

The First Amendment: Speech, Religion and the Constitution

GVPT 439B

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Office Hours: 4:15-5 M/W and on request.

Course Content

The purpose of this course is to explore the various facets of the First Amendment. Why protect speech and the practice of religion? Are these “special?” What is speech? What is religion? Do rights to speech and religion trump other rights?

In this course, we will examine various “types” of speech and their relationship to the First Amendment. Among these types are offensive and hate speech, political speech, commercial speech, and obscenity and pornography. Are each of these protected by the First Amendment or are there “governmental interests” that allow some to be regulated and others not? Are there some types of speech that should not be protected (*e.g.* hate speech)?

In the second half of the course, we will look at the religion provisions of the First Amendment: the Free Exercise Clause and the Establishment Clause. We will examine such questions as: what does it mean to “establish” religion? Can government adopt a religious code as its official law? What does it mean to “exercise” religion? Can one ignore general laws that apply to others if they conflict with one’s religion?

There are no easy answers to these questions but they are some of the most important and interesting ones facing Americans today.

Course Requirements

This is not a lecture course (though there are a couple of background lectures to give you an overview of upcoming material) and you will not simply memorize facts and regurgitate them. My goal is to help you to become a critical and rigorous thinker, and a clear and forceful advocate for your views. To do this, you will have to have command of relevant facts and law, but you will also have to be able to logically and consistently apply relevant law to new facts and situations. You will be evaluated on both your written and your oral presentation of your ideas.

You are required to complete all assignments for this course. Failure to complete any assignment will result in an “F” for the course. Due dates are not “suggested” completion dates. Each assignment/exam is due as noted on the syllabus unless I

announce otherwise on ELMS. It is YOUR responsibility to check ELMS on a weekly basis for any modifications to the syllabus.

1. **Class participation:** VERY IMPORTANT. You should come prepared to discuss the readings each and every class. I will use a “kinder, gentler” version of the Socratic method. Anyone can be called upon at any time. Equally important, I will assign several students to assist in leading the discussion each class. I expect each of you to speak not only to me but directly to your peers. An important part of the learning experience is understanding differing arguments and points of view. Learning depends upon the active engagement of everyone.
2. **Exams:** There will be two exams over the course of the semester: a mid-term and a final exam.
3. **Discussion Leader Outline:** You will each be assigned to “lead” one (or more) of our classes. You will prepare a brief outline of your reflections/questions regarding the assigned material. Your outline should be no more than 1-2 pages. These outlines are due at the beginning of class and will not be accepted late. Make sure you bring a copy for me and one to use as you lead discussion.
4. **Short papers/Online surveys:** Over the course of the semester, there are a number of hypothetical cases for discussion. If you are assigned to lead discussion for the class, you must prepare a one-page paper describing how you would decide the hypothetical case. Everyone should complete the related survey on ELMS. (Please do so the night before the class in which the hypo is to be discussed. I may add hypos that are not listed on the syllabus. It is YOUR responsibility to be informed at all times about these short assignments. If you miss class, make sure you check with a colleague as to whether there was an assignment.
5. **Hypo Case Opinion.** You will write a 7-10 page judicial “opinion” in one of the hypotheticals discussed in the course. We will talk more about this in class and I will post a sample opinion as a model.

Grading Criteria

Grades will be computed as follows:

Participation/Short Papers	20%
Opinion	25%
Mid-Term Exam	25%
Final Exam	30%

Grades will be assigned based upon the following scale:

A+	97-100
A	93-96
A-	90-92
B+	88-89
B	83-87
B-	80-82

With your hard work and dedication, it will not be necessary for me to assign any other grades in this course!

Work must be *excellent* to be assigned a grade in the A range and very good to be assigned a grade in the B range. This means that any paper that contains spelling or grammatical errors will not receive a grade in the A range. Spellcheck and proofread your papers. Better yet, have a friend or colleague critique your work.

