

Government 62
Theorizing Free Speech

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218 Silsby Hall
Office Hours: Monday, 3-5pm

Overview:

The First Amendment of the United States Constitution reads in part: "Congress shall make no law... abridging the freedom of speech." While we are so committed to "freedom of speech," it is much less clear what these words mean. This course tackles this puzzle by examining the philosophical and constitutional issues regarding free speech. Readings draw from Supreme Court cases and secondary sources. Areas covered include: philosophical foundations of free speech, normative/doctrinal frameworks for analyzing free speech, defamation, hate speech, obscenity, pornography, and symbolic conduct. This course is not designed specifically for students contemplating law school. It is aimed at students who want a general understanding and introduction to freedom of speech.

Packets:

Two Course packets: Cases and Secondary Readings (both available at Wheelock Books) (All cases are also uploaded on Blackboard) (All secondary sources are on reserve at Baker Berry). As I do not permit computers in class, you should make sure all materials are printed out/copied if you elect not to purchase the course packets.

Selected readings and handouts are on Blackboard under the Course Materials link.

Requirements:

Take Home Midterm: 40%

Take Home Final: 60%

(See grading policy below)

Take Home Midterm and Final (PLEASE READ CAREFULLY):

The midterm will be available on February 3rd on Blackboard. It will be due in class on February 10th. However, I will automatically grant everyone a week extension in order to accommodate unforeseen personal circumstances placing the extended date to February 17th. **Please note that as a result I will not entertain any kind of extension beyond February 17th.** The final will be available by the last day of class. It will be due on March 14th by 3pm. I will not accept a late final. Students with disabilities should self-identify at the Office of Student Accessibility Services to request support services. (<http://www.dartmouth.edu/~accessibility/>).

Attendance/Participation:

I expect everyone to come to class having done the reading. I intend to lecture on most Monday and Wednesday leaving seven or so discussion sections/reviews. These will generally but not always fall on Friday. I will assign a group of students to be "on call" ready to participate for the discussion sections. I've listed some questions to consider for those sections. While I will expect those students "on call" to participate more actively, I expect everyone to contribute to the discussion. Although participation is not a formal component of the grade, regular attendance/participate may positively impact your grade. **I do not permit computers in class.**

Reference Letters:

I aim to write reference letters that are thorough and meaningful. To do so, my general policy is that students complete two courses with me, if they seek such a letter.

Assignments

Note: each number on the syllabus represents a lecture, discussion sections are listed as well by date.

1/6

Introduction.

I. The Puzzle of “Free Speech”

1/8

Harm Principle

1. J.S. Mill, *On Liberty* (Ch. I) (<http://www.bartleby.com/130/1.html>); *Dennis v. US* (1951) (pp. 8-9, 10-11, 15-16, 22-25, 36-37, 52-56), *Brandenburg v. Ohio* (1969) (pp. 2-4); BBC Article on the Lyrical Terrorist; British Terrorism Act of 2000 (selection); Terrorist Handbook manual http://www.fas.org/irp/world/para/manualpart1_1.pdf; FTC Article on Airborne Deceptive Advertising (8/14/08).

Do you find Mill’s harm principle a persuasive constraint on state power? What do you make of the standard in *Dennis*? In his concurrence in *Dennis*, Justice Frankfurter argues that the Court should defer to Congress in such matters? Do you agree? What do the dissenting justices in *Dennis* make of the “Communist threat”? Why is *Brandenburg*’s standard more speech protective than *Dennis*? If you believe the Court decided *Brandenburg* correctly, what do you make of the lyrical terrorist? Clearly, the state may prohibit the possession of bomb making materials (e.g., dynamite, fuse). What, then, is so problematic about prohibiting possession of the Terrorist Handbook? Does the deceptive advertising by Airborne meet the *Brandenburg* test? If not, how may the Federal Trade Commission regulate/prohibit such speech? What is the content of the speech in *Brandenburg*? Does that make a difference?

