

Constitutional Law II
Professor Meyerson
Fall 2013

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CONSTITUTIONAL LAW II
SECTION 341

COURSE INFORMATION AND SYLLABUS

Meeting Location and Times:

Room 802

Wednesday: 3:00 pm - 4:50 pm

Class Attendance, Preparation, and Participation: You are required to attend class regularly and be prepared for class; adequate class attendance, preparation, and participation are also essential if you wish to understand the material.

To conform with ABA and law school guidelines, you are entitled to 5 absences per semester. A student with more than 5 unexcused absences will not be permitted to take the final.

Unless told otherwise, for each class, you are responsible for: 1) any unfinished material from the preceding assignment: **PLUS** 2) the assignment following the one discussed in the preceding class. If you miss a class, you must obtain the class notes from the missed class before attending the next class.

Class participation is an essential part of process of becoming a lawyer. All students are expected to be prepared to participate in each class session, as I will call on students randomly and solicit volunteers. If you are not prepared to discuss the day's reading and the questions for the day's assignment, please give me a note prior to class. This will avoid embarrassment for both of us.

Use of the Internet during class (This is huge.)

You absolutely can neither be on the Internet nor texting during class. You are required to turn off your access to wireless Internet before the start of class. We will discuss this more on the first day. Suffice to say- texting or internet use during class will be prima facie evidence of unsatisfactory class participation.

I reserve the right to decrease a grade for unsatisfactory class participation or preparation.

Materials

You are required to have Stone, Seidman, Sunstein, and Tushnet, **First Amendment Law** (4th ed. 2012).

Throughout the semester, additional material will be posted on the course TWEN site.

I will post old exams on-line as the semester progresses.

As stated above, I reserve the right to lower grades for inadequate class attendance, preparation, and participation.

Office Hours

My scheduled Office Hours for Fall, 2013 are:

Wednesdays 9:30-10:15, 1:30 - 2:45

Fridays 9:30-10:15, 12:00-1:15

I will have a sign-up sheet on my office door for those who want to schedule an appointment. [This is recommended as I may be elsewhere in the building or library if no one has scheduled an appointment]. If you cannot find a convenient time, *please* let me know and we will find a mutually convenient time to meet or talk on the phone.

READING ASSIGNMENTS

Note: There will be additional readings added to those listed

1. a) Introduction to Freedom of Religion pp 649-56, 665-9, and the “Memorial and Remonstrance” [“Memorial and Remonstrance” is on TWEN – please download or print this before class, as there will not be internet access during class]; **b) Free Exercise** pp 732-35, 739-48, 750

- a) 1) What was [were] the original purpose[s] of the Religion Clauses?
- 2) What is the issue that led to Madison’s “Memorial and Remonstrance”? What are Madison’s most important arguments? Do you agree with them?
- 3) Define religion. [Should courts?]

- b) 1) What does “free exercise” mean?
- 2) What is “rule” of *Smith*? What is the majority’s rationale and O’Connor’s response? Which do you agree with?
- 3) Are *Sherbert and Yoder* still good law?
- 4) Was *City of Hialeah* correctly decided? Why or why not?

2. a) Introduction to Establishment pp 672-81, 684-93; **b) The Ten Commandments: *McCreary* and *Van Orden*** [on line]

- a) 1) What does it mean for a law to be “respecting the establishment of religion”?
- 2) What does “Coercion” mean in Establishment Clause cases? Does the Court get it right?
- 3) Should government “endorsement” of religion be unconstitutional? If so, is the “Pledge of Allegiance” unconstitutional?

b) The Ten Commandments: *McCreary* and *Van Orden* [on TWEN]

- 1) Why did the Court reach different results in *McCreary* and *Van Orden*? What

“rule” emerges from the two cases?

2) What are the differing views of American history? Whose do you find most convincing?

3) What are the differing views of the proper relationship between government and religion? Whose do you find most convincing?

3) a) Governmental Purpose/Aid for Religion pp 701 to top of 703, 706-07, 714-24, 754-62, 765; b) **Introduction to Freedom of Speech** pp 3-16

a) (1) What is an illegitimate governmental purpose under the Establishment Clause? How is such purpose proven?

2) When can government fund religious institutions?

3) What does it mean to “accommodate” religion? When does accommodation become an establishment?

4) In *Locke v Davey*, what part of the First Amendment is the state allegedly violating? What does the Court mean by “play in the joints”?

5) What does RLUIPA try to accomplish? Is it good policy?

b) 1) What are the major values served by protecting freedom of expression? Which one do you think is most important?

2) How important should the “original understanding” of the framers’ be in interpreting the First Amendment?

3) Why does the First Amendment [which begins “Congress shall make no law...”] apply to the States?

4) a. Dangerous Speech I pp 24 -25, 29-34, 38-41, b. **Dangerous Speech II** pp 43–46, 62-65, 70-73

a) 1) Why was the Government permitted to punish speech in *Schenck, Frohwerk*,

and *Debs*? What “test” is used? Do you think the speech in these cases met that “test”?

2) Are the facts in *Abrams* different from the earlier 3 cases?

3) What is the reasoning behind Holmes’ dissent [focus on the second paragraph on p33]?

4) How does Holmes define “incitement” in *Gitlow*?

b) 1) What crime did Ms. Whitney commit?

