

First Amendment Theory

JMS 733

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2/12/14 revision

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Office hours:

Mon. 9:00-12:45, Wed. 2:30-3:45,

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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

Vikram David Amar, ed., *Freedom of Speech* (Amherst, NY: Prometheus Books, 2009)

Garrett Epps, ed., *Freedom of the Press* (Amherst, NY: Prometheus Books, 2008)

Owen M. Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard University Press, 1996)

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:

- I. Introduction and thesis, e.g. *New York Times v. Sullivan* exemplifies self-government theory, or *Citizens United* is incompatible with marketplace theory
- 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

Research Paper:	50 percent
Attendance/Participation:	25 percent
Discussion Questions:	15 percent
Book Presentation:	10 percent

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 be 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

Edwin Meese III, Speech to Federalist Society, <http://bit.ly/1dWgbVR>

William J. Brennan Jr., speech at Georgetown University,
<http://to.pbs.org/1cScAs4>

First Amendment Values

Epps, Introduction, 17-25

David A. Anderson, "The Origins of the Press Clause," Amar, 65-81

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

West Virginia Board of Education v. Barnette, <http://bit.ly/1jkcDi8>

Wooley v. Maynard, <http://bit.ly/1f3Aobi>

Marketplace of Ideas

John Milton, *Areopagitica*, Epps, 29-39

John Stuart Mill, *On Liberty*, ch. 2 (WebCampus)

Benjamin Franklin, “An Apology for the Printers,” Epps, 40-45

Schenck v. United States, <http://bit.ly/KnGDNX>

Abrams v. United States, <http://bit.ly/Ls06x2>

Zechariah Chafee, Jr., “Freedom of Speech in War Time,” Amar, 25-31

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)

Cohen v. California, <http://bit.ly/1dm28ox>

Marketplace of Ideas and Its Limits

Kenneth L. Karst, “Equality as a Central Principle in the First Amendment,” Amar, 141-149

Herbert Marcuse, “Repressive Tolerance,” <http://bit.ly/fVwiF>

C. Edwin Baker, “Scope of the First Amendment,” Amar, 115-124

Derek E. Bambauer, “Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas,” 696-709 (WebCampus)

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

Cato, “An American ‘Cato’ Defends Criticism of the Government,” Epps, 46-51

Alexander Meiklejohn, “The First Amendment Is an Absolute,” Amar, 125-140

Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, 24-28 (WebCampus)

Robert H. Bork, “Neutral Principles and Some First Amendment Problems,” Epps, 272-280

New York Times v. Sullivan, Epps, 121-132

Elena Kagan, “A Libel Story: *Sullivan* Then and Now” (WebCampus)

Jack M. Balkin, “Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society,” 31-47 (WebCampus)

6. Feb. 26

Opening Discussion: Privacy

Daniel Solove, "10 Reasons Why Privacy Matters," <http://bit.ly/1iLFM5N>

Stephen Bates, "Disciplining the British Tabloids: *Mosley v. News Group Newspapers*," 170-191 (WebCampus)

Book Presentation: Amanda Cunningham

Self-Government: Tax-Funded Speech

Art Funding

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

National Endowment for the Arts v. Finley, <http://bit.ly/1aCB1sH>

Public Schools

Epperson v. Arkansas, <http://bit.ly/1eLlpT0>

Board of Education, Island Trees School Dist. v. Pico, <http://bit.ly/1iIai0h>

Speech by Officials

Penthouse International v. Meese, <http://bit.ly/1ainHfA>

7. March 5

→ *We meet at 3 p.m.* ←

Opening Discussion: Defining "Religion"

United States v. Ballard, <http://bit.ly/1hbhOj9>

United States v. Kuch, <http://bit.ly/1dKLa9u>

Nurre v. Whitehead, <http://bit.ly/1cOeUMN>

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, <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)

C. Edwin Baker, “The Media That Citizens Need,” Epps, 286-299

Paul Horwitz, “Or of the [Blog],” Epps, 322-338

Yochai Benkler, “A Free Irresponsible Press: Wikileaks and the Battle Over the

Soul of the Networked Fourth Estate,” 356-363 (WebCampus)

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, <http://bit.ly/1f7axPV>

Ann-Margret v. High Society Magazine, <http://bit.ly/1aFirjG>

Book Presentation: Brittany Rodriguez

Checking Value

Vincent Blasi, “The Checking Value in First Amendment Theory,” 521-544, 565-649 (WebCampus)

11. April 9

Opening Discussion: Progress report on final papers

Book Presentation: Jason Thompson

Fourth Estate and Access

Stephen Bates, “Regulating Gatekeepers of Information: The Associated Press as Common Carrier,” 62-101 (WebCampus)

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
Jerome A. Barron, "Access to the Press: A New First Amendment Right," 1641-1656, 1666-1678 (WebCampus)

12. April 16

Journalists and the First Amendment

Nelson v. McClatchy Newspapers, <http://bit.ly/19IuVsI>

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)

"'There Is No Such Thing as Free Speech': An Interview with Stanley Fish," <http://bit.ly/1jqHfyy>

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

Mari J. Matsuda, "Public Response to Racist Speech," Amar, 214-232

Harper v. Poway School Dist., <http://bit.ly/1hbpi9x>, and denial of rehearing en banc, <http://bit.ly/1dOYB75>

John Paul Stevens, "Should Hate Speech Be Outlawed?" <http://bit.ly/1aFn4dy>

14. April 30

Opening Discussion: The Boundaries of Hate Speech

John Derbyshire, "The Talk: Nonblack Version," <http://bit.ly/LyioNf>

Book Presentation: Denitsa Yotova-Green

Challenges to First Amendment Theory: Pornography

Walter Berns, "Pornography vs. Democracy: A Case for Censorship,"
<http://bit.ly/1mmIHl6>

Irving Kristol, "Pornography, Obscenity, and the Case for Censorship"
(WebCampus)

Catherine A. MacKinnon, "Pornography as Defamation and Discrimination"
(WebCampus)

Larkin v. G. P. Putnam, <http://bit.ly/1ihEAcN>

American Booksellers v. Hudnut, Epps, 203-209

Coyote Publishing v. Miller, <http://bit.ly/KuPWvp>

15. May 7

Opening Discussion: Your papers (informal)

Challenges to First Amendment Theory: Community Values

Readings TBA