

Constitutional Law II  
Professor Meyerson  
Fall 2017

Office: Room 1118  
Phone: (410) 837-4550  
E-mail: mmeyerson@ubalt.edu

## COURSE INFORMATION AND SYLLABUS

Meeting Times: Wednesdays: 1:30 pm - 3:20pm

Location: Room assignments are available through MyUB.

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 2 absences per semester. A student with more than 2 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.)**

Repeated studies, as well as my own experience, prove that using the Internet or texting during class lowers class performance and exam grades. The fact that this may not have occurred in college for you is not relevant at all. I will ask you all to turn off your access to wireless Internet and put away your cell phone 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** (5th ed. 2016)

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

## Course Website

This course has a TWEN page that links to this syllabus, announcements, the class assignments, and other class materials. You are responsible for self-enrolling in the TWEN page and for checking it regularly for course information.

## Grading

Your grade will be determined by a closed-book final examination.

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

## Student Learning Outcomes

Students will learn the basic rules of freedom of religion and speech; they will learn how to present both sides of difficult religion and speech issues; they will learn the history and current effect on democracy of our First Amendment rules; they will learn how to structure legal arguments in a logical sequence; and they will learn how to be precise with legal language. They will also learn how to work collaboratively to solve legal problems.

## Course Expectations

American Bar Association Standards for Law Schools establish guidelines for the amount of work students should expect to complete for each credit earned. Students should expect approximately one hour of classroom instruction and two hours of out-of-class work for each credit earned in a class in order to obtain a *minimum* passing grade.

You are also expected to complete all reading assignments before class, to participate consistently in class discussion, to work collaboratively on all group assignments, and to be able to demonstrate that you have read and reflected on the issues raised in each assignment, and can answer the questions accompanying each assignment.

## Office Hours

My scheduled Office Hours for Fall, 2017 are:

Wednesdays: 9:30- 10:20, 12:00 – 1:20 (except for faculty meetings)

Fridays: 9:30- 10:20, 12:00 – 1:20

**IMPORTANT:** 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.

Class Cancellation:

If I must cancel a class, I will either let you know ahead of time or, if need me, notify you via email. If there is inclement weather, students should visit the University of Baltimore web site or call the University's Snow Closing Line at (410) 837-4201. If the University is open, students should presume that classes are running on the normal schedule.

Academic Integrity:

Students are obligated to refrain from acts that they know or, under the circumstances, have reason to know will impair the academic integrity of the University and/or School of Law. Violations of academic integrity include, but are not limited to: cheating, plagiarism, misuse of materials, inappropriate communication about exams, use of unauthorized materials and technology, misrepresentation of any academic matter, including attendance, and impeding the Honor Code process. The School of Law Honor Code and information about the process is available at [http://law.ubalt.edu/academics/policiesandprocedures/honor\\_code/](http://law.ubalt.edu/academics/policiesandprocedures/honor_code/).

If you have even the slightest doubt about whether certain actions would violate the Honor Code, please contact me or Associate Dean Dionne Koller.

Title IX Sexual Misconduct and Nondiscrimination Policy:

The University of Baltimore's Sexual Misconduct and Nondiscrimination policy is compliant with Federal laws prohibiting discrimination. Title IX requires that faculty, student employees and staff members report to the university any known, learned or rumored incidents of sex discrimination, including sexual harassment, sexual misconduct, stalking on the basis of sex, dating/intimate partner violence or sexual exploitation and/or related experiences or incidents. Policies and procedures related to Title IX and UB's nondiscrimination policies can be found at: <http://www.ubalt.edu/titleix>.

Disability Policy:

If you are a student with a documented disability who requires an academic accommodation, please contact Leslie Metzger, Director of Student Services, at 410-837-5623 or [lmetzger@ubalt.edu](mailto:lmetzger@ubalt.edu).

## READING ASSIGNMENTS and QUESTIONS

**Note: There will be additional readings added to those listed**

**1. a) Introduction to Freedom of Religion** pp 539-41, 556-60, 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 625-27, 631-40, 642

- 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 define religion?]

- 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 562-571, 574-83; **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** 610-16, 646-51, 657-58;

**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 22-24, 27-32, 35-38, **b. Dangerous Speech II**  
pp 40-43, 56-59, 61-63

- a) 1) What “test” is used to permit government to punish speech in *Schenck*, *Frohwerk*, and *Debs*? 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 first 14 lines in the full paragraph on p32]?
- 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) In *Holder* How is advocating that “terrorism” is legal different from giving advice to a “terrorist group” how to argue in court that “terrorism” is legal?

**5) a) Speakers and the Angry Audience** pp 69-74, 78-81, 82-84 (from *Street* to *Johnson*); **b) Hate Speech** pp 263-69, 271-79

- 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** pp135-41, 145-48, 255-57; 152-55; b) **Privacy and Hurt Feelings** pp 156-58, 87 -90, 159-62

- 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?
- 5) From *Alvarez*: Should provably false statements 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?
- 3) Is there a right to privacy?

7) a) **Commercial Speech** pp 172- 179, 183-89; b) **Obscenity** pp 194-95, 203-210, 212 [*Ashcroft*]

- a) 1) Define “commercial speech”. What types of “advertisements” are not “commercial speech”? Give examples.
- 2) Are *Thompson* and *Sorrell* 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 229-33, 238-40, 242-46, **Overbreadth and Vagueness** pp 111-15, 117-18, 214-16, 119-20

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 wasn't the law in *Ferber* overly broad?

9) a) **Prior Restraints** pp 122-23, 127-29, 130-31, 90-99; b) **Introduction to Content-Neutrality** pp 287-84

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 302-11, 317-26, 349-50; 351-55; b) **Free Speech in Restricted Places** [*Morse* on TWEN]

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) What regulation of speech is permitted in public schools? 2) Why?

**11) a) Government-Funded Speech** pp 360-63; 366-73, 379-83; **b) Expressive Conduct** pp 384-92, 399-404;

a) 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?

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

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

**12) a). Political Contributions and the First Amendment** 441-54, 459-65, 432-35; **b) Right of Association/ The Right Not to Speak** pp 479-8, 483-86, 489-93

a) 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?

b) 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?

**13) a) Government Employment** pp 471-76; 249 **b) Technology and the First Amendment** pp224-29

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) Should the Court view violent video games as equivalent to violent literature for First Amendment purposes?