In the first half of the semester we will explore topics in First Amendment theory and practice. This year the seminar will focus on the philosophical and political theory foundations of the freedom of expression; the historical roots of freedom of speech principles: the forgotten years; clear and present danger as changing forms; the interactive relationship between internal Court decision making and the world outside; Cass Sunstein’s First Amendment as an expression of judicial minimalism; the offensive, lewd, and profane off and on the Internet; hate speech, fighting words, and robust political speech off and on the Internet; whether there should be limits on First Amendment absolutism; and the free exercise of religion in the context of state establishment of religion. Particular concern will be given to the interpretation of the First Amendment through an analysis of the Supreme Court’s social construction process in light of absolutist or “neutral” First Amendment principles.

The second half of the semester will be devoted to each student researching and writing a 20-30-page seminar paper and making a 25 minute presentation to the class on the topic of the seminar paper. Papers may be written on a wide range of topics including, but not limited to, the following possible topics: philosophical foundations of First Amendment principles; pragmatism as a way to view First Amendment speech; the social construction process under the First Amendment; judicial review, Sunstein’s judicial minimalism, and the First Amendment; Citizens United and Campaign Finance in a democracy; state establishment of religion; free exercise of religion; hate speech and fighting words on campus, the streets, and the Internet; the translation of First Amendment principles to the Internet; the government as speaker—such as the funding of the arts; a Supreme Court justice’s approach to First Amendment speech, press, or religion; the First Amendment and changing definitions of offensive speech in differing contexts; what is viewed as “political” and “equality” under First Amendment principles. Since this is the only constitutional law seminar at Oberlin, you may wish to write your paper on any topic in constitutional law and theory, including equal protection and privacy rights, as well as issues of separation of powers.

The following required readings have been ordered by Oberlin Bookstore for your purchase:


**ALL OTHER REQUIRED AND RECOMMENDED READINGS ARE ON ERes**

The password for the readings for this seminar on ERes is **POLT301**.

**Other Sources of Information and Full Texts of Cases**

Full text of cases are available on the LexisNexis Academic Universe Computer-based Legal Data Service, which is on the web and thus available in your dorm rooms. LexisNexis can be accessed on the web by going to www.oberlin.edu. Click on Libraries, then find articles, then database by name, then L-M. After selecting “LexisNexis Academic,” click on “Legal Research” and then “Get a Case.”

Other websites on the Internet at which you can read the full Supreme Court cases and view other materials on the Supreme Court and constitutional law include the following: [www.supremecourtus.gov](http://www.supremecourtus.gov), which is the official web site of the United States Supreme Court and [www.findlaw.com/casecode/](http://www.findlaw.com/casecode/) which is a particularly useful venue at which you can find all Supreme Court decisions, state and lower federal court opinions, as well as news about the Supreme Court and law. [Oyez.nwu.edu](http://oyez.nwu.edu) is a site at which you can hear oral arguments on major Supreme Court cases. Another useful website is www.firstamendmentcenter.org. If you plan to use Inter-Library Loan, start the process early enough to receive the materials at the proper time.

My office hours will be in Rice Hall, Room 232, on Tuesday, 3:00-4:00, and Friday, 1:00-2:30, or by appointment. I can be reached at my office number, 775-8495. I also can be reached at x58487, the Politics Department number (where you can leave a message on an answering machine), at home, 774-1670, or by e-mail (Ronald.Kahn@oberlin.edu). I will have a sign-up sheet for office hours. Please sign up as early in the office hours that fits your schedule.

