

Political Science 3774^{SEP}
Free Speech and Dangerous Ideas
Fall 2017

Prof. Mapel

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Office Hours (subject to revision): TTR 2:00 – 3:15; otherwise by appointment (Ketchum 151)

COURSE DESCRIPTION

This course examines liberal democracy and the rights guaranteed by the First Amendment. Why are freedoms of speech, press, association and religion important in a liberal democracy? When can the US government legitimately limit these freedoms? How should these freedoms be balanced against other values, such as national security and equality? Should various "low value" forms of speech, e.g., fighting words, profanity, obscenity, and hate speech, receive less protection than "high value" political, scientific and artistic speech?

COURSE REQUIREMENTS

Briefs: 10% of final grade. In this course, class presentations of readings and especially briefs of cases are designed to develop critical thinking skills and must be done according to a specific format. For a handout on briefing, go to "Briefing A Case on the reading list at Desire2Learn. Students are expected to turn in detailed, precise, logically organized briefs demonstrating insight into the central issues of the case. In writing a brief, you are required to read the commentary at the end of each assigned reading in Stone and to *address in your brief the main questions posed by that commentary*. Each student will be assigned specific cases to brief for class. Students are required to email me a copy of their briefs before beginning of class. There are no make-ups for late briefs without a documented excuse. The number of written briefs and oral presentations will depend upon how many times we succeed in rotating through members of the class. In addition to assigned briefs, students are strongly urged to brief *all* major cases as a way of studying the material and being ready for exams.

There are several, quite specific directions that you must follow:

Your brief must be emailed to me as a docx file that I can edit electronically and return to you.

It must have a file name as follows: your last name, your section number, a one-word name of the case, e.g., "Smith 001 Gitlow.docx"

You must use spelling and grammar check software and also proof-read the brief for typos.

You must present the brief in class the day that it is due. The brief does not count if you send it to me but fail to present it in class.

Each failure of a requirement above drops your brief a letter grade, absent a documented excuse.

Participation: 15% of final grade. Based on attendance, active participation in class, and evidence of careful reading before class. Students may miss two classes without an excuse; thereafter, absence counts against the final grade without a documented excuse for reasons

recognized by the University. Students who attend regularly but participate seldom can expect to receive a below average grade, i.e., a "D" for this part of the course. Those who do not attend regularly will fail this part of the course, and you must pass all parts in order to pass the course itself.

Two Midterm Exams: 25% each of final grade.

Final exam: 25% of final grade

Quizzes will also be given if preparation for class appears to lag. I will adjust the other requirements accordingly. The Keller Center for the Study of the First Amendment may sponsor lectures during this term. Attendance at particular, announced lectures will count for extra-credit if you sign up and attend. You must do ALL of the assignments about in order to pass the course.

Extra Credit: Keller Center talks

There will be three Keller Center talks plus a conference on "Money and the First Amendment" (dates listed below in reading schedule). To get extra credit you must sign up ahead of time to attend **one** of the three talks and/or **one** of the panels. You then need to show up and hand in a one-page summary or outline of the talk or panel within 24 hours. Attendance at each talk or panel counts as one percent added to your final grade.

Those who cannot attend can get equivalent extra credit by turning in satisfactory brief of one or both of the following cases (unless you are already briefing that case, in which case we will have to make other arrangements): *Dennis* (the entire case as presented in Stone and must email me your brief before class Feb. 4) or *New York Times v. United States* (the entire case as presented in Stone and must email me your brief before class on Feb. 11).

These requirements are subject to change by the instructor.

COURSE POLICIES

Disabilities: If you qualify for accommodations because of a disability, please submit to me a letter from Disability Services in a timely manner so that your needs may be addressed. Disability Services determines accommodations based on documented disabilities. Contact: 303-492-8671, Willard 322, and <http://www.colorado.edu/disabilityservices>

Religious Observance: Campus policy regarding religious observances requires that faculty make every effort to reasonably and fairly deal with all students who, because of religious obligations, have conflicts with scheduled exams, assignments or required attendance. Students are required to let me know within the first two weeks of the course if they want an accommodation. For details of campus policy see http://www.colorado.edu/policies/fac_relig.html

Classroom Decorum: Students and faculty each have responsibility for maintaining an appropriate learning environment. Students who fail to adhere to such behavioral standards may be subject to discipline. Faculty have the professional responsibility to treat all students with understanding, dignity and respect, to guide classroom discussion, and to set reasonable limits on the manner in which they and their students express opinions. Professional courtesy and sensitivity are especially important with respect to individuals and topics dealing with differences

of race, culture, religion, politics, sexual orientation, gender variance and nationalities. Class rosters are provided to the instructor with the student's legal name. I will gladly honor your request to address you by an alternate name or gender pronoun. Please advise me of this preference early in the semester so that I may make appropriate changes to my records. See policies at <http://www.colorado.edu/policies/classbehavior.html> and at http://www.colorado.edu/studentaffairs/judicialaffairs/code.html#student_code

