First Amendment Theory
JMS 733
Spring 2014
2/12/14 revision

Stephen Bates
702/895-5188
stephen.bates@unlv.edu
www.stephenbates.org

Office hours:
Mon. 9:00-12:45, Wed. 2:30-3:45,
or by appointment
Greenspun Hall #2132

This course examines the fundamental principles of First Amendment law, the major theories about the importance of free speech, and the intersections and tensions between law and theory. Along with the works of scholars, we will examine judicial opinions.

Learning Outcomes
The successful student will
• Understand the fundamentals of legal reasoning and argumentation
• Grasp the key principles of First Amendment law and some of the cases that established them
• Gain a basic understanding of the First Amendment’s framing
• Recognize the disputes among scholars as to the original intent underlying the First Amendment
• Master the major First Amendment theories
• Comprehend the debates among First Amendment theorists
• Analyze and apply First Amendment theory in two research papers
• Develop a personal philosophy regarding the First Amendment and its role in American society

Required Texts

Other readings will be posted on WebCampus or handed out in class.


**Research Paper**

Your grade for the course will depend in large part on a research paper. You should examine one theory in depth, compare the pros and cons of two or more theories, or discuss how a theory has contributed to or conflicted with one or more major court cases. The key criterion is that you should intelligently dissect and apply one or more First Amendment theories. Your argument must be grounded in theory. It should demonstrate that you have mastered the subject matter of the seminar.

For the best grade, present a strong thesis, support it with compelling evidence, and anticipate and rebut counterarguments. I recommend that you follow this outline:


II. Brief summary of theory

III. Brief summary of case and its holding

IV. Arguments supporting thesis and evidence to back them up

V. Counterarguments and rebuttals

VI. Conclusion

You must get my approval in advance for your topic. I can help you narrow or focus your topic if necessary. Start thinking about it right away. We'll discuss your progress periodically in class.

The paper should be at least 16 pages long plus bibliography. Feel free to write at greater length if you’re inspired. Any citation system is fine (footnotes, parentheticals) so long as it clearly indicates the source of each fact and quotation, including the page number. Lapses in grammar and spelling will hurt your grade.

The paper is due by the end of the last class, May 7. You’ll lose 2 points (out of 50) for each day that the paper is late, starting as soon as the May 7 class period ends.

I’ll read a draft up until two weeks before the due date—that is, by April 23.

**Participation**

The other major grading component for the course is participation.

Attendance is expected. Attendance alone is not enough, however. You must come prepared to discuss the assignments in an intelligent manner. *Do the reading—closely, critically, and analytically.*

In addition to discussing the readings, we’ll spend part of each class talking about First Amendment topics in the news. Keep an eye out for pertinent articles.
Discussion Questions

At the outset of each class, you’ll turn in three discussion questions based on the readings. These questions should be analytical rather than factual, and designed to stimulate a meaty discussion. They can touch on two or more of the day’s readings, or draw forth connections between the day’s readings and earlier readings, or delve deeply into a single reading, or apply a reading’s argument to a contemporary issue.

You’ll turn in just the questions—but you should also have thoughts on their answers.

Book Presentation

You’ll also read a book on a topic related to freedom of speech and present it to the class. Plan on devoting at least 10 minutes to the presentation. Use of PowerPoint, handouts, etc. is encouraged.

You can choose a book or article from a list that will be distributed in the first class, or you can choose a different one. Just don’t choose something you’ve already read. You’ll sign up for your choice in the second class.

Grading

<table>
<thead>
<tr>
<th>Component</th>
<th>Percentage</th>
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</thead>
<tbody>
<tr>
<td>Research Paper:</td>
<td>50 percent</td>
</tr>
<tr>
<td>Attendance/Participation:</td>
<td>25 percent</td>
</tr>
<tr>
<td>Discussion Questions:</td>
<td>15 percent</td>
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<tr>
<td>Book Presentation:</td>
<td>10 percent</td>
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</tbody>
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There will be no final exam.

Contacting Me

Come see me during office hours or, if you have a conflict, make an appointment for another time. Or email me with your question; if I don’t respond within 24 hours, send your message again.

Computer Issues

The WebCampus Support Center is open at all times. It has a self-service knowledge base as well as access to live chat with technicians. You can reach it through the WebCampus portal or 702/895-0761.

Academic Integrity

Academic integrity is a concern for every member of the campus community; all share in upholding the values of honesty, trust, respect, fairness, responsibility and professionalism. By choosing to join the UNLV community, students accept the expectations of the Academic Misconduct Policy and are encouraged when faced with choices to always take the ethical path. Students assume the obligation to conduct themselves in a manner compatible with UNLV’s function as an educational institution.
An example of academic misconduct is plagiarism: using the words or ideas of another, from the Internet or any source, without proper citation of the sources. See the Student Academic Misconduct Policy (approved December 9, 2005) located at: http://studentconduct.unlv.edu/misconduct/policy.html.

