

FIRST AMENDMENT SEMINAR - SPRING 2013

There are three assigned books for this seminar. They are:

1. The First Amendment: A Reader (Second Edition) by Garvey and Schauer.
2. The American First Amendment in the Twenty-First Century, Cases and Materials (Foundation Press, Fourth Edition) by Van Alstyne.
3. First Amendment Stories, edited by Garnett and Koppelman.

Pages marked with an **R** are to the Garvey and Schauer **Reader**.

Pages Marked with a **S** are for the **Stories Book**.

Other pages that are not so marked are to the Van Alstyne **Casebook**

Class participation is an important aspect of this course and the quality of that participation may affect your grade.

Computers will be allowed in class, but only for classroom purposes. Wi-fi access will be permitted, but only as it relates to class discussion. Any other use of the computer or the internet is improper. **I may ask any student whom I see violating this rule to leave class. Such expulsion from class may result in the lowering of your grade as much as one whole letter grade.** Phone use for any purpose will not be permitted unless there is a personal emergency requiring it.

Thank you very much for your co-operation. I think and hope that these rules will enhance the quality of classroom dialogue and your enjoyment of this course.

(Please read pp. 35-56 in the Garvey and Schauer Reader for the first class on January 22, 2013)

JAN. 22:

A. Speech

I. Philosophical Foundations of Protecting Speech

a. **Introduction**
R p 35

b. **Theory of Free Speech**
R pp.36-43 Kent Greenawalt, Speech and Crime (1980)
R pp.43-47 Frederick Schauer, Must Speech Be Special (1983)

R pp. 47-56 Thomas I. Emerson, *Toward a General Theory of the First Amendment* (1963)

JAN. 24

c. **The Search for Truth in the Marketplace of Ideas**

R pp. 58-65 John Stuart Mill, *on Liberty* (1859)
R pp.65-71 Frederick Schauer, *Free Speech: A Philosophical Enquiry* (1982)
R pp.72-74 Catherine a. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987)
R pp.74-77 R.H.Coase, *The Market for Goods and the Market for Ideas* (1974)
R pp.77-80 Owen Fiss, *Why the State?* (1987)

d. **Self-Expression and Personal Liberty**

R pp.86-90 Martin H. Redish, *The Value of Free Speech* (1982)
R pp.94-99 Robert H. Bork, *Neutral Principles and Some First Amendment Problems* (1971)

JAN. 29

e. **Free Speech and Democratic Theory**

R pp.101-103 Alexander Meiklejohn, *Political Freedom* (1960)
R pp.114-123 Cass R. Sunstein, *Free Speech Now* (1992)

f. **Additional Perspectives**

R pp.137-142 Lee C. Bollinger, *The Tolerant Society* (1986)
R pp.149-153 Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment* (1990)
R pp.161-167 Ronald A. Cass, *the Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory* (1987)

II. **Public and Private Property and the Public Forum Concept**

a. **Blur between Public And Private Property**

pp. 566-569 *Hudgens v. NLRB* (1976)

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pp. 570-574 *Pruneyard Shopping Center v Robins* (1980)
p. 574-575 Notes
pp. 575-580 *Lebron v. Natl RR Passenger Corp.* (1995)
pp. 581-585 *Brentwood Academy v. Tennessee Secondary School*

Athletic Ass'n.

b. Public Forum Analysis

Background

- pp. 426-427 Introductory Note
pp. 454-462 *Perry Education Association v Perry Local Education Association* (1983)
pp. 471-479 *Hazelwood School District v. Kuhlmeier* (1988)

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- pp. 479-489 *Morse v. Frederick* (2007)
pp. 489-494 *Rosenberger v Rector and Visitors of the University of Virginia* (1995)
pp. 494-496 Note on “A ‘Forum’ Discussion and Review”
pp. 497-508 *ISKON v Lee* (1992)
pp. 789-815 *Hastings Christian Fellowship v. Martinez* (2010)