Required Reading

The Constitution of the United States

Recommended Reading

Power and Alexander, *A Short and Happy Guide to the First Amendment*

Cases and Other Materials

Reading for the semester will mostly consist of Supreme Court cases. These appear on the syllabus in italics, e.g. *Oregon v. Smith*. Most will be posted on ELMS; in not, they are easily available online.

1. *Nexis Uni*. On the library's homepage, enter NexisUni as the database. Then click on NexisUni. From there click on the legal tab followed by Federal and State cases. Enter the case name to retrieve the case. NexisUni also allows you to see law review and other articles related to the case.
2. Law.Cornell. You can also find all of the cases on Cornell University Law School's web site. Go to www.law.cornell.edu and then enter the name of the case. The site generally provides pdf versions of majority, concurring and dissenting opinions in a case.
3. Other websites. I also highly recommend www.oyez.org and www.scotusblog.com. Oyez contains transcripts and recordings of many/most of the cases we will discuss. Arguments generally last 30 minutes so this is a

quick way of discovering the issues that the Justices thought were important in a case. Scotusblog has up-to-date information on recent and pending cases and commentary for a variety of perspectives.

Academic Integrity

The University of Maryland, College Park has a nationally recognized Code of Academic Integrity, administered by the Student Honor Council. This Code sets standards for academic integrity at Maryland for all undergraduate and graduate students. As a student you are responsible for upholding these standards for the course. It is very important for you to be aware of the consequences of cheating, fabrication, facilitation and plagiarism. For more information on the Code of Academic Integrity or the Student Honor Council, see <http://www.studenthonorcouncil.umd.edu/whatis.html>.

Academic honesty is taken very seriously in this course. Plagiarism and any other infractions will be taken up with the appropriate university judicial proceedings.

Students should write and sign the following statement on the cover page of each paper or exam they submit in this course, "I pledge on my honor that I have not given or received any unauthorized assistance on this assignment."

Students with Disabilities

Students with disabilities who are registered with Disability Support Services (301-314-7682) are encouraged to meet with me early in the semester to arrange appropriate academic accommodations.

Inclement Weather

Exams will be rescheduled for the next class meeting if the university is officially closed because of inclement weather. Similarly, any assignments due should be turned in at the next class meeting. Official closures and delays are announced on the campus website and snow phone line (301-405-SNOW) as well as local radio and TV stations.

Religious Holidays

For any assignment due on a religious holiday, you must make arrangements to submit the assignment **before** your absence.

General Policies

1. Late Assignments. Short Papers are due at the **beginning** of the appropriate class. If you are leading the class discussion, you should bring a copy for

yourself and a copy for me. No late papers will be accepted. If you expect to miss the class for any reason, you should email your paper before the beginning of class.

2. Exams including the Final Exam will be re-administered for those with excused absences only. An absence can only be excused in advance.
3. Cell phones and computers. ALL cellphones and computers must be turned off during class. This is a discussion class so your active participation is required. Studies have shown that multi-tasking is not productive or efficient. Moreover, it is disrespectful and harmful to classmates.
4. Attendance. While I do not take attendance, I do make a mental note of those who are absent. 100% attendance is expected. You cannot do well in this class if you are not in class to listen to and participate in the discussion

A complete discussion of all UMD undergraduate course policies can be found at: <http://www.ugst.umd.edu/courserelatedpolicies.html>.

OFFICE HOURS

Finally, I strongly encourage everyone to visit me during office hours—even if you do not have questions to discuss. It is a great way for me to get to know you and help you be successful in this course.

Course Schedule

WEEK 1

August 27

Introduction and Overview of the First Amendment

August 29

Why Free Speech?

What are the historical roots of the Speech Clause? What social functions does it serve? Is the Speech Clause absolute? Should it be?