Copyright

The University requires all members of the University Community to familiarize themselves and to follow copyright and fair use requirements. You are individually and solely responsible for violations of copyright and fair use laws. The university will neither protect nor defend you nor assume any responsibility for employee or student violations of fair use laws. Violations of copyright laws could subject you to federal and state civil penalties and criminal liability, as well as disciplinary action under University policies. Additional information can be found at: http://provost.unlv.edu/copyright/statements.html.

Disability Resource Center (DRC)

The UNLV Disability Resource Center (SSC-A 143, http://drc.unlv.edu/, 702-895-0866) provides resources for students with disabilities. If you feel that you have a disability, please make an appointment with a Disabilities Specialist at the DRC to discuss what options may be available to you. If you are registered with the UNLV Disability Resource Center, bring your Academic Accommodation Plan from the DRC to me during office hours so that we may work together to develop strategies for implementing the accommodations to meet both your needs and the requirements of the course. Any information you provide is private and will be treated as such. To maintain the confidentiality of your request, please do not approach me before or after class to discuss your accommodation needs.

Religious Holidays Policy

Any student missing class quizzes, examinations, or any other class or lab work because of observance of religious holidays shall be given an opportunity during that semester to make up missed work. The make-up will apply to the religious holiday absence only. It shall be the responsibility of the student to notify the instructor no later than the end of the first two weeks of classes, January 31, of his or her intention to participate in religious holidays which do not fall on state holidays or periods of class recess. This policy shall not apply in the event that administering the test or examination at an alternate time would impose an undue hardship on the instructor or the university that could not reasonably been avoided. For additional information, please visit: http://catalog.unlv.edu/content.php?catoid=4&navoid=164.

Incomplete Grades

The grade of I – Incomplete – can be granted when a student has satisfactorily completed all course work up to the withdrawal date of that semester/session but for reason(s) beyond the student’s control, and acceptable to the instructor, cannot complete the last part of the course, and the instructor believes that the student can finish the course without repeating it. A student who receives an I is responsible for making up whatever work was lacking at the end of the semester. If course requirements are not completed within the time indicated, a grade of F will be recorded and the GPA will be adjusted accordingly. Students who are fulfilling an Incomplete do not register for the course but make individual arrangements with the instructor who assigned the I grade.

Tutoring

The Academic Success Center (ASC) provides tutoring and academic assistance for all UNLV students taking UNLV courses. Students are encouraged to stop by the ASC to learn more about subjects offered, tutoring times and other academic resources. The ASC is located across from the Student Services Complex (SSC). Students may learn more about tutoring services by calling (702) 895-3177 or visiting the tutoring web site at: http://academicsuccess.unlv.edu/tutoring/.
UNLV Writing Center

One-on-one or small group assistance with writing is available free of charge to UNLV students at the Writing Center, located in CDC-3-301. Although walk-in consultations are sometimes available, students with appointments will receive priority assistance. Appointments may be made in person or by calling 895-3908. The student’s Rebel ID Card, a copy of the assignment (if possible), and two copies of any writing to be reviewed are requested for the consultation. More information can be found at: http://writingcenter.unlv.edu/

Rebelmail

By policy, faculty and staff should e-mail students’ Rebelmail accounts only. Rebelmail is UNLV’s official e-mail system for students. It is one of the primary ways students receive official university communication such as information about deadlines, major campus events, and announcements. All UNLV students receive a Rebelmail account after they have been admitted to the university.

Class Schedule

1. Jan. 22
   Introduction

2. Jan. 29
   Opening Discussion: Constitutional Interpretation
   William J. Brennan Jr., speech at Georgetown University,
   http://to.pbs.org/1cScAs4

   First Amendment Values
   Epps, Introduction, 17-25
   Steven J. Heyman, “Righting the Balance,” Amar, 32-49
   Thomas Emerson, “From Toward a General Theory of the First Amendment,”
   Epps, 256-271
   Henry E. Jackson, “A Brief for Free Speech” (WebCampus)

   Understanding Case Law
   Orin S. Kerr, “How to Read a Legal Opinion” (WebCampus)

3. Feb. 5
   Opening Discussion: Silence and the First Amendment
**Marketplace of Ideas**
John Stuart Mill, *On Liberty*, ch. 2 (WebCampus)
Benjamin Franklin, “An Apology for the Printers,” Epps, 40-45
Alan M. Dershowitz, “Shouting ‘Fire!’” (WebCampus)