Honor Code: All students at the University of Colorado, Boulder are responsible for knowing and adhering to the academic integrity policy of this institution. Violations of this policy may include: cheating, plagiarism, aid of academic dishonesty, fabrication, lying, bribery, and threatening behavior. All incidents of academic misconduct shall be reported to the Honor Code Council (honor@colorado.edu; 303-725-2273). Students who are found to be in violation of the academic integrity policy will be subject to both academic sanctions from the faculty member and non-academic sanctions (including but not limited to university probation, suspension, or expulsion). Other information on the Honor Code can be found at <http://www.colorado.edu/policies/honor.html> and <http://www.colorado.edu/academics/honorcode>

Sexual Harassment: The University of Colorado at Boulder policy on Discrimination and Harassment (<http://www.colorado.edu/policies/discrimination.html>), the CU policy on Sexual Harassment, and the CU policy on Amorous Relationships applies to all students, faculty and staff. Any student, faculty or staff member who believes s/he has been the subject of discrimination or harassment based upon race, color, national origin, sex, age, disability, religion, sexual orientation, or veteran status should contact the Office of Discrimination and Harassment (ODH) at 303-492-2127 or the Office of Judicial Affairs at 303-492-5550. Information about ODH and the campus resources available to assist individuals regarding discrimination or harassment can be obtained at <http://www.colorado.edu/odu>

Attendance and Class Registration: If a student fails to answer roll during the first two classes of this course, he or she will be administratively dropped. If a student misses more than 50% of classes, he or she will fail the course.

REQUIRED TEXTS

1. *The First Amendment*, Stone, Seidman, Sunstein, Tushnet, eds. (Aspen Law and Business, 4th edition. Note that all page numbers below are given for the FOURTH edition of this book. You **must** use **this** edition, as selections vary from edition to edition and class discussion and briefs need to be uniformly based on the same excerpts from the cases.

2. Articles listed below on reading schedule are available on Desire2Learn class website. ^[1]_[SEP]

3. *New York Times* articles. Most of the Chinook databases (for example, FirstSearch, Lexis-Nexis) are licensed solely for the use of current students, staff, and faculty of the University of Colorado at Boulder. These databases are available to anyone from on-campus locations. If you are trying to access these from a remote location, however, you must be authenticated as a CU-Boulder employee or student.

SCHEDULE OF READINGS (check on-line before every class, as schedule may change).

Each assignment has several parts. First, there are readings from "Stone." These readings

present excerpts from major cases and provide commentary. These readings also include study questions, which you should read and try to answer, especially when you are briefing a case for class presentation. In addition, you should study in detail (and usually brief) the cases below identified by bullets. Assignments also include some required historical or philosophical essays on First Amendment topics. Finally, there are suggested readings for those interested in pursuing a particular topic at greater length. Readings should be done by the day listed and in the order listed.

For background on the basic operations of the Supreme Court, see Alepheus T. Mason, *American Constitutional Law: Introductory Essays and Selected Cases*, Chapter 2, pp. 24-40 (Prentice Hall, 2002). Go to "Mason2" on D2L.

August

29 **Introduction to course**

31 **Truth and the Marketplace of Ideas**^[T T L]_[S E P S E P]

John Stuart Mill, excerpt from *On Liberty*, Chapter 2 ("MILL_LIBERY_CH 2")

Bernard Williams, "The Marketplace of Ideas," ("Williams")

Suggested: Frederick Schauer, excerpt from *Free Speech: A Philosophical Inquiry*, Chapter 2 ("SchaerFreeSpeechPhilInquiry")

Suggested: H.J.McCloskey, "Liberty of Expression: Its Grounds and Limits," ("McClosky_Liberty")

September

5 **Democratic Government and Personal Expression**

Alexander Meiklejohn, excerpt, "Political Freedom" ("Meiklejohn")

Martin H. Redish, excerpt, "The Value of Free Speech" (this article is sandwiched between two other, suggested readings by Baker and Richards which present variations of the self-realization rationale for freedom of expression. To find the reading by Redish, go to "BAKER_~1") on D2L and scroll through Baker's article to Redish. Richards' article follows.

Suggested: Thomas Scanlon, "A Theory of Freedom of Expression" ("Scanlon_freedomofexpression")

Suggested: C. Edwin Baker, excerpt, "Scope of the First Amendment Freedom of Speech" ("BAKER~1.PDF")

Suggested: David A.J. Richards, excerpt, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" ("RichardsFreeSpeechObscenity")

7

Representative Democracy and Judicial Neutrality

Required: information about Robert Bork, his Supreme Court hearings, and how Bork was "borked" (<http://eightiesclub.tripod.com/id320.htm>)

Robert H. Bork, "Neutral Principles and Some First Amendment Problems" or ("Bork.Neutral"). The entire article is available on the web, but the required reading starts on page 20, subheading "Some First Amendment Problems," and goes to the bottom of p. 31. There are also alternative page numbers at the bottom of each page, and following those numbers, you read from bottom 204 to middle of 215. Ignore any "start" and "stop" suggestions in the margin.