Read: Mill, *On Liberty*, Chap. 2 (on ELMS)

Listen: Ted Radio Hour Podcast: The Right to Speak @ talk/NPR<https://www.npr.org/rss/podcast.php?id=510298>

Assignment: Please complete the First Amendment Attitudes Survey on ELMS. **(Due at beginning of class!)**

WEEK 2

September 3

NO CLASS—Labor Day

September 5

What is Speech?

Is conduct speech? Does speech require “meaning” or the expression of ideas? Who determines this? The speaker or the hearer? What if a case involves both speech and non-speech?

Cases: *U.S. v. O’Brien*; *Texas v. Johnson*; *South Fla Free Beaches v. City of Miami*; *Barnes v. Glen Theatre*

Discussion Problem: Federal law makes it a crime to deface U.S. currency. Your client is convicted because he routinely writes “mass murderer” over the face of Andrew Jackson on the twenty dollar bill. Does he have a First Amendment claim? Does your answer change if he regularly draws “devil horns” on Jackson instead?

WEEK 3

September 10

The Content Distinction

Can government prefer some point of views to others or must government be neutral as to differing viewpoints? How do

we determine if government regulation is directed at the content of speech? Is there a freedom from speech?

Cases: *Police Department of Chicago v. Mosley*; *Hill v. Colorado*

September 12

“Clear and Present Danger”

Why does “no law” not mean “NO law?” When is speech “dangerous?” How does the court know? How “clear” and “present” must danger be?

Cases: *Debs v. United States*; *Abrams v. United States*

WEEK 4

September 17

Unlawful Action and Incitement

Should the Constitution protect extremist speech? Should Neo-Nazis and Klansmen have First Amendment rights to promote hate speech? Are some ideas (e.g. advocating racial genocide) so abhorrent that they should not receive protection by the First Amendment?

Cases: *Brandenburg v. Ohio*; *Hess v. Indiana*, *Rice v. Paladin Enterprises*; *Chaplinsky v. New Hampshire*

Discussion Problems:

1) The Neo-Nazi Party of America posts on its website the name, address and photo of the foreman of the jury and the judge who presided at the trial of a white supremacist. Is this protected by the First Amendment? Does your answer change if the website post also includes a statement that “someone should do something about the race mongrels in America.”

2) LGBT America posts the names and addresses of all businesses and individuals who gave money to “Defeat Prop 2” (an organization opposing state legislation to make sexual orientation a protected class for purposes of anti-discrimination law). They are sued by the owner of a small business who says his store was harmed because of his membership in the group. Do they have a First Amendment defense? (What if they incorrectly identified him as a member of the group?)

September 19

Overbreadth and Vagueness

How clear does government regulation have to be? How do we tell if a government regulation of speech “goes too far?” Should courts defer to the judgement of legislative bodies in regulating speech?

Cases: *Erznoznik v. City of Jacksonville*; *Board of Airport Commissioners v. Jews for Jesus*; *US v. Stevens*; *Coates v. City of Cincinnati*

Discussion Problem: “Drain the Swamp” (on ELMS)

WEEK 5

September 24

Four Letter Words and “Indecent” Speech

Is “vulgar” speech protected by the First Amendment? What is vulgar speech? Do changing social values make such categories irrelevant? Is vulgar speech different from indecent speech? Who decides? What if such speech is also political speech? Does regulation of such speech involve unconstitutional content discrimination?

Cases: *Cohen v. California*; *FCC v. Pacifica*; *Bethel School District*

Discussion Problem: Can an ex-husband picket his wife with a sign that says “C***”?

September 26

Obscenity and Pornography

What is the difference (if any) between indecent speech and obscenity? What is the difference between such speech and pornography? Should pornography that is degrading to women be protected by the First Amendment? How do we decide what is “degrading?”

Cases: *Miller v. California*; *Ashcroft v. Free Speech Coalition*; *American Bookseller’s Ass’n v. Hudnut*

Discussion Problem: Ben and Jen make political porn (on ELMS)

For additional reading: Watson, Lori. 2010. “Pornography.” *Political Compass* 5/7: 535-550.

