

The First Amendment: Speech, Religion and the Constitution

GVPT 439B/MLAW 358F

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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? Should 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 political speech, offensive speech, hate speech, and obscenity. 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)? Should we treat digital platforms such as Facebook, YouTube, and Twitter the same way we treat newspapers and TV stations, or should some other kind of standard apply?

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? Does government have to be “neutral” regarding religion? Is neutrality even possible? How and should religious views inform public policy and 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. Our 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 apply relevant law logically and consistently to new factual 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 we 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 the Socratic method in our discussion (though it will be a kinder, gentler version than the one typically used in law school). To facilitate discussions, we will assign a small group of you to assist in leading the discussion each class but anyone can be called upon at any time. Equally important, I expect each of you to speak not only to me but also directly to your peers. An important part of the learning experience is understanding differing arguments and points of view.
2. **Discussion Leader Papers:** Over the course of the semester, there will be a number of hypothetical cases for discussion. These will be posted on ELMS. If you are assigned to lead discussion for the class, you must prepare a 250–500 word paper describing how you would decide the hypothetical case. (Word counts exclude titles, cover pages, paper identification, etc.) This paper must be submitted on ELMS by 8am on the day of the class you are assigned to read.
3. **Online Surveys:** Each hypo will have a related survey on ELMS. Everyone including discussants should complete the related survey. As with discussant papers, the survey should be completed by the beginning of class in which we will discuss the hypo. It is YOUR responsibility to be informed at all times about these short assignments.

4. **Hypo Case Opinion.** You will write a 1750-2500 word Supreme Court judicial resolving one of the hypotheticals we discuss in the course. We will talk more about this in later in the semester and we will post a sample opinion as a model.
5. **Quizzes.** If we determine that you are not adequately prepared for discussion, we reserve the right to post short quizzes on ELMS. We will note these in class. If you are not in class, it is YOUR responsibility to check ELMS and complete any short quiz. There will generally be posted on Thursday and due on Friday
6. **Exams.** There will be a mid-term and a final exam.

(Un)Grading Criteria

Grades in this course will be determined on a collaborative basis: between you, me, your TA and your preceptor. At the end of the semester, each of you will submit a self-assessment. This self-assessment will highlight what you have learned in the course, the amount of effort you expended in the course and the grade which you believe accurately reflects your overall performance. Your TA, preceptor and I will also do our own assessment. In preparing ours, we will roughly weight your performance based upon the following criteria:

Mid-Term	20%
Discussant Papers	20%
Hypo Opinion Paper	30%
Final	30%

We will also take into account quiz scores (if any) and most importantly, your participation in class. Participation will be evaluated on a purely subjective basis taking into consideration the quality and quantity of your comments in class. I reserve the right to adjust your final grade up or down one step (*e.g.*, A- to A) based upon your class participation.

Suffice it to say that we want everyone to be successful in this course, and we will give you the tools to do so. Your ultimate success depends upon you.

We will use the University suggested scoring scale. 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. 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*
Robson, *First Amendment: Cases, Controversies, and Contexts, Second Edition*

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*. Newer cases will be posted on ELMS; others are easy to find online. Better yet, access the Robson book noted above online. It's free and it has most of the cases we will be discussing. Alternatively, if like me, you like to have a hardcopy book that you can hold in your hands, any casebook titled First Amendment will serve your purposes.

While you should feel free to consult Wikipedia and other online case summaries, you should NOT rely on these. Some are good; some are ok; and some are inaccurate. These is no substitute for reading the cases yourself.

There are two very good sites for finding cases:

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. We also highly recommend www.oyez.org and www.scotusblog.com. Oyez contains transcripts and recordings of many/most Supreme Court arguments in 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 from a variety of perspectives.
4. Finally, we encourage you to listen to the *Make No Law* podcast. Many episodes deal with cases we will be discussing. (Many relevant episodes are noted on the syllabus.)

General Policies

- Late Assignments. Short papers, quizzes and surveys are due as noted above. Quizzes and surveys will be locked at the due time so you must complete them on time.
- Electronic devices. While I do not prohibit use of electronic devices, I strongly discourage it. Studies have shown that contrary to received wisdom, people cannot multi-task. You cannot formulate arguments and counter arguments if you're busy trying to take notes or access material. And you certainly cannot do so if you're shopping online, checking you fantasy football league or engaging in other non-legal (*i.e.*, frivolous) activities! If you are worried about note-taking, you may record the class for your future reference. Just let me know if you plan to do so.
- Attendance. I do not take attendance (though I do make a mental note of who's in class and who's not.) You do not need to let me know that you will not be in class, but if a situation arises (*e.g.* covid) where you expect to miss more than an occasional class, please let me know immediately so we can ensure that you don't fall behind in the class.
- Do not fall behind in your reading and review of cases. In this course (like many law courses), later material builds on preceding material. If you fall behind, it will be difficult if not impossible to catch up.
- **A complete discussion of all UMD undergraduate course policies can be found at: http://www.ugst.umd.edu/courserelated_policies.html**

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>.