1/10

Definitional

2. Schauer

Why is the ordinary definition of speech over and under inclusive? What is the difference b/w something being within the scope of the First Amendment and being protected by the First Amendment? According to Schauer, how do we go about defining speech for purposes of the First Amendment? How does this implicate the philosophical justifications for freedom of speech? What is (at the very least) necessary for something to qualify as speech under the First Amendment? Consequently, why is obscenity not “speech”?

1/13

Discussion Component: Imagine I set up shop to sell my 100% straight from the French Alps water (call it “Bedi water”). Turns out there is not one drop of water from Europe in it only water from my tap in Lebanon, NH. Currently, it is against the law for me to engage in deceptive and false advertising. Why doesn’t such a law violate free speech?

1/15

Content-neutral/Content-based vs. Low/High Value Speech

3. *Chaplinsky v. New Hampshire* (1942) (<http://supreme.justia.com/cases/federal/us/315/568/case.html>); *City of Chicago v. Mosley* (1972); *Planned Parenthood v. Life Activists* (9th Cir. 2002) (pp. 5-9, 13-23, 27-29, 30-34; 42-53, 62); *Florida Bar v. Went for It* (1995) (pp. 6-8, 14-15);

In what way does *Chaplinsky* articulate the low/high value speech distinction? What is the difference between a content-neutral and a content-based regulation? Why should we be more skeptical of the latter? Why is a threat not protected speech? What constitutes a threat? According to the majority in *Life Activists*, why was the Wanted Poster not protected speech? Why does the dissent disagree? Does the Wanted Poster meet the *Brandenburg* test? Is it political speech? Why does that even matter? Does the speech in *Florida Bar* meet the *Brandenburg* test? Why is truthful, non-deceptive commercial speech not protected like the speech in *Brandenburg*? How does the Court in *Florida Bar* justify its disparate treatment of purely commercial speech versus other kinds of speech? This is the low/high value of speech. What value does the dissent in *Florida Bar* assign to this kind of advertising by lawyers?

1/17

Discussion Component: Is watching a theater production “speech”? If so, is a theatre production with nude actors engaging in intercourse “speech”? If that’s speech, why isn’t a film of nude actors engaging in intercourse “speech”? If I send you a letter saying I’m going to kill you, why isn’t that protected speech? (if it’s “speech” at all). Is it because this letter is low value speech?

II. Philosophical Foundations of Free Speech

1/20

Marketplace of Ideas

4. Mill, *On Liberty* (Ch. II) (<http://www.bartleby.com/130/2.html>).

What is the purpose of Mill’s argument in Chapter 2 (e.g., what proposition does he want to establish)? What is Mill’s evidence that the silenced or prohibited speech could be true? What are the assumptions underlying the marketplace of ideas argument? What if the silenced or prohibited speech is false? Why does this still entail that the state ought not to restrict speech? Is this too sanguine a view of the “marketplace”?

1/22

Democratic Self-Government

5. Meiklejohn; Bork (skip p. 7-19). 4/15

Why does Meiklejohn contend that freedom of speech does not mean freedom to speak (or the freedom to say what you want)? According to him, what does freedom of speech mean? How does this connect to democracy? Why does a commitment to democratic self-government justify freedom of speech? According to Bork what is the scope of protected speech? Why isn't advocacy of law violation protected? Why does Bork advocate for a "neutral" First Amendment principle? (In arguing for a neutral principle, Bork discusses other constitutional issues such as privacy and equal protection. Do not focus on these issues as they are beyond the scope of our class. Rather, try to get a sense of what Bork means by "neutrality.")

1/24

Autonomy

6. Scanlon; Redish (skip pp.608-616; 619-622) (read the parts on commercial speech, obscenity, and defamation but keep in mind we have not yet read some of the relevant cases).