WEEK 6

October 1

Hate Speech

What limitations (if any) does the First Amendment place on hateful speech? How does the First Amendment apply to laws that seek to regulate speech directed at racial and other minorities? Must the state prove the hateful intent of the speaker? What if the hateful speech is not directed at a minority group?

Cases: *R.A.V. v. City of St. Paul*; *Virginia v. Black*; *Snyder v. Phelps*

Discussion Problem: Is placing a Trump sign on lawn of Mexican-American family hate speech unprotected by the Constitution? What if the sign said “Build the Wall”?

October 3

Speech and Public Forums

Can government control speech on its property? Does the nature of the property matter? The content or nature of the speech?

Cases: *Int’l Society for Krishna Consciousness v. Heffron*; *US v. Kokinda*

Discussion Problem: Can a university decline to provide public space for a speech by the head of the US Neo-Nazi party and sponsored by a university political club? If it does provide space, can the University charge the club for “heightened public safety” it says are needed at the speech?

WEEK 7

October 8

Time, Place and Manner Regulations

What if the government is not concerned with the content or nature of speech but merely wants to regulate the time, place and manner of speech? Is this allowed? What would “reasonable” regulations look like? Can it regulate signs on government property? Loud music?

Cases: *Watchtower Bible v. Village of Stratton*; *Members of City Council v. Taxpayers for Vincent*; *Frisby v. Schultz*

October 10

Do Students Have First Amendment rights?

Can government regulate the speech of its students? Can students be punished for the content of speech? Can certain types of speech be banned by schools? Are there different standards for primary and secondary schools versus colleges and universities? Should there be?

Cases: *Tinker v. Des Moines*; *Morse v. Frederick*

Discussion Problem: Can a public university punish a student pursuant to its Speech Code for an email that demeans and insults women and racial minorities?

WEEK 8

October 15

Governmental Speech

Do local, state and federal governments have First Amendment rights? Do they “speak?” Can government mandate certain speech that it believes is of high value or importance? Must government speech be truthful? Can it constitutionally limit its speech, e.g. by banning certain books in public libraries?

Cases: *Pleasant Grove City v. Summun*; *Walker v. Texas Sons of Confederate Veterans*; *US v. American Library Association*

Discussion Problem 1: Must a state grant a license plate to the Neo-Nazi party of America where it grants license plates to members of the Democratic and Republican parties?

Discussion Problem 2: Can a local library adopt a policy to buy only books that are critical of/oppose abortion?

October 17

The First Amendment and the Press

What protections should the press have in a democratic society? What is the “press?”

Cases: *Near v. Minnesota*; *NYT v. U.S.*; *U.S. v. Progressive*

Discussion Problem: The NRA issued a press release stating that in its next issue of its monthly magazine, America’s First Freedom, it will publish instructions for how to make a 3-D printer pistol. The Virginia Attorney General (the NRA is headquartered in Virginia) sues to stop publication of the

article. You are the judge in the case. Would you grant the motions for a permanent injunction?

PART 2: THE RELIGION CLAUSES

WEEK 9

October 22 Exam Review and Catch-up Day

October 24 **MID-TERM EXAM**

WEEK 10

October 29 **What Is Religion and Why Is It Special?**

Cases: *U.S. v. Seeger*

Discussion Problem: Is the Church of the Flying Spaghetti Monster a religion?

October 31

A Brief History of Religion in America

Is America a Christian nation? Was it once a Christian nation but no longer? What is the proper role between religion and the state? Is religion a necessary basis for government?

Readings:

Jefferson's Letter to the Danbury Baptists
Governor John Winthrop, "A Model of Christian Charity"
Barton, David. "Is President Obama Correct: Is America No Longer a Christian Nation?" at www.wallbuilders.com

Discussion Problem: John Smith has claimed that the words "under God" in the Pledge of Allegiance are an unconstitutional establishment of religion and seeks a declaratory judgment that the federal law creating the Pledge is unconstitutional? You are the judge in the case. How would you rule?