**TIME LINES FOR RESEARCHING, PRESENTING, AND WRITING PROSPECTUSES AND SEMINAR PAPERS**

It is important that students identify the subject matter of their seminar paper research prior to Spring Break. In class meetings from time to time, I will ask you about your seminar paper topics. On Monday and **Tuesday, October 29/30**, the first Monday and Tuesday after Fall Recess, I will meet with you individually to discuss your seminar paper topic. These meetings will be held in my office, Rice 232. You should have chosen your paper topic before you meet with me and have done some research on it so you can discuss your approach to the topic and bibliographic sources that you will use in your research. I will review a draft of your paper prospectus if you have a draft ready for that meeting. The prospectus is to be five to seven double-spaced pages. It is to describe the topic of your paper, the primary questions that you seek to research, methods you will use to answer these questions, a full bibliography of sources you will use in the paper, and expected findings. We will not meet as a class on Tuesday, November 6; however, I will be in my office if you have questions about your prospectus and project. By **Friday, November 9, at 5:00 PM**, e-mail to me and to each of the students in the seminar a copy/draft of your prospectus.
Each student will read all the prospectuses, and write comments on the prospectuses of three or four students assigned to your group based on paper content. Please send your comments to all members of the seminar and me by **Sunday, November 11, 2012 by 5:00 PM**. On **Tuesday, November 13**, we will meet during regular class time to discuss each prospectus. Students should be prepared to respond to questions and comments by fellow class members and the teacher. By **Tuesday, November 20**, students are to provide to me a final copy of your prospectus. The grade on the prospectus will be based on the quality of the prospectus, the in class responses to comments by fellow students and me, and the ability to respond to those comments in the final version of the prospectus. At class meetings on November 27, December 4, December 11, 2012, and one additional class to be arranged students will make twenty-five minute oral presentation, before which they will hand out a detailed outline of their talk to each class member.

Your class participation will count 20% of the grade, your prospectus, outline, and presentation will count as 20% of your grade, and your seminar paper will count 60% of your grade. The seminar paper is due at my office, Rice 232, by **Wednesday, December 19, 2012**, the day when the final would be given if there were a final in the seminar.

**Schedule of Classes**

I. Tuesday, September 4, 2012
   Organizational Meeting

II. Tuesday, September 11, 2012
   Freedom of Speech I: First Amendment Theory; Common Law Constitutional Law; Clear and Present Danger Today; Is Freedom of Speech More Robust on the Internet? (September 11, 2012)

III. Tuesday, September 18, 2012
    Freedom of Expression II: Hate Speech; First Amendment Speech and the Right of Association; The Right Not to Speak; Government as Speaker and Funder (Tuesday, September 18, 2012)

IV. Tuesday, September 25, 2012
    Political Solicitation, Contribution, and Expenditure

V. Tuesday, October 2, 2012
   Freedom of the Press

VI. Tuesday, October 9, 2012
   The Religion Clauses: State Establishment of Religion

VII. Tuesday, October 16, 2012
    The Religion Clauses: The Free Exercise of Religion

    Fall Recess

VIII. Monday/Tuesday October 29/30, 2012 meet individually with Prof. Kahn to discuss paper topics.
IX. No class meeting on Tuesday November 6, 2012 (election day). Work on your prospectuses and research for the seminar paper and email a draft of your prospectus to the teacher and all class members by Friday November 9, 2012.

X. By Sunday November 11, 2012, by 5:00PM, send comments/critiques of draft student prospectuses to the teacher and all students.

   We shall meet Tuesday, November 13, 2012 at regular class time to discuss each prospectus. Students should be prepared to answer questions expected based on the comment/critiques they have received.

XI. By Tuesday, November 20, 2012, each student will hand in to the teacher the final version of their prospectus.

   Tuesday November 20, 2012, First Set of Class presentations.

XII. Tuesday Evening, November 27, 2012 Class Presentations and Pizza Dinner at Ron Kahn’s Home, 45 King Street. (Time TBA)

XIII. Tuesday, December 4, 2012 Class Presentations.

XIV. Tuesday, December 11, 2012 Class Presentations

(An additional class period for presentations may if no volunteers for Tuesday November 20, 2012)
I. Organizational Meeting (September 4, 2012)

II. Freedom of Speech I: First Amendment Theory; Common Law Constitutional Law; Clear and Present Danger Today; Is Freedom of Speech More Robust on the Internet? (September 11, 2012)

A. Why Value Freedom of Speech?


1. An Overview of First Amendment Theory:
   Personal Liberty and Individual Self-Fulfillment
   The Search for Truth in the Marketplace of Ideas
   Participation in Decision-making


2. Critiques of First Amendment Theory


   Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 152-174.


Additional Sources


C. Clear and Present Danger Today


Note: The Road to *Brandenburg*

*Brandenburg v. Ohio* (1969) (KKK Speech and imminent)

Note: The *Brandenburg* Formulation

*Hess v. Indiana* (1973) (Were Taking the F... Street!)