What is the irrationality Scanlon hopes to address? How does his autonomy defense of freedom of speech restrict state action? Consider Scanlon's scenarios 1-6. How is his argument from autonomy consistent with restricting speech in each scenario? What of scenario 4—yelling "fire" in a crowded theatre? Why does Redish believe that autonomy is the ultimate value even under a self-government or a market place of ideas rationale? How does he respond to Bork's narrow defense of freedom of speech? How do Scanlon and Redish incorporate a balancing component in their respective arguments?

1/27

Discussion Component: According to Bork, advocating law breaking should not be protected speech—he would therefore not adopt the *Brandenburg* test? Is this persuasive? What about the principle of civil disobedience that was so crucial to the civil rights movement? What do we do about an unjust law? What if I just advocate for you not to pay your taxes, because our government is unjust? Does a law banning that violate free speech?

1/29

Shaping Character

7. Bollinger (two readings).

According to Bollinger, what virtues does a free speech regime generate? How does freedom of speech cultivate such virtues? In particular, what is Bollinger's defense of extreme speech? Does hard-core pornography (obscenity) contribute to this tolerance ethic? How would judges decide what contributes to such an ethic? According to Bollinger, why is consistency overrated?

III. Applications—Speech

1/31

False Statements of Fact

8. *New York Times v. Sullivan* (1964); *Gertz v. Welch, Inc.* (1974) (pp. 4-8, 12-16, 20-27); BeVier.

What standard does the Court adopt in *Sullivan*? What standard would Justice Black adopt? Why should it be harder for a public official to recover damages from libelous statements than a private individual? What does BeVier make of this speech protective regime? Does it make sense to regulate “false” statements of facts in the public arena? Why do Justices Douglas and Black contend that the *Sullivan* standard is under-protective of speech? How does the high/low value speech distinction resurface in these cases?

2/3

*Midterm review. Midterm will be available before class. I will answer any questions about it or about the readings in general.

2/5

Child Pornography

9. *New York v. Ferber* (1982) (pp. 4-15, 21-23); *Ashcroft v. Free Speech Coalition* (2002) (pp. 12-21, 25-29) Adler.

What justifies the Court in declaring (non-obscene) child pornography outside the protection of the First Amendment? Do you believe that if such child pornography has some artistic value, it should be protected? Do you find Adler’s argument persuasive? What is the role of context when banning this kind of speech? By failing to protect at least some kinds of child pornography do we risk collapsing the distinction between speech and action? How would Schauer respond? Why should we protect “virtual” hardcore child pornography?

2/7

Adult Pornography

10. *Miller v. CA* (1973) (pp. 6-21, 24); *FCC v. Pacifica* (1978) (pp. 5-8, 17-24; 24-29, 32-33); *Ashcroft v. ACLU* (2004) (pp. 5-12, 14-22).

Should obscenity (hard core adult pornography) be protected speech? Do you find *Miller*’s definition of obscenity and argument against its protection persuasive? Why is obscenity not protected (or not even within the scope) of the First Amendment? Are the possible justifications persuasive? Consider *Pacifica* and *ACLU* dealing with the ostensible protection of children (make sure to read Carlin’s monologue on p. 19 of *Pacifica*) Does it make sense to uphold restrictions on such speech with regards to the broadcast media but not with regards to the Internet? Is filtering software a genuine less restrictive alternative to COPA? Whose responsibility is it to protect children from “objectionable” speech: parents or the state?

2/10

Discussion Component: Suppose I take pictures of my neighbors children playing naked in the yard. I have a stash of them, pictures I use for sexual gratification in the privacy of my home. Adler suggests that a state could make such possession a crime (leave aside the separate issue about the neighbor's claim of an invasion of privacy). Does that violate free speech? Suppose instead I use the pictures for an artistic collage about children of the Upper Valley to be displayed at the Hood Museum. (Midterms Due in Class).

2/12

11. *American Booksellers Assoc. v. Hudnut* (7th Cir. 1985); *R. v. Butler* (Canada 1992) (pp. 1-6, 13-18, 22-55, 67-68); <http://laws.justice.gc.ca/en/charter/1.html#anchorbo-ga:l I-gb:s 2> (online version of Canadian Charter of Rights and Freedoms); Harvard Law Review Note. MacKinnon (excerpt on Blackboard).