III. Government speech

- pp. 306-311 *Rust v. Sullivan* (1991)
pp. 311- 312 Note

Feb. 7

IV. Coerced Expression and Freedom Not to Speak

- pp. 586-587 Introduction
pp. 587-593 *West Virginia v Barnette* (1943)
pp. 594-598 *Wooley v Maynard* (1977)
p.604-605 Note
pp. 605-609 *Board of Regents of the University of Wisconsin v Southworth* (2000)
pp. 609-610 Notes and Questions
pp. 615-627 *Boy Scouts of America v Dale* (2000)
pp. 632-638 *Rumsfeld v. Forum for Academic and Institutional Rights* (2006)

Feb. 12

V. Anonymity and First Amendment

- pp. 753-754 Introductory Note
- pp. 754-759 *McIntyre v. Ohio Elections Commission* (1995)
- p. 759 Question on Anonymity Issue
- pp. 760-763 *Buckley v American Constitutional Law Foundation, Inc.* (1999)

VI. First Amendment and Confidentiality

- pp. 205-208 *Cohen v Cowles Media Co.* (1991)
- pp. 207-208 Note
- pp. 208-215 *Bartnicki v Vopper* (2001)

Feb. 14

VII. Secrecy and National Security: Pentagon Papers case and its progeny

- pp. 105-113 *New York Times Co. v. U.S.* (1971)

Feb. 19

VIII. Hate Speech and Harassing Speech

a. Introduction to the Literature

- R** pp.393-396 Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story (1989)
- R** pp.396-399 Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision (1991)
- R** pp.399-404 Robert C. Post, Racist Speech, Democracy and the First Amendment (1991)

Cases

- pp.229-238 *R.A.V. v. City of St. Paul* (1992)
- pp. 245-249 *Wisconsin v. Mitchell* (1993)
- pp. 249-253 Notes on *Mitchell* and *R.A.V.*
- R** pp.404-411 Akhil Reed Amar, the Case of the Missing Amendments: *R.A.V. v. City of St. Paul* (1992)

Feb. 21

- pp. 238-245 *Virginia v. Black* (2003)

- c. **Sexual and Racial Harassment and the First Amendment**
 - R pp.414-421 Kingsley R. Browne, Title VII As Censorship: Hostile-Environment Harassment and the First Amendment (1991)
 - R pp.421-427 Catherine MacKinnon, Only Words (1993)

Feb. 26

IX. Pornography

- a. **Feminism and Pornography**
 - pp. 222-228 American Booksellers v. Hudnut
 - p. 228 Note
 - R p.349-355 Catherine MacKinnon, Pornography, Civil Rights and Speech (1985)
 - R p.369-374 Steven G. Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea (1988)

Feb. 28

X. Regulation of Speech – Government as Employer or Purchaser of Services

- pp.299-304 Background
- pp. 304-306 Unconstitutional conditions doctrine
- pp. 306-311 *Rust v. Sullivan* (1991) (see above Government Speech)

- pp. 320-325 Public sector employees
 - a. *Pickering v. Board of Education* (1968)

S pp. 265-291- Story of *Pickering v. Bd. of Education*

- pp. 330-333 b. *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle* (1977)

- pp. 333-334 c. *Givhan v. Western Consolidated School Dist.*(1979)

- pp. 334-341 d. *Connick v. Meyers* (1983)

- pp. 340-341 Note

pp. 347-349

A Reprise: Applying the *Pickering-Connick* Test

pp. 354-362

Garcetti v. Ceballos

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XI. Schools -Libraries, Teachers and the Classroom, and Student Speech

pp. 351-352 *Catcher in the Rye* problem story

pp. 362-373 *Bd. of Ed. v. Pico* (1982)

pp. 254-261 *Tinker v Des Moines Indep School Dist* (1969)

pp. 471-479 *Hazelwood School Dist. v. Kuhlmeier* (1988) (see Public Forum materials above)

pp. 479-489 *Morse v. Frederick* (2007) (see Public Forum materials above)

