

LSHV-444-01 Room: 117 ICC

GEORGETOWN UNIVERSITY
2019
FREE SPEECH, THE FIRST AMENDMENT AND THE SUPREME COURT
SCORPIONS IN THE CONSTITUTIONAL BOTTLE
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I. COURSE PRECIS

Free speech is very much about line-drawing. We are generally agreed that political speech, no matter how heated, is the hallmark of an open society, and highly protected under the First Amendment. We are also generally agreed that you can't cry fire in a crowded theater when there is no fire; and that child pornography is bereft of any constitutional protection. Those are easy. What about the gray areas, where unfettered speech is a threat to safety, to reputation, to national security, to morality?

In pushing the free speech envelope, how far is too far? Where (if at all) should society -- and the Supreme Court -- draw the line? Justice Brandeis, a champion of free speech, noted that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." Justice Holmes, another champion, observed that "the ultimate good desired is better reached by free trade in ideas." Justice Jackson, also a proponent, nonetheless cautioned that speech free of reasonable fetters, if unchecked, can lead to anarchy and convert the Bill of Rights "into a suicide pact." Who is right? Or are they all right?

When is speech so uncivil that domestic tranquility takes precedence? What is lost and what is gained as a society in resolving these tensions? This course grapples with these issues. Through historical analysis and case study of the leading Supreme Court speech cases, we will examine the interplay between speech and censorship, liberty and order; majoritarianism and libertarianism; and the legal, societal and ethical implications of the Supreme Court's First Amendment pronouncements in this volatile, contentious /perpetually vexing area.

II. Course Goals/Aims and Requirements

Historical documents and Supreme Court decisions will serve as grist for the analytical mill as we assess whether the rule of law can simultaneously protect free speech and preserve a civil society. We will start in the Colonial period (John Peter Zenger) and the Constitutional Convention, progress through landmark cases – Near, Brandenburg, New York Times v. Sullivan, the Pentagon Papers – to the present, to include the current SCOTUS Term and the three blockbuster First Amendment “compelled speech” cases decided last Summer (Masterpiece Cakeshop, Becerra, Janus).

Teaching Method: Class is a fast-paced mix of lecture, case analysis, discussion, and the Socratic method of teaching based on textbook and case assignments.

We place a premium on interdisciplinary inquiry, close reasoning and cogent exposition (oral and written).

- **Interdisciplinary Inquiry:** You will be pushed to develop the ability to examine issues through kaleidoscopic inquiry. History, economics, and political theory and

practice all weigh heavily in a contextual understanding of the Court, Free Speech and the Constitution.

- Close/Critical Reasoning: We are of course interested in WHAT the Court decides-- the Court's answer to the question posed is our analytical destination. Our paramount interests lie elsewhere: we must identify the basis for the Court's decision -- the WHY (the analytical journey); only then can we assess whether the decision is compelling and persuasive.
- Written and Oral Exposition

Examinations: The examinations (take-home) will consist of essay questions in which you will be asked to analyze and discuss the constitutional implications of hypothetical church-state scenarios. A mid-term examination will be given the week of March 18. The final examination will be given the week of April 29.

Research Paper: Each student will be assigned to research a particular topic tied to a particular free speech issue. The student will produce a scholarly research paper (not an A&E biography) of 16-20 pages (double-spaced). Assignments will be selected on January 19.

Class Attendance and Participation: Structured argumentation is an acquired skill. You will be pushed in class to reason critically, articulate a position, and defend it. Class preparation, attendance and participation are essential. Any student who misses a class is in jeopardy of expulsion. Students who know that they must miss a class must notify the professor in advance. Two absences = mandatory withdrawal.

III. Textbook/Supplement, Grading and Class Schedule

Required Text: Zelezny, Communications Law: Liberties, Restraints and the Modern Media (6th Ed.) **Note: 6th Ed.** (Paper is fine). I have placed a book order at the GU Bookstore. (Also available on Amazon – new starting at \$60).