Why may the state not regulate or prohibit non-obscene adult pornography? How does the Canadian Supreme Court understand “community standards?” How is this different from the American test? Why does the Canadian Supreme disagree? Even though the Canadian Supreme Court agrees that the obscenity regulation violates the right to expression, why do they uphold the law? What is the rationale underlying the Canadian decision? If we assume that pornographic images harm women is that sufficient to the end the inquiry? Is adult pornography “low value” speech? What is the relationship between preventing harm (specifically to women) and the value of this kind of speech? If you believe that constitutional law rightly protects adult pornography, what about images and speech that constitute workplace harassment under Title VII? If the state may prohibit or sanction an employee from posting a picture that objectifies women on his desk, why may the state not prohibit such images more broadly?

2/14

Discussion Component: Suppose an employer has pictures of scantily clad women in his office. Merely having such images in the office constitutes a hostile working environment. The employer could be subject to civil claims by his employees. Does such a thing violate his free speech rights? If so, what's the difference between that and a scantily clad picture of the same woman in Times Square or a subway car or a public bus?

2/17

Hate Speech

12. *Beauharnais v. Illinois* (1952) (pp. 6-18); Brink.

The Court upholds the statute in *Beauharnais* (1952). Do you find the Court's reasoning persuasive? As you know from previous readings, the state may pass laws against libel. That is, an individual may sue someone who defames her (makes false statements of fact about her). What, then, is so problematic about an individual suing someone who defames the group she belongs to? What is Brink's position on such group libel legislation? Do you find his argument persuasive? Consider again workplace harassment. If we ought to protect group libel, shouldn't we protect speech that constitutes such harassment? Again, what's the difference (if any)?

2/19

13. *R.A.V. v. City of St. Paul* (1992) (pp. 5-19, 22-27, 32-38); *Wisconsin v. Mitchell* (1993). 5/13

According to Scalia, why is the statute in *R.A.V.* content-discriminatory? Why is this problematic even though the statute only regulates “low value” or non-protected speech, namely “fighting words?” Consider here *Mosley*. What does Justice Stevens make of the categories deployed in the Court’s free speech jurisprudence? What is his alternative? Why do hate crime statutes like the one in *Wisconsin* not trigger “free speech” concerns? What would Adler say?

2/21

Discussion component. Dartmouth does not have a speech code. Leaving aside the private/public university issues, do you think Dartmouth should have a code? What if a public university has a policy that only prohibits certain kinds of demeaning speech involving racial or sexual epithets? 5/16

2/24

14. *Snyder v. Phelps* (2010) (on Blackboard).

This was an 8 to 1 decision with Alito dissenting. Is this an easy case? Keep in mind that central to the suit was whether Snyder’s parents could sue the Westboro Baptist church for intentional infliction of emotional distress. Does the very idea of being able to sue someone for emotional distress because of what they said undermine free speech? Does it matter that the protest seems to touch on issues of public concern?

IV. Applications—Non-Speech

2/26

Symbolic Conduct

15. *U.S. v. O’Brien* (1968) (pp. 5-14); *Texas v. Johnson* (1989) (pp. 5-17, 18-28); *City of Erie v. Pap’s A.M.* (2000) (pp. 8-10, 11-18, 26-36).

The threshold question in these cases is whether the conduct is within the scope of the First Amendment. How do we know that certain kinds of conduct are symbolic (they contain speech and non-speech elements) while others are not (they contain only non-speech elements)? Assuming the law regulates symbolic conduct, how do we determine if the law is constitutional under the First Amendment? Consider *O’Brien*, *Johnson*, and *City of Erie*. How does the content-neutral/content-discriminatory distinction aid in deciding this question. Is it permissible for the state to regulate with the purpose of addressing the “secondary effects” of speech? Justice Stevens dissents in *Johnson* and *City of Erie*. Is this a consistent position? Reconsider the case of hate crime penalty enhancements. Do such laws regulate symbolic conduct or not?