2) How does Brandeis argue for a broad protection of freedom of expression in *Whitney*? What “test” does he propose?

3) Does the Court’s test in *Brandenburg* seem like any of the tests previously used or proposed? Why are Douglas and Black unhappy?

4) Compare *Scales* (p62) with *Holder* (p70): What is the difference between advocating that “terrorism” is legal and giving advice to a “terrorist group” how to argue in court that “terrorism” is legal?

5) a) Speakers and the Angry Audience pp 84-87, 92-94, 96-98 (from *Street to Johnson*); b) **Hate Speech** pp 300-07, 310-19

a) 1) When does an angry audience justify silencing a speaker?

2) Why was Feiner arrested? Is the Court’s analysis in *Feiner* correct?

3) What are “fighting words”? What would be examples of modern-day “fighting words”?

b) 1) Are *R.A.V.*, *Mitchell*, and *Va v Black* consistent? What rule[s] of law can be derived from both cases?

2) Is there a “law of hate speech”? Should all, some, or no hate speech be fully protected?

3) Is a “threat” ever protected by the First Amendment?

6) a) Defamation pp156-62, 167-71, 290-94; b) **Privacy and Hurt Feelings** pp 176-81, 102-04

- a) 1) What does “defamation” mean?
- 2) What are the First Amendment rules for defamation cases?
- 3) Define “actual malice”, “reckless disregard”, “public figure,” and “private figure”.
- 4) What is meant by “group libel”? Should “group libels” be protected by the First Amendment?

- b) 1) In *Hustler Magazine*, how is the tort alleged different from defamation? Why should the rule of law be the same?
- 2) Should the speech in *Snyder v Phelps* be protected?

7) a) Commercial Speech pp 186- 193, 196-207; b) **Obscenity** pp 227-236, 238-39

- a) 1) Define “commercial speech”. What types of “advertisements” are not “commercial speech”? Give examples.
- 2) Is *Thompson* consistent with *Virginia Pharmacy and Central Hudson*?
- 3) What is rule today for regulating commercial speech?
- 4) Should the constitutional standard for regulation of commercial speech be different from that for other forms of regulation?

- b) 1) How does the Court define “obscenity”?
- 2) What is the argument for and against the Court allowing the criminalization of “pure speech” merely because it is “obscene”?
- 3) Does the Internet change anything? Everything?

8) a). Indecency and Children pp 271-80, 285-86, 643-44 ; **Overbreadth and**

Vagueness pp 127-38

- a) 1) What is indecent but not obscene?
- 2) When, how, why can indecency be regulated?
- 3) What role does the type of medium utilized have on the constitutionality of indecency regulation?

- b) 1) Define “overbreadth” and “vagueness”. How are they different?
- 2) When & why can a bad guy get off because of overbreadth?
- 3) Why isn’t a law modeled on *Miller v California* “vague”?

9) a) Prior Restraints pp 138-40, 145-50, 108-17; b) **Introduction to Content-Neutrality** pp 285-92, 240-43, 296-97

- a) 1) What is the difference between a prior restraint and subsequent punishment? Give examples of each. Why are prior restraints considered worse?

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- 2) What did each Justice argue in the *NY Times v US*?
 - 3) Should a magazine be able to publish an unclassified recipe for how to build an atomic bomb?

- b) 1) Define content-neutrality.
- 2) Why does the court treat a content-neutral law differently than a content-based law?
- 3) Why should a court ever strike down a content-neutral law?

10) a) The Public Forum pp 339-47, 348-53, 392-396; b) **Government-Funded Speech** pp 402-05; 409-17

- a) 1) Define “public forum” and “limited public forum”
- 2) What governmental property is *not* a public forum?

- 3) Are there any public fora at the University of Baltimore School of Law?
- 4) What type of regulation is permitted for a public forum?

b) 1) When can a speech-restriction be placed on recipients of government funding?

2) Is this rule consistent with the purpose of the First Amendment?

11) a) Expressive Conduct pp 423-30, 438-46; **b. Political Contributions and the First Amendment** 494-510, 481-86

a) 1) What is the difference between “expressive conduct” and “pure conduct”?

2) What is the constitutional standard for regulating “expressive conduct”?

b) 1) Should making a political contribution be considered the same as making a political speech for purposes of the First Amendment? [why and why not?]

2) Under current law, what types of contribution can be constitutionally regulated?

3) Why was the Arizona law struck down?

12) a) Right of Association/ The Right Not to Speak pp 519-527, 531-36; ; b) **Free Speech in Restricted Places** pp 541-50

a) 1) Why does the Court imply a “right of association” in the First Amendment?

2) What are the two different “rights” of association?

3) How can these rights be regulated?

4) Why does the Court imply a “right of not to speak” in the First Amendment?

What does this right entail?

b) 1) What regulation of speech is permitted in a) military bases, b) schools, and c) prisons?

2) Why?

13) a) Government Employment pp 552-68; b) Special Protection for the Press? pp 592-98, 600-04, 606-13

a) 1) Do government employees have First Amendment rights? If so, how do those rights differ from other speakers? Why?

2) Can the government “reward” its friends with government jobs? Deprive its foes of government jobs?

b) 1) Who is the “press”? Who is not?

2) Does the press have the right of access to criminal trials? Does the press have the right to keep sources confidential?

3) What are the policy arguments for and against special protection for the press?