Dress up as your favorite Supreme Court Justice. Bonus points for best costume!

WEEK 11

November 5

Prayer in Public Schools

Is prayer in public school an “establishment?” What about at school events such as graduation and football games? Must schools prevent prayer in order to avoid establishment of religion?

Cases: *Engel v. Vitale*; *Abington School Dist. v. Schempp*; *Lee v. Weisman*; *Good News Club v. Milford Cent. Sch.*

Discussion Problem: The Satanic Church sponsors local student groups. One such high school group petitions to hold its monthly meeting in school space following the end of the school day. The school allows the Good News Club the right to use school space. Must it grant the request of the Satanic group?

November 7

Vouchers and Aid to Religious Schools

Does government financial aid to religion violate the First Amendment? Does it matter whether the aid is direct (i.e. payments v. tax deductions) or whether the aid is given directly to schools as opposed to the students or their parents? Does the purpose of the aid matter?

Cases: *Mitchell v. Helms*; *Zelman v. Simmons-Harris*

WEEK 12

November 12

The Evolution/Creationism Controversy

Can government take sides in the debate over evolution? Can it seek to promote conflicting points of view? Does mandating the teaching of creationism constitute an “establishment” of religion? Should it? Is this government speech protected from an Establishment challenge?

Cases: *Edwards v. Aguillard*; *Kitzmiller v. Dover Area School District*

November 14

Religious Symbols in Public Places

Are there limits on religion in the public square? Can the government put religious symbols on public property? How do we determine if something is a “religious symbol?” What if a symbol has dual meanings?

Cases: *County of Allegheny v. ACLU*, *Van Orden v. Perry*

Discussion Problem: Martin Luther King memorial and the “big” cross.

WEEK 13

November 19

Prayer in Governmental Places

Reading: Conkle, “Legislative Prayer.” (On ELMS)

Cases: *Marsh v. Chambers*; *Town of Greece v. Galloway*

Discussion Problems: Can a judge begin each session of court with the Lord’s Prayer? Can I begin this class with a prayer?

November 21

NO CLASS: HAPPY THANKSGIVING

WEEK 14

November 26

Free Exercise: Compelling State Interest

What does it mean to “exercise” religion? Is religion something one simply believes? Something one “does?” When must governmental rules yield to religious exercise?

Cases: *Sherbert v. Vermer*; *Yoder v. Wisconsin*

November 28

Narrowing the Compelling Interest Test

What about laws of “general applicability?” Should religious believers get preferential treatment/exemptions from such

laws? What if there is governmental “animus” towards religion?

Cases: *Employment Division v. Smith*; *RFRA*

WEEK 15

December 3

After *Smith*: RFRA and Free Exercise

Can legislatures protect free exercise of religion even if the First Amendment does not? What if the free exercise of religion conflicts with constitutional or statutory rights enjoyed by others? Does the free exercise of religion also necessarily involve free speech rights?

Case: *Hobby Lobby*; *Elane Photography v. Willock*;

Discussion Problem: The State of Columbiana passes a state “RFRA.” The language is broad allowing any individual to assert a defense against a charge of discrimination in the event of a refusal of service provided the refusal is based upon a “sincerely held religious belief.” John Smith and James Doe attempt to buy a wedding cake from the Jesus is Love bakery but the owner refuses to make them a cake on the grounds that doing so would violate his religious beliefs. Is the baker guilty of discrimination? Assume alternatively that the owner of the bakery is a Satanist and the couple are members of the Westboro Baptist Church.

December 5

Animus Towards Religion: Can Government be “Neutral”?

Church of Lukumi Babalu; *Masterpiece Cake*

WEEK 16

December 10

Final Thoughts about the First Amendment