2/28

Campaign Finance

16. *Buckley v. Valeo* (1976) (pp. 30-42, 48, 51-59, 145-146, 148-151, 156-161, 170-172); *Davis v. FEC* (2008) (pp. 8-11, 13-17, 19-24); Smith.

Don't get bogged down in the details of *Buckley*. Focus on the general categories of contributions and expenditures. What is the difference (if any) between contribution limits and expenditure limits? Why do such limits even trigger the free speech concerns? Why does the *Buckley* court contend that the former are consistent with the First Amendment but not the latter? Why do the dissenting judges disagree? (Keep in mind that later decisions permit severe expenditure limits for corporations—Lecture 19). How does the Millionaire's Amendment violate an individual's right to freedom of speech? Smith argues that campaign finance reform rests on faulty assumptions. Do you find his argument persuasive? In particular, how does he challenge *Buckley's* reasoning regarding corruption and the influence of money in campaigns? From the standpoint of democracy, are you convinced that we are better off without campaign finance reform? Finally, consider the individual versus the collective defense of free speech? In bringing in the concerns of equality and fairness, have we gone beyond the scope of free speech? Or are such values at the core of free speech--and the First Amendment?

3/3

Discussion Component: Imagine I send your parents a letter saying that you are dead—obviously, you're not dead. I just like parents thinking that. Do you think your parents could sue me for intentional infliction of emotional distress? If so, why doesn't Snyder get to do the same?

3/5

17. *Citizens United v. FEC* (2010) (excerpt on Blackboard including Stevens' dissent)

Citizens United struck down the law in *McConnell v. FEC* (2003) that prohibited corporations from making independent expenditures for express advocacy or issue advocacy ("electioneering communication"). I'll summarize *McConnell* in class. The majority characterizes this as an outright ban on such speech. Why does the dissent disagree? According to the majority, why should the identity of the speaker not matter for constitutional purposes? What do you make of the law's exception for "media corporations"? Why does the majority reject the anti-corruption and anti-distortion arguments? Does the dissent's reasoning prove too much? If we may prohibit corporations from spending general treasury funds to expressly advocate the election or defeat of a candidate, why may we not prohibit an individual billionaire from doing so? If the concern is with anti-corruption or anti-distortion does the identity of the speaker matter?

3/7

Final Exam Review. The final will be available before class. I will answer any questions about it or about the readings in general.

Grading Policy

Your exams will be graded on three criteria. First, how well written, clear, and coherent is the response? Second, how well does the response answer the question? Third, how nuanced and sophisticated is the content of the response? Keep in mind that an exam is not like taking a driving test in which you start with 100 points and lose points for errors. Rather, you start with zero points. The burden, then, is on you to write an answer that will meet these three criteria.

Below is a general rubric for grading:

A: This is a superb answer that is extremely clear and well written. It not only answers the question in a creative and insightful way but also offers a new or fresh perspective that was not obvious from class materials. It represents a deep, thorough, and complete understanding of the material.

A-: This is an excellent answer that is extremely clear and well written. It not only answers the question by drawing on the relevant class materials but also offers a creative or insightful synthesis of them. It represents a very strong grasp of the material.

B+: This is a good answer that is relatively clear and well written. It answers the question by drawing on the relevant class materials. It represents a good grasp of the material.

B: This answer makes some good points but may be unclear or may not answer the question completely or may not draw on the relevant class materials. It represents a good but in certain respects deficient grasp of the material.

B- and below: These answers are weaker than a B answer with regards to one or more of the three outlined criteria.