4. **Feb. 12**

**Opening Discussion: Constitutional Values**
Alexander M. Bickel, “The ‘Uninhibited, Robust, and Wide-Open’ First Amendment” (WebCampus)

**Marketplace of Ideas and Its Limits**
Kenneth L. Karst, “Equality as a Central Principle in the First Amendment,” Amar, 141-149

5. **Feb. 19**

**Opening Discussion: Rules and Standards**
Antonin Scalia, “The Rule of Law as a Law of Rules” (WebCampus)

**Self-Government**
Virginia Report (James Madison), Epps, 76-86
Alexander Meiklejohn, “The First Amendment Is an Absolute,” Amar, 125-140
Elena Kagan, “A Libel Story: *Sullivan* Then and Now” (WebCampus)
6. Feb. 26

**Opening Discussion: Privacy**

**Book Presentation: Amanda Cunningham**

**Self-Government: Tax-Funded Speech**

**Art Funding**
Fiss, *Irony of Free Speech*, 27-49

**Public Schools**

**Speech by Officials**

7. March 5

→ **We meet at 3 p.m. **←

**Opening Discussion: Defining “Religion”**

**Book Presentation: Azalee Maslow**

**Self-Fulfillment**
Frederick Schauer, “Must Speech Be Special?”, *Amar*, 85-99
Martin H. Redish, “Value of Free Speech” (WebCampus)

8. March 12

**Guest instructor:**
*Allen Lichtenstein, General Counsel, ACLU of Nevada*

Topic and readings TBA

March 19: Spring Break
9. March 26

**Opening Discussion: Defining “Press”**
*Glik v. Cunniffe, [bit.ly/1aCCvn0](http://bit.ly/1aCCvn0)*
*Lyle v. Warner Bros. (WebCampus)*
*Search King v. Google (WebCampus)*

**Fourth Estate**
*Potter Stewart, “Or of the Press,”” Epps, 281-285*
*William A. Rusher, The Coming Battle for the Media, 199-202 (WebCampus)*
*Commission on Freedom of the Press, A Free and Responsible Press, 1-29 (WebCampus)*
*Paul Horwitz, “Or of the [Blog],” Epps, 322-338*
*J. B. S. Hardman, from Freedom of the Press Today, 122-132 (WebCampus)*
*Philip Meyer, “Certification of Journalists: Necessary for Our Times” (WebCampus)*

10. April 2

**Opening Discussion: Defining “News”**
*Toffoloni v. LFP Publishing, [bit.ly/1f7axPV](http://bit.ly/1f7axPV)*

**Book Presentation: Brittany Rodriguez**

**Checking Value**

11. April 9

**Opening Discussion: Progress report on final papers**

**Book Presentation: Jason Thompson**

**Fourth Estate and Access**
*United States v. Associated Press (WebCampus)*
*Red Lion Broadcasting Co. v. FCC, Epps, 133-140*
*Miami Herald Publishing v. Tornillo, Epps, 170-175*
Fiss, *Irony of Free Speech*, 50-78

12. April 16

**Journalists and the First Amendment**

**Book Presentation: Marisa Toth**

**Challenges to First Amendment Theory: Stanley Fish**
Stanley Fish, “There’s No Such Thing as Free Speech … And It’s a Good Thing Too” (WebCampus)
Stanley Fish, “The Trouble with Tolerance” (WebCampus)
Stanley Fish, “Crying Censorship” (WebCampus)
Daniel J. Silver, review of Fish, *There’s No Such Thing as Free Speech* (WebCampus)

13. April 23

**Opening Discussion: Progress report on final papers**

**Book Presentation: Kyle Yim**

**Challenges to First Amendment Theory: Hate Speech**
Fiss, *Irony of Free Speech*, 5-26
Akhil Reed Amar, “The Case of the Missing Amendments,” Amar, 198-213

14. April 30

**Opening Discussion: The Boundaries of Hate Speech**

**Book Presentation: Denitsa Yotova-Green**
Challenges to First Amendment Theory: Pornography
Walter Berns, “Pornography vs. Democracy: A Case for Censorship,”
http://bit.ly/1mmIHI6
Irving Kristol, “Pornography, Obscenity, and the Case for Censorship”
(WebCampus)
Catherine A. MacKinnon, “Pornography as Defamation and Discrimination”
(WebCampus)
American Booksellers v. Hudnut, Epps, 203-209

15. May 7

Opening Discussion: Your papers (informal)

Challenges to First Amendment Theory: Community Values
Readings TBA