I take academic honesty very seriously. Plagiarism and any other infractions will be referred to the appropriate university judicial authorities. In submitting work for this course, you are deemed to be familiar with and compliant with the Honor Code.

Having said this, I encourage collaboration in this course. Collaboration does not violate the Honor Code. Getting feedback from fellow students and mentors and

incorporating their comments into your work is not plagiarism and is a surefire way to improve your work products. However, the final work product should always be your work.

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

The University will note any school closures on its website.

Religious Holidays

For any survey or quiz due on a religious holiday, you must submit the assignment before your absence. If you are scheduled to be a discussant, please see us and we will reassign you to another class.

Policy on Excused Absences related to COVID-19

In light of the COVID-19 epidemic, self-certified notes will serve as documentation for COVID-19 related absences or missed course expectations. This means that you do not need a note signed by a doctor or other health professional for COVID-19 related absences.

In the event that you cannot complete the regular course assessments due to COVID-19 related absences, we will work with you to determine alternative assignments for you to make up missing work and complete the course. Note that according to university policy, these alternative assignments are permitted and cannot be the basis for an Arbitrary and Capricious grading claim.

Statement on Diversity and Inclusivity

The Government and Politics Department deeply values the voices and perspectives of all people. We are committed to having a diverse department that recognizes and appreciates the differences in race, ethnicity, culture, gender, sexual orientation, religion, age, abilities, class, nationality, and other factors. Our department

prioritizes diversity and seeks to foster a diverse community reflected in its faculty, staff, and students.

In this class, students are invited to share their thoughts and a diversity of opinions is not only welcome but encouraged. Each of us is the product of our own unique experiences and these experiences in turn can provide unique insights into how we understand the law.

At the same time, we are all (to a degree at least) limited by our experiences. It is thus important to understand the experience and perspectives of others. Respectful communication is expected, even when expressing difficult or controversial issues.

Reporting Racism and Other Forms of Hate and Bias

If you experience racism or other forms of bias in this class or any GVPT course, we encourage you to do at least one of the following:

- Please report the experience to me or the teaching assistant.
- Report the experience to David Cunningham, the GVPT Director of Undergraduate Studies at dacunnin@umd.edu
- Report the experience to the GVPT Diversity, Equity, and Inclusion committee, led by Professor Antoine Banks at abanks12@umd.edu

Please also report all incidents of hate and bias to the Office of Diversity and Inclusion at <https://diversity.umd.edu/bias/>.

OFFICE HOURS

Finally, we strongly encourage everyone to visit us during our office hours—either in person or virtually. It is a great way for us to get to know you and help you to be successful in this course.

Course Schedule

WEEK 1

August 29 Introduction to the First Amendment

Assignment: Please complete the First Amendment Attitudes Survey on ELMS.

August 31 **Interpreting the Constitution: Is the Constitution a “living” or a “dead” document?**
Read: Scalia, Brennan, and Souter articles (on ELMS)

WEEK 2

September 5 NO CLASS—Labor Day

September 7 **Why Free Speech? Or is More Speech the Best Response to Bad 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: Free Speech is Killing Us (on ELMS)

Listen: Ted Radio Hour Podcast: The Right to Speak @ [talk/NPRhttps://www.npr.org/rss/podcast.php?id=510298](https://www.npr.org/rss/podcast.php?id=510298)

WEEK 3

September 12

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*

Hypo: Making a Point with a Bang
(Discussants: Group 1; Respondents: Group 5)

September 14

“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: *Schenck v. U.S.*; *Debs v. United States*; *Abrams v. United States*

Podcast: *Make No Law*, “Fighting Faiths,” 27 July 2018
<https://legaltalknetwork.com/podcasts/make-no-law/2018/07/fighting-faiths/>

Podcast: *Make No Law*, “Imminent Lawless Action,” 28 October 2020
<https://legaltalknetwork.com/podcasts/make-no-law/2020/10/imminent-lawless-action/>

WEEK 4

September 19

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*

Podcast: *Make No Law*, “Fighting Words,” 31 January 2018
<https://legaltalknetwork.com/podcasts/make-no-law/2018/01/fighting-words/>

September 21

The Content Distinction (With a short digression on Standards of Review)

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*

Read: Standards of Review (On ELMS)

WEEK 5

September 26

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*; *Shurtleff v. Boston*.