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Course Packet #1 (Cases)

1. *Dennis v. US* (1951)
2. *Brandenburg v. Ohio* (1969)
3. *City of Chicago v. Mosley* (1972)
4. *Planned Parenthood v. Life Activists* (9th Cir. 2002)
5. *Florida Bar v. Went for It* (1995)
6. *Gertz v. Welch, Inc.* (1974)
7. *New York Times v. Sullivan* (1964)
8. *New York v. Ferber* (1982)
9. *Ashcroft v. Free Speech Coalition* (2002)
10. *Miller v. CA* (1973)
11. *American Amusement v. Kendrick* (7th Cir. 2001)
12. *FCC v. Pacifica* (1978)
13. *Ashcroft v. ACLU* (2004)
14. *American Booksellers Assoc. v. Hudnut* (7th Cir. 1985)
15. *R. v. Butler* (Canada 1992)
16. *Beauharnais v. Illinois* (1952)
17. *R.A.V. v. City of St. Paul* (1992)
18. *Wisconsin v. Mitchell* (1993).
19. *U.S. v. O'Brien* (1968)
20. *Texas v. Johnson* (1989)
21. *City of Erie v. Pap's A.M.* (2000)
22. *Buckley v. Valeo* (1976)
23. *Davis v. FEC* (2008)
24. *Austin v. Mich. Commerce* (1990)

25. *McConnell v. FEC* (2003)

26. *Citizens United v. FEC* (D.D.C. 2008)

Articles (also on reserve at Baker Berry):

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Course Packet #2 (Articles)

1. Guardian. "‘Lyrical Terrorist’ has conviction squashed." (6/17/08)
(<http://www.guardian.co.uk/uk/2008/jun/18/uksecurity>)
2. British Terrorism Act of 2000 (Part VI, Sec. 57)
(http://www.opsi.gov.uk/acts/acts2000/plain/ukpga_20000011_en_6#pt6-pb1-l1g57)
3. Federal Trade Commission, Press Release. "Makers of Airborne Settle FTC Charges of Deceptive Advertising." (8/14/08)
(<http://www.ftc.gov/opa/2008/08/airborne.shtm>)
4. Schauer, Frederick. "Speech and ‘Speech’—Obscenity and ‘Obscenity’: An Exercise in the Interpretation of Constitutional Language," 67 *Georgetown Law Review* 899 (1978), pp. 899-933.
5. Shaman, Jeffrey M. "The Theory of Law-Value Speech," 48 *Southern Methodist University Law Review* 297 (1995), pp. 297-348.
6. Meiklejohn, Alexander. "The First Amendment is an Absolute," *Supreme Court Review* (1961).
7. Bork, Robert H. "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* (1971, Vol. 47, 1), pp. 1-35.
8. Scanlon, Thomas. "A Theory of Freedom of Expression," *Philosophy and Public Affairs* (Vol. 1, No. 2, 1972), pp. 204-226
9. Redish, Martin H. "The Value of Free Speech," 130 *University of Pennsylvania Law Review* 591 (1981), p. 590-645.
10. Bollinger, Lee C. "The Tolerant Society: A Response to Critics," 90 *Columbia Law Review* 980 (1990), pp. 979-1003.
11. Bollinger, Lee C. *The Tolerant Society: Freedom of Speech and Extremist Speech in America*, (Oxford: 1986), pp. 124-133.
12. Bevier, Lillian R. "The Invisible Hand of the Marketplace of Ideas," in *Eternally Vigilant: Free Speech in the Modern Era* (eds. Bollinger and Stone).
13. Bell, Rosalind E. "Reconciling the Protect Act with the First Amendment," 87 *New York University Law Review* 1878 (2012).

14. Stone, Geoffrey. "Sex, Violence, and the First Amendment," 74 *University of Chicago Law Review* 1857 (2007).
15. Note, "Anti-Pornography Laws and First Amendment Values," 98 *Harvard Law Review* 460 (1984).
16. Brink, David. "Millian Principles, Freedom of Expression, and Hate Speech," *Legal Theory* 7 (2001).
17. Smith, Bradley. "Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," 105 *Yale Law Journal* 1049 (1996), pp. 1049-1091.