

First Amendment Rights

Times: MW 11:00 A.M.–12:15 P.M.
Office Hours: MW 10:00–11:00 A.M.

Room: 108

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Description

Perhaps the most iconic feature of the U.S. Constitution, the First Amendment retains a popular place in the public imagination. This course focuses primarily on the freedom of speech guaranteed by the First Amendment, with due attention also given to freedom of association and the religion clauses. Because the language of the constitutional text is so vague—extending protection to the “freedom of speech” or the “free exercise” of religion—our understanding of First Amendment law will depend entirely on Supreme Court opinions and scholarly critiques of those opinions. Our study of First Amendment case law and theory will be supplemented with exercises designed to present you with problems you might face in practice. Finally, as the First Amendment tends to be bar examiners’ favorite “Con Law” subject, we will supplement our study with practice bar-type questions as well.

Required Materials

Hellman, Araiza, Baker, & Bhagwat *First Amendment Law: Freedom of Expression and Freedom of Religion* (4th ed., Carolina Academic Press 2018) [[Amazon](#)]
2019 Casebook Supplement [[Link](#)]

Recommended Supplementary Reading

The First Amendment chapters in the [Chemerinsky treatise](#) (recommended in your Constitutional Law course) are just as useful as the rest of the book. If you are looking for a First-Amendment-focused supplement, the following are suggested:

Jerome A. Barron & C. Thomas Dienes, *First Amendment Law in a Nutshell* (5th ed., West 2018)
Daniel A. Farber, *The First Amendment* (4th ed., Foundation Press 2014)
John C. Knechtle, *Mastering First Amendment Law* (Carolina Academic Press, 2018)
Robert C. Powers & Mark C. Alexander, *A Short & Happy Guide to the First Amendment* (West 2016)
Russell L. Weaver, *Understanding the First Amendment* (6th ed., Carolina Academic Press 2017)

Website

We will use the [SIU D2L](#) webpage for our class. Please check it often for new postings.

Learning Objectives

At the conclusion of this course, students should be able to:

- identify the unprotected categories of speech and explain why they receive no First Amendment protection.
- state the test for commercial speech and explain why this category receives a unique standard.
- identify a prior restraint on speech, distinguish it from a subsequent punishment, and analyze its constitutionality.
- undertake a compelled speech analysis.
- explain why freedom of association is protected and under what standard.
- explain the principle of content neutrality.
- undertake forum analysis for speech that occurs on government property.
- explain time, place, and manner restrictions as a means of incidental speech regulation.
- apply rational basis review, intermediate scrutiny, and strict scrutiny as required by case law.
- apply the *Lemon* test, as well as competing tests, for Establishment Clause claims.
- apply the *Smith* test for Free Exercise claims.
- confidently approach [MBE](#) and [MEE](#) bar-style questions on the First Amendment.

Evaluation

Midterm (out-of-class)	20%
Final Examination	80%

The midterm will be a timed, bar-style essay (30 minutes) that you will write out in Exemplify during a time of your own choosing within a timeframe to be determined during Week 6 of the semester. The final exam will be cumulative and will consist of both multiple-choice and essay questions patterned after those you will encounter on the bar exam. All exams will be closed-book.

S/U Grading

The grades of students who have elected to take this course with S/U grading will be converted by the Registrar according to the following scale: 2.1 or greater = Satisfactory; below 2.1 = Unsatisfactory. Only students who receive a Satisfactory grade will earn academic credit for the course. Otherwise, the course requirements and expectations do not differ for students taking the course for an S/U grade.

Attendance Policy

The Attendance Rules specified in the School of Law Rules III.5(f)–(g) are in full force. Attendance will usually be taken with a sign-in sheet, which each student is required to sign at the beginning of class. It should be noted that a student who is called upon in class, but in the opinion of the instructor, is unprepared, may be marked as absent for the day. A student may “note out” of class discussion for a particular day but must not sign the attendance sheet for that day.

Laptops and Other Electronic Devices

Laptop computers should *not* be used in class for any purpose other than taking notes. If any student inappropriately uses a laptop (for sending email, chatting, web browsing, etc.) he/she will be marked as absent for the day. The easiest way to avoid suspicion of laptop misuse is not to use one in class in the first instance.

Workload Expectations

The American Bar Association (“ABA”) law-school-accreditation standards contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310, “a ‘credit hour’ is an amount of work that reasonably approximates not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks.” This is a 3-credit hour class, meaning that we will spend two 75-minute blocks of time together each week. The amount of assigned reading and out-of-class preparation should take you about 3 hours for each class session and 6 hours for the week. All told, applying the ABA standard to the number of credits offered for this class, you should plan on spending ***no less than 9 hours per week (3 in class and 6 preparing for class) on course-related work.***



Reading Assignments

(subject to change)

CHAPTER 1: THE PROBLEM OF SUBVERSIVE ADVOCACY

Monday, August 19

- A. First Encounters, pp. 3–12
- B. The *Abrams* Case and the Holmes Dissent, pp. 12–16
- C. Learned Hand and the *Masses* Case, pp. 16–22