Required Course Supplement: Will be provided to students at no charge. **BUT YOU MUST OBTAIN THROUGH DEAN SULLIVAN'S OFFICE IN ADVANCE OF FIRST CLASS!**

Time: The class will meet Saturdays from 9AM to Noon (1/12, 1/26, 2/2, 2/9, 2/23, 3/16, 3/23, 4/13, 4/27).

Grading: The grade for the course will be based upon the mid-term (30%) the research paper (35%), the final examination (30%). The quality of class preparation and classroom presentation will be factored into the final grade (5%).

NO TAPING OR RECORDING OF CLASSES!!

SYLLABUS

INTRODUCTION AND OVERVIEW

CLASS SCHEDULE

Textbook and Supplement (Handout) must be brought to all classes.

I. NUTS AND BOLTS OF FREE SPEECH ANALYSIS

Session 1 – January 12: THE CONSTITUTIONAL SKUNK AT THE GARDEN PARTY

- INTRODUCTION -- SEMESTER PREVIEW

- THE CONSTITUTION AND U.S. LEGAL SYSTEM -- AN OVERVIEW
Supp: Stein Article; Hentoff Article; Constitution--Excerpts; Supreme Court Justices -- Biographies; Glossary

- WHY FREE SPEECH AT ALL?
Supp: Abrams, Whitney, Schwimmer, Near, Terminiello, NYT v. Sullivan, Cohen

- THE FIRST AMENDMENT -- SCOPE OF PROTECTED SPEECH
Text: 34-47

- THE FIRST AMENDMENT -- CONTENT-BASED REGULATION OF SPEECH
Text: 47-57
Supp: Near

NO CLASS JANUARY 19

Session 2 – January 26: TENUOUS BALANCING: CIVIL SOCIETY - UNCIVIL SPEECH

- THE FIRST AMENDMENT -- CONTENT-NEUTRAL REGULATION OF SPEECH (TIME, PLACE AND MANNER RESTRICTIONS)
Text: 57-59
Supp: Krishna, Lakewood, Schenck, Chicago Park District

- THE FIRST AMENDMENT -- RESOLVING CONFLICTS BETWEEN UNCIVIL SPEECH AND CIVIL RESTRAINTS (LEVELS OF SCRUTINY)
Text: 59-69
Supp: Cohen

- THE FIRST AMENDMENT -- CASES WITH A DIFFERENT SPIN

Text: 72-73
Supp: Southworth, Rumsfeld, Morse, Summum
Research Topics Distributed

II. HOT BUTTONS: CONTEMPORARY FREE SPEECH ISSUES

Session 3 – February 2: ISSUE #1: SPEECH AND VIOLENCE

- INCITEMENT

Text: 86-93

Supp: Abrams, Whitney, Terminiello

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- HATE SPEECH

Text: 51-52

Supp: R.A.V., Wisconsin v. Mitchell, VA v. Black

- SPEECH ENDANGERING NATIONAL SECURITY

Text: 93-97

Supp: Unabomber Article

Research Topics Assigned Sample Exam Question Distributed

Session 4 – February 9: ISSUE #2: SPEECH AND SAFETY

SPEECH ENDANGERING INDIVIDUAL SAFETY

Text: 99-113

Case Supp: Paladin (Hit Man) (4th Cir.)