S pp. 402-436 The Story of *Tinker v. Des Moines* to *Morse v. Frederick*: Similar Stories of Different Student Speech with Different Results

XII. Sexting & Cyber Bullying

Logan Case

Ohio Law and other States

Mar. 7

XIII. Campaign Finance Laws

Citizens United v. Federal Election

S pp.345- 373 The Nine Lives of *Buckley v. Valeo*

XIV. Limits on Protests

1. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)

Ramifications for other kinds of protests

Mar. 12

B. RELIGION CLAUSES OF THE FIRST AMENDMENT

I. Establishment Clause Religion in Public Life

R pp. 518-521

Kathleen M. Sullivan, Religion and Liberal
Democracy

R pp. 521-524

Frederick Mark Gedicks, Public Life and Hostility
to Religion

II. Religion in Public Schools

Ronna Greff Schneider, Getting Help With Their Homework: Schools,
Lower Courts, and the Supreme Court Justices
Look for Answers Under the Establishment
Clause, 53 Admin. L. Rev. 943 (2001)

Mar. 14

III. The Free Exercise of Religion The Value of Religious Freedom

R pp. 563-583

Michael W. McConnell, The Origins and Historical
Understanding of Free Exercise of Religion

R pp. 583-587

Robert C. Casad, The Establishment Clause and the
Ecumenical Movement

IV. What is Religion

R pp. 595-600

Note, Toward a Constitutional Definition of
Religion

R pp. 600-607

Kent Greenawalt, Religion as a Concept in
Constitutional Law

Mar. 26

V. Conflict and Reconciliation

R pp. 625-630	Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict
R pp. 630-634	Abner S. Green, The Political Balance of the Religion Clauses

VI. Religion Clauses and the Various Analytical Frameworks

pp. 1060-1072	a. <i>Everson v Bd. Of Ed.</i> (1947)
pp. 1072-1075	Note
pp. 1101-1106.	b. <i>Lemon v Kurtzman</i> (1971)
pp. 1138-1141	c. <i>Agostini v Felton</i> (1999)
pp. 1176-1182	d. <i>Marsh v Chambers</i> (1983)
pp. 1191-1199	e. <i>County of Allegheny v A.C.L.U.</i> (1989)

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pp. 1199-1209	f. <i>Lee v Weisman</i> (1992) and Note
pp. 1209-1215	g. <i>Santa Fe School District v. Doe</i>
S pp.481-511	Of Football, 'Footnote One,' and the Counter-Jurisdictional establishment Clause: The Story of <i>Santa Fe Independent School District v. Doe</i>
pp. 1141-1151	h. <i>Mitchell v Helms</i> (2000)
pp. 1151-1162	i. <i>Zelman v. Simmons-Harris</i> , 122 S.Ct. 2460 (2002)

Apr. 2

pp. 1218-1228	j. <i>Elk Grove Unified School District v. Newdow</i> , 124 S.Ct. 2301 (2004)
pp. 1228-1234	k. <i>McCreary County v. ACLU of Kentucky</i> , (2005)
S pp. 513 – 554	l. <i>Van Orden v. Perry</i> (2005)
	The Story of the Ten Commandments Cases: <i>Van Orden v. Perry</i> and <i>McCreary County v. ACLU</i>

Apr. 4

VII. Religion Issues in the Curriculum

- a. Evolution, Creation Science and Intelligent Design
1. *Aguillard v. Louisiana*, 482 U.S. 578 (1987)
 2. *Kitzmiller v. Dover Area School District*, 400 F. Supp.2d 707, (M.D. Pa. 2005)
- R** pp. 558-562 Stephen L. Carter, Evolution, Creationism, and Treating Religion as a Hobby

VIII. Applications of general laws

Hosanna-Tabor Evangelical Lutheran Church v. EEOC,
132 S. Ct. 694 (2012)

Apr. 9 – begin student presentations