Wednesday, August 21

- F. *Brandenburg v. Ohio* and Its Implications, pp. 50–60
- G. The “True Threat,” pp. 60–63
- H. A Last Word from Justice Holmes, pp. 63–65

CHAPTER 2: UNPROTECTED SPEECH: THE *CHAPLINKSY* EXCLUSIONS

Monday, August 26

- A. “Fighting Words”, pp. 67–75
- Chapter 3: A. Offensive Language and Images, pp. 155–75

B. “The Libelous”—or Otherwise Tortious

Wednesday, August 28

- [1] The Constitutionalization of Defamation, pp. 75–93

Monday, September 2 – Labor Day Holiday

Wednesday, September 4

- [2] “Public Figures” and Private Plaintiffs, pp. 93–110
- [3] “Outrage” and Emotional Distress, pp. 110–22

Monday, September 9

- C. [1] “The Lewd and Obscene”: Initial Development of the Law, pp. 124–38
- C. [2] “The Lewd and Obscene”: Current Doctrine, pp. 138–53

CHAPTER 3: NEW CANDIDATES FOR CATEGORICAL EXCLUSION OR LIMITED PROTECTION

Wednesday, September 11

- C. Commercial Speech, pp. 197–232

CHAPTER 4: TRANS-SUBSTANTIVE DOCTRINES

Monday, September 16

- A. Prior Restraints, pp. 265–94

CHAPTER 5: CONTENT-BASED REGULATION

Wednesday, September 18

- A. The Principle, pp. 305–12, supp. p. 1
- B. Defining Content Discrimination, pp. 312–24, supp. p. 1

CHAPTER 6: REGULATING THE “TIME, PLACE, AND MANNER” OF PROTECTED SPEECH

Monday, September 23

- A. Early Development of the Doctrine, pp. 341–50
- B. Applications of the Doctrine, pp. 350–60

Wednesday, September 25

- B. Applications of Doctrine, pp. 360–88

CHAPTER 7: EXPRESSIVE CONDUCT AND SECONDARY EFFECTS

Monday, September 30

- A. Expressive Conduct, pp. 389–407

Wednesday, October 2

- B. “Secondary Effects” as a Basis for Regulation, pp. 407–29
- C. Expression and Conduct: Untangling the Doctrines, pp. 429–44

CHAPTER 8: SPEECH ON GOVERNMENT PROPERTY AND THE PUBLIC FORUM DOCTRINE

Monday, October 7

- A. Foundations of the Doctrine, pp. 445–53
- B. Mass Demonstrations and the Problem of the “Hostile Audience”, pp. 453–67

Wednesday, October 9

- C. Access to Nontraditional Forums and Facilities, pp. 467–505, supp. pp. 3–9
- D. Speech on Private Property, pp. 505–08

CHAPTER 9: COMPELLED EXPRESSION

Monday, October 14

- A. Compelled Speech, pp. 509–26, supp. pp. 11–12

Wednesday, October 16

- CHAPTER 10: FREEDOM OF ASSOCIATION**, pp. 537–65 (entire chapter)

CHAPTER 12: BEYOND REGULATION: THE GOVERNMENT AS EMPLOYER AND EDUCATOR

Monday, October 21

A. First Amendment Rights of Government Employees, pp. 615–40, supp. pp. 21–24

Wednesday, October 23

B. The First Amendment in the Public Schools, pp. 641–63

CHAPTER 13: BEYOND REGULATION: WHOSE MESSAGE IS IT?

Monday, October 28

B. When is the Government the Speaker?, handout (*Summum*) + pp. 686–704

CHAPTER 15: TESTING THE BOUNDARIES OF DOCTRINE

Wednesday, October 30

A. “Hate Speech,” pp. 739–60

Monday, November 4

B. Government Programs and Offensive Speech, pp. 761–72, supp. pp. 25–37

C. The Internet as the New Public Square?, pp. 772–82

CHAPTER 17: THE ESTABLISHMENT CLAUSE

Wednesday, November 6

A. [1] Financial Aid to Religion: Basic Principles, pp. 813–18, supp. pp. 39–47

A. [2] The *Lemon* Test as Modified, pp. 818–23

A. [3] School Vouchers, pp. 842–57

Monday, November 11 – Veterans Day Holiday

Wednesday, November 13

B. School Prayer, pp. 857–77

C. School Curriculum, pp. 877–85

Monday, November 18

D. Displays in Public Places, pp. 885–921, supp. pp. 47–67

CHAPTER 18: THE FREE EXERCISE CLAUSE

Wednesday, November 20

B. Modern Cases, pp. 946–77

C. Discrimination Against Religion, pp. 977–88, supp. pp. 71–78

CHAPTER 19: INTERRELATIONSHIPS AMONG THE CLAUSES

Make-up Class by Recorded Lecture

B. Tensions between the Religion Clauses, pp. 1008–30

Make-up Class by Recorded Lecture

C. Religious Speech, pp. 1030–52, supp. pp. 80–82

Thanksgiving Vacation, November 22–December 1

FINAL EXAMINATION: Wednesday, Dec. 4, 8:15 A.M.

Amendment 1.

*Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof;
or abridging the freedom of speech, or of the press,
or the right of the people peaceably to assemble,
and to petition the Government for a redress of grievances.*