Note: *Schenk to Brandenburg*, and Beyond

Speech That “Threatens”

* Bridges v. California* (1941)


D. Is Freedom of Speech More Robust on the Internet?

1. Virtual Child Porn, Animal Cruelty, and Violent Video Games


Note: Child Pornography


Note: Violence as Obscenity
2. Sex and Indecent, Non- Obscene Speech on the Internet


*FCC v. Pacifica Foundation* (1978) (Dirty words on radio)
*Sable Communications, Inc. v. FCC* (1989)
*Reno v. American Civil Liberties Union* (1997) (Sex on the Internet)
Note: “Indecent Expression”

Additional Sources


  Chapter 8, World War One, 67-79.
  Chapter 9, Holmes and Brandeis Dissenting, 80-89.

III. Freedom of Expression II: Hate Speech; First Amendment Speech and the Right of Association; The Right Not to Speak; Government as Speaker and Funder (Tuesday, September 18, 2012)

A. First Amendment Principles and Government Responses to Hate Speech


*Beauharnais v. Illinois* (1952) (Group defamation in the 1950's)
Note: Group Defamation and "Hate Speech"
Note: *R.A.V.* and *Mitchell*
Note: *R.A.V.* and *Black*
Note: Pornography and the Victimization of Women

Commentary


  Chapter 4, The Appearance of Hate, 65-104.
  Chapter 5, Protecting Dignity or Protection from Offense?, 105-143.
  Chapter 6, C. Edwin Baker and the Autonomy Argument, 144-172.
  Chapter 7, Ronald Dworkin and the Legitimacy Argument, 173-207.


**B. First Amendment Speech and the Right of Association**


*NAACP v. Alabama* (1958) (State cannot require it to see membership lists)


Note: Association and the First Amendment

*Board of Directors of Rotary International v. Rotary Club of Duarte* (1987) (State can require Rotary Club to admit women under anti-discrimination law)


Note: The Meaning of Dale

**C. Compelled Affirmation, Expression, and Association: The Right Not to Speak**


*Pruneyard Shopping Center v. Robins* (1980)

Note: Compelled Affirmation, Expression, and Association: The Right Not to Speak

*Minersville School District v. Gobitis* (1943) overruled in *West Virginia State Board of Education v. Barnette* (1943) (State can’t require all children in public schools to salute and pledge allegiance to the flag)

*Wooley v. Maynard* (1977) (State can’t punish citizens who cover up “Live Free or Die” on License Plates)


*Rumsfeld v. FAIR* (2006) (Government can force universities to accept military recruiters on campus under threat of loss of federal aid, even though the military violated rules against discrimination against gays).

**D. The Government as Speaker (and funder) Under the First Amendment: Doctors Providing Advice of Abortions, Legal Aid Lawyers, NEA Arts Funding, Permanent Displays in parks, and Filters on Government Supported Library Computers**

Rust v. Sullivan (1991) (Government doctors not allowed to counsel or refer patients about abortions)

Note: The Implications of Rust

National Endowment for the Arts v. Finley (1998) (Is the NEA allowed to consider “standards of decency” when awarding grants?)

Legal Services Corporation v. Velazquez (2001) (Can government paid lawyers be banned from testing the constitutionality of welfare laws?)

Note: The Reach of Government Speech


United States v. American Library Association (2003) (Can government grants to libraries for computers require blocking software to limit access to materials that are “harmful to children”?)


Chapter 4, Democratic Persuasion and State Subsidy

IV. Political Solicitation, Contribution, and Expenditure (September 25, 2012)

A. Conflicts on the Court Over Principles, Practices, and Court versus Legislative Power


Buckley v. Valeo (1976)

Note: Buckley and the Problem of Abridging Speech to “Enhance” the Electoral Process

Note: Subsidy and Disclosure

Brown v. Socialist Workers ’74 Campaign Committee (1982) (No disclosure permitted)


Doe v. Reed (2010) (Disclosure of referendum signatures permitted)

Note: Contribution Limits, PACS, and Political Parties


Davis v. Federal Election Commission (2008)(No increase in expenditure limit for candidates facing millionaire spending on own campaign)

Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett (2011) (No increase in matching funds when opponents spend robustly on own election)

Note: Corporate Contributions and Expenditures (Look for seeds of Citizens United)

spending on referenda to those affecting business assets)

*Austin v. Michigan Chamber of Commerce* (1990) (Corporations can’t use general treasury funds to support or oppose candidates for public office)


*McConnell v. Federal Election Commission* (2003) (Government can prohibit corporations and labor unions from funding electioneering communications from general treasuries targeting clearly identified candidates 60 days before general election and 30 days before primaries)

*Federal Election Commission v. Wisconsin Right to Life* (2007) (McConnell principles weakened - issue advocacy is not same as express campaign advertisement and is not subject to same limits on corporations and labor unions)


Note: Reflections on *Citizens United*

B. “Electoral Exceptionalism” Under First Amendment Speech Principles


Chapter 1 Introduction (Monica Youn): 1-8.
Chapter 4, “Electoral Exceptionalism” and the First Amendment (Geoffrey Stone): 37-54.

C. Money and Rights: Does Spending Equal Speech?


Chapter 5, Money and Rights (Deborah Hellman): 57-76.
Chapter 6, Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle on the Wake of *Citizens United* (Frances R. Hill): 77-95.
Chapter 7, First Amendment Fault Lines and the *Citizens United* Decision (Monica Youn): 95-117.

D. Corruption and Democracy: Can Political Spending Undermine Our Republic?


Chapter 8, On Political Corruption (Samuel Issacharoff): 119-134.


V. Freedom of the Press (October 2, 2012)

A. Expression By the Press That Discloses Confidential Government Information


(The Pentagon Papers Case)
Note: *Nebraska Press* and the Pentagon Papers
Note: The Progressive Controversy
Note: Dangerous Ideas and Information—Final Thoughts


Note: “The Central Meaning” of *New York Times v. Sullivan*  
Note: Other False Statements of Fact  


Chapter 11, To the Supreme Court, 103-112.
Chapter 12, There Never Is a Time, 113-126
Chapter 13, May It Please the Court, 127-139.
Chapter 14, The Central Meaning of the First Amendment, 140-152
Chapter 20, Envoi, 234-248.

C. Does the Press Have a Preferred Status To Gather News Under First Amendment?


*Branzburg v. Hayes* (1972) (Must the press appear before grand juries?)

Note: A Right to Gather News?


Note: A Press Right of Access to Information?

*Pell v. Procunier* (1974) (Right to interview inmates)

Access to Military

*Gannett v. DePasquale* (1979) (Access to judicial hearings)

*Richmond Newspapers v. Virginia* (1980) (Right to attend criminal trials)


Note: Variations on the Press Right of Access

D. The Internet Compared to “The Press” As Intermediaries in a Deliberative Democracy


Note: The First Amendment in Cyberspace

Note: Free Expression-Final


Chapter 4, “Social Glue and Spreading Information,” 89-104.


Additional Sources

Chapter 1, The Central Image, 1-23
Chapter 3, Autonomy’s Control, 40-61
Chapter 4, The Secondary Image, 62-84.
Chapter 6, Reflections, 108-132
Postscript, 153-155.


Chapter 2, Surveying the Public on Press Freedoms, 26-38.
Chapter 3, What Americans Know About the Freedom of the Press, 39-55.
Chapter 4, Public Support for the Freedom of the Press, 56-74.
Chapter 6, Support for Press Freedoms within a Medium:
    Elite, Mainstream, and Tabloid News Sources, 95-110.
Chapter 7, Public Opinion, the First Amendment, and the Challenges of the Twenty-First Century, 111-121.
VI. Religious Clauses I: the Separation of Church and State (October 9, 2012)

A. History of the Religion Clauses


_Everson v. Board of Education_ (1947) (School transportation)

The History of the Religion Clauses

Additional Sources


B. General Approaches to the Religion Clauses and Defining Religion


General Approaches
1. Strict Separation
2. Strict Neutrality
3. Noncoercion and anti-indoctrination
4. Nonpreferentialism
5. Volunteerism and separation
6. “Equal Liberty”

Defining Religion

Commentary


Strict Separation:
Alan Schwartz, “No Imposition of Religion, the Establishment Clause Value,” 452-459,
Neutrality:
Donald A. Giannella, Religious Liberty, Non Establishment, and Doctrinal Development Part II. The Nonestablishment Principle, 466-471.