NO CLASS FEBRUARY 16

Session 5 – February 23: ISSUE #3: SPEECH ENDANGERING REPUTATION LIBEL

Text: 116-154; 156-162

Supp: NYT v. Sullivan, Oprah Article, Westmoreland v. CBS Packet

NO CLASS MARCH 2 OR MARCH 9

Session 6 – March 16: ISSUE #4: SPEECH AND PERSONAL PRIVACY

INVASION OF PRIVACY

- Public Disclosure of Embarrassing Private Facts

- Intrusion

- Intentional Infliction of Emotional Distress

Text: 176-178; 190-200; 204-Top208; 214-217

Supp: Favish

Week of March 18 – MIDTERM EXAM (TAKE HOME)

Session 7 – March 23: ISSUE #5: SPEECH AND MORALITY

OBSCENITY AND NON-OBSCENE SEXUAL EXPRESSION

· Obscenity

Text: 446-460

· Child Pornography

Supp: Ferber, Williams

"Virtual" Child Pornography

Supp: Ashcroft v. Free Speech Coalition

· Regulating Non-Obscene Sexual Expression (Books-Film-Live Entertainment)

Text: 468-473

ISSUE #6: ELECTRONIC SPEECH AND MORALITY I:
BROADCAST, CABLE AND CYBERSPEECH

Introduction

Text 379-88; 433-Middle 436

March 30 and April 6: Research Paper Independent Study

Session 8 – April 13: ISSUE #6: ELECTRONIC SPEECH AND MORALITY II:
BROADCAST, CABLE AND CYBERSPEECH

Broadcast and Cable: Content Controls on Indecency

Text: 473-483

Supp: Fox v. FCC Packet (2d Cir. Opinion and SCOTUS Remand)

· Cyberspeech: Content Controls on Indecency

Text: 484-487

Supp: Ashcroft v. ACLU I and II, United States v. ALA

NO CLASS ON APRIL 20

Session 9 – April 27: ISSUE #7: RECENT SCOTUS OPINIONS ON SPEECH /WRAP-UP

Supp: Fall 2009 – Fall 2017 Terms Packet

Week of April 29 -- FINAL EXAMINATION (TAKE HOME)

SEMESTER PAPER -- DUE MAY 9

IV. Honor Code

This course is governed by the University Honor Code -- I commit myself to respect and uphold the Georgetown University Honor System: To be honest in my academic endeavor; and to conduct myself honorably, as a responsible member of the Georgetown Community.

V. Disabilities Statement

If you believe you have a disability that affects academic performance, then you should contact the Academic Resource Center (arc@georgetown.edu) for further information. The Center located in the Leavey Center, Suite 335. The Academic Resource Center is the campus office responsible for reviewing documentation provided by students with disabilities and for determining reasonable accommodations in accordance with the Americans with Disabilities Act (ADA) and University policies.

VI. Instructional Continuity Due to Unforeseen Disruptions

If weather or other unforeseen events prevent on-site classroom instruction, we will “convene” by telephone and/or add time to regularly scheduled classes, to compensate.

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SUPPLEMENT
FREE SPEECH, THE CONSTITUTION, AND THE SUPREME COURT
SCORPIONS IN THE CONSTITUTIONAL BOTTLE
SPRING 2019

STEIN ARTICLE
HENTOFF ARTICLE
CONSTITUTION -- EXCERPTS
SUPREME COURT JUSTICES -- BIOGRAPHIES
GLOSSARY

ABRAMS
WHITNEY
SCHWIMMER
NEAR
TERMINIELLO
NEW YORK TIMES V. SULLIVAN
COHEN

KRISHNA
LAKEWOOD
SCHENCK
CHICAGO PARK DISTRICT

SOUTHWORTH
RUMSFELD
GARCETTI
MORSE
SUMMUM

R.A.V.
WISCONSIN V. MITCHELL
VIRGINIA v. BLACK
Hate Crimes Article
Unabomber Article

HIT MAN (4th Circuit)
Oprah Article
Westmoreland v. CBS Packet
FAVISH

FERBER
WILLIAMS
ASHCROFT V. FREE SPEECH COALITION

FOX v. FCC Packet (2nd Circuit Op and SCOTUS remand)
ASHCROFT V. ACLU I AND II
UNITED STATES V. ALA

FALL 2009 – FALL 2012 TERMS Packet
FALL 2013 – FALL 2017 TERMS Packet