Speech and the First Amendment
 5. Religion in Government Activities
 - a. School prayer
 - b. Legislative Chaplains
 - c. Religious Symbols on Government Property
 - d. Government Aid to Religion