Accommodation:

C. Does the “Lemon Test” Survive Weisman?: The Anti and Noncoercion Principles Compared to the “Lemon Test”

1. The “Lemon Test” and the Anticoercion Principle


The Lemon [v. Kurtzman (1971)] Test
Lee v. Weisman (1992) (School prayer and the anti-coercion principle)
Note: The Non-Coercion Principle
Engel v. Vitale (1962) (School prayer)


Commentary


Gary J. Simson, “The Establishment Clause in the Supreme Court: Rethinking the Court’s Approach,” 486-492.

Chapter Four, “Constituting the Separation of Church and State,” 107-138. (ERes)

**D. The Non-Endorsement Principle and De Facto Establishments:**

Creche in Public Holiday Display


Note: The Non-Endorsement Principle

*County of Allegheny v. ACLU* (1989) (Free standing nativity scene)

*Capitol Square Review and Advisory Board v. Pinette* (1995) (KKK cross on public property)


*Salazar v. Buono* (2010) (Cross on public ground)

**E. Impermissible Purposes: The School Prayer Cases**


Note: Problems with a “Purpose” Test


*Wallace v. Jaffree* (1985) One minute “for meditation or voluntary prayer"

*Larson v. Valente* (1982) (Government purpose and religious organization reporting requirements)

*McCreary County v. ACLU of Kentucky* (2005) and *Van Orden v. Perry* (2005) (Ten Commandments-No and Yes)

*Epperson v. Arkansas* (1968) (Ban on teaching evolution)

*Edwards v. Aguillard* (1987) (Must teach “creation science” when schools teach evolution)

**F. Facially Neutral Statutes That Incidentally Aid Religion: Permissible and Impermissible Effects—Aid to Religious and Other Non-Public Schools**

*This will be discussed at the start of Class VII.*


Note: From *Aguilar to Mitchell*

*Aguilar v. Felton* (1985) (No remedial help to educationally deprived)
Witters v. Washington Department of Services for Blind (1986) (Aid for student at Christian college)
Zobrest v. Catalina Foothills Sch. Dist. (1993) (Sign language interpreter at Catholic high school)
Rosenberger v. Rectors and Visitors of University of Va. (1995) (Use of mandatory student fee funds for student religious magazine)
Agostini v. Felton (1997) (Aguilar overruled)
Mitchell v. Helms (2000) (Lending state computers to non-public schools)
Zelman v. Simmons-Harris (2002) (Vouchers to Attend Non-Public Schools)

Note: Purpose and Effect in Aid to Non-Public Education—Benevolent Neutrality?
Note: Concluding Observations

Commentary


A. The Free Exercise Clause: Required Accommodations


Sherbert v. Vernor (1963) (Work on Saturday for unemployment benefits)
Wisconsin v. Yoder (1972) (Compulsory school attendance for Amish)

B. Problems (Limits) on Mandatory Accommodation


United States v. Lee (1982) (Amish and social security taxes)
Goldman v. Weinberger (1986) (Jewish yarmulke in military)
O'Lone v. Estate of Shabazz (1987) (Prayer meetings in prison)
Employment Division, Department of Human Resources v. Smith (1990) (Religious use of a banned drug, peyote)

Note: Should Accommodation Be Required?


Chapter 5, Religious Freedom and the Reason for Rights

C. Permissible Accommodation


Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos (1987) (Religious test for employees of relig. orgs.)
Board of Ed. of Kiryas Joel Village School District v. Grumet (1994) (Special school district for Satmar Hasidim Jews)

Note: When--If Ever--Should Accommodations of Religion Be Permitted?
Thornton v. Caldor (1985)

Note: Free Exercise and the Right of Expressive Association
Widmar v. Vincent (1981) (School facilities for relig. groups)
Torcaso v. Watkins (1961) (State officials must believe in God)
McDaniel v. Paty (1978) (Bar to ministers as legislators)
Larken v. Grendel’s Den (1982) (Can church be given authority to veto liquor licenses for nearby restaurants)

Note: Concluding Observations

Fall Recess

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