September 28

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*; *FCC v. Pacifica*

Recommended: “*The Seven Words You Can Never Say on Television*”

Text: <https://genius.com/George-carlin-the-seven-words-you-can-never-say-on-television-annotated>

Video:

https://www.youtube.com/watch?v=lqvITJfYnik&list=RDlqvITJfynik&start_radio+1&t=21

WEEK 6

October 3

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*

Podcast: *Make No Law*, “Crush,” 12 April 2018
<https://legaltalknetwork.com/podcasts/make-no-law/2018/04/crush/>

October 5

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*

Podcast: *Make No Law*, “Bonus: The Mailbag Episode,” 12 September 2018
<https://legaltalknetwork.com/podcasts/make-no-law/2018/09/bonus-the-mailbag-episode/>

WEEK 7

October 10

Regulation of “Social” Speech

Can government regulate speech that occurs on social platforms—medium matter? If government can regulate, how far can this regulation go? Is “vulgar” speech protected by the First Amendment? What is vulgar speech? How about untruthful 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 v. Packingham v. North Carolina*

Podcast: *Make No Law*, “The F-Bomb,” 29 November 2018
<https://legaltalknetwork.com/podcasts/make-no-law/2018/11/the-f-bomb/>

Podcast: *Make No Law*, “Deplatformed: Social Media Censorship and the First Amendment,” 28 August 2019
<https://legaltalknetwork.com/podcasts/make-no-law/2019/08/deplatformed-social-media-censorship-and-the-first-amendment/>

October 12

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*

WEEK 8

October 17

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*; *Bethel School District v. Fraser*; *Hazelwood School District v. Kuhlmeiser*; *Morse v. Frederick*; *Mahanoy Area School District v. B.L.*

(https://www.supremecourt.gov/opinions/20pdf/20-255_g3bi.pdf)

Podcast: *Make No Law*, “The Schoolhouse Gates,” 31 January 2018

<https://legaltalknetwork.com/podcasts/make-no-law/2018/01/the-schoolhouse-gates/>

October 19

Compelled Speech

Can government require persons to speak? If so, what kinds of speech can be required and what kinds may not? Are safety labels constitutional? Can government require businesses to inform workers of their rights?

Cases: *NIFLA v. Becerra*; *Rust v. Sullivan*

WEEK 9

October 24 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*

October 26 Catch-up Day and Review for Midterm

WEEK 10

October 31 Midterm Exam

PART 2: THE RELIGION CLAUSES

November 2 What Is Religion and Why Is It Special?

What constitutes a “religion”? Is a generalized belief in a “spirit” that connects everyone a religion? Is the Church of the Flying Spaghetti Monster a religion? The Satanic Church? What is the “exercise” of religion and why does the Constitution protect it?

Cases: *U.S. v. Seeger*

Links:

For the Church of the Flying Spaghetti Monster:
<https://www.venganza.org/about/>

For the Satanic Church:

<https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/17/a-satanic-idols-3-year-journey-to-the-arkansas-capitol-building/> Be sure to watch the videos linked to the site.

WEEK 11

November 7

Is America a Christian Nation: Religion in America 2022

How religious is America? Is America now a “secular” nation? Is religion under assault in America? What about religions other than Christianity? Does the First Amendment provide them “equal protection” or does Christianity enjoy “special protection under the First Amendment? Can government be “neutral” among religions? Between religion and secularism? Should it be?

Read: Barton, David. “Is President Obama Correct: Is America No Longer a Christian Nation?” at www.wallbuilders.com

View: 2022 Religious Liberty Summit: U.S. Supreme Court Justice Samuel Alito, <https://www.youtube.com/watch?v=uci4uni608E&t=1s>

Review: History of Religion in America (PPT on ELMS)

November 9

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 certain “exercises of prayer in schools 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.*; *Kennedy v. Bremerton School District*

WEEK 12

November 14

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: *Lemon v. Kurtzman*; *Mitchell v. Helms*; *Zelman v. Simmons-Harris*; *Trinity Lutheran Church v. Comer*; *Espinoza v. Montana*; ***Carson v. Makin***

November 16

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*; *American Legion v. AHA (Review Pleasant Grove City v. Summum)*

WEEK 13

November 21

Catch-up Day

November 23

NO CLASS: HAPPY THANKSGIVING

WEEK 14

November 28

Prayer in Governmental Places

May local governments begin official meetings with an invocation, devotional reading, prayer, or benediction? Does it matter whether the invocation, devotional reading, prayer, or benediction is non-sectarian?

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

November 30

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? What about laws of “general applicability?” Should religious believers get preferential treatment/exemptions from such laws? Can legislatures protect free exercise of religion even if the First Amendment does not?

Cases: *Sherbert v. Vermer*; *Yoder v. Wisconsin Employment Division v. Smith*; *RFRA*

WEEK 15

December 5

Compelling State Interest Concluded

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

December 7

Animus Towards Religion: Can Government be “Neutral”?

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

Case: *Church of Lukumi Babalu; Masterpiece Cakeshop; South Bay United Pentecostal Church v. Newsome*

WEEK 16

December 12

Final Thoughts about the First Amendment: Free Speech in the Era of Trump
(Hypo Opinion Papers Due)

December ?

Final Exam as Scheduled by the University