Google recent obituary of Robert Bork in *The New York Times*

A. Content-Based Restrictions: Dangerous Ideas and Information

12

Subversive Speech: The World War I Cases: "Clear and Present Danger"

Watch excerpts from film: "The American Experience: Emma Goldman"

Stone, 19-32

- *Schaffer*
- *Masses*
- *Schenk*

Suggested: Historical background on WWI, The "Red Scare" and the deportation of resident aliens: David Cole, *Enemy Aliens*, Chapter 8 ("Cole8") and Chapter 9 ("Cole9")

14

Subversive Speech: The World War I Cases: "Clear and Present Danger"

Stone, 24 -37

- *Schenk*
- *Abrams*

18

Subversive Speech: The "Red Scare Cases"

Stone, 38 - 51

- *Gitlow*
- *Whitney*

21

McCarthyism

"Tail Gunner Joe," 374 - 393, *Perilous Times* READING TO COME

- *Dennis* in Stone, 51-60

Loyalty Oaths

- *Adler and Elbrandt* in Stone, 569- 72

Investigative Committees

- *NAACP v Alabama*, in Stone 519-520
- *Barenblatt v US*
- *Gibson*^{[1][1][1]}_{[SEP][SEP]} last two cases in Stone, 587-591

Suggested: Cole, Chapter 10, "The Second Red Scare: Targeting Radical Citizens" ("Cole10")

26 The Pentagon Papers

Movie, "The Most Dangerous Man in America"

28 The Press, Secrecy and National Security

Stone, 108 - 124

- *New York Times v. United States*
- *United States v. Washington Post* (also listen to oral arguments)

The Progressive Controversy

Stone, *Perilous Times*, 500-521 (Note: this is a DIFFERENT book by Stone). ("The Pentagon Papers")

The New York Times, "When Do We Publish a Secret?", July 1, 2006;
The New York Times, "On Telling Secrets: The Editors and the Readers," July 4, 2006; find both articles on-line

October

3 Brandenburg and Review

Stone, 60 - 75

- *Brandenburg*

Stone, *Perilous Times* 521-6 ("Perilous")

Stone, et. al, "The History and Philosophy of Free Expression," 3-18

Ronald Collins and David M. Skover, "What is War? Reflections on Free Speech in Wartime" ("SchenkSurvives")

Reread Bork, "Neutral Principles" (go to link from second week of class), middle

of p. 31 to the end, or follow alternative page numbers at bottom, 215 -19.

Stone, *Perilous Times*, 528-58 ("TheSecretofLiberty")

"Isis and the First Amendment" on D2L

Suggested: Hans A. Linde, "Clear and Present Danger Reexamined: Dissonance in the Brandenburg Concerto" ("LINDE~1")

5 First Mid-Term Exam. You are required to bring your casebook to the exam.

B. Content-Based Restrictions: "Low" Value Speech

10 "Fighting Words"

Stone, 81 - 104

- *Terminiello*
- *Cantwell*
- *Feiner*
- *Chaplinsky*
- *Snyder*

"Skokie"

Suggested: Feinberg, "The Nazis in Skokie" 86-93 ("FeinbergNazisinSkokie")

12 Hate Speech

(Instructor may be at professional conference, in which case no class on this day and we will discuss Hate Speech on the 17th).

Stone, 300-320.

- *R.A.V.* (listen to oral arguments)

Suggested: "An Intense Attack by Justice Thomas on Cross-Burning," *The New York Times*, Thurs. Dec. 12, 2002 p. A1 and A27 – find on -line

17 False Statements of Fact

Stone, 136 -146

- *New York Times v Sullivan* (Wechsler, Campbell)
- *Hustler v. Falwell*
Suggested
- *Curtis*

- *Gertz*
- *Dunn and Bradstreet*

Stone, *Perilous Times*, 25-6, bottom 33-48, 71-3

Harry Kalven Jr., "The New York Times Cases: A Note on 'The Central Meaning' of the First Amendment" ("KALVEN~1")

Suggested: Stone, 155 – 67.

Cass Sunstein, excerpt, "Free Speech Now" ("SunsteinFreeSpeechNow")

Pierre Leval, "The No-Money, No-Fault Libel Suit: Keeping Sullivan in Its Proper Place" ("LEVAL_~1")

Stanley Ingber, "Rethinking Intangible Injuries: A Focus on Remedy" ("INGBER~1")

Diane L. Zimmerman, "Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Test" ("ZIMMER~1")

19 **The Lewd, the Profane, and the Indecent**

Stone, 260 - 74

- *Cohen*
- *Ernoznick*
- *Pacifica* (listen to "Seven Dirty Words")

"The Decency Police," *Time* (March 26, 2006) ("The Decency Police")

Suggested: Joel Feinberg, "Obscenity on the Public Media: *F.C.C. v. Pacifica*, 281-7 ("OBSCEN~1"). To find, scroll through to second half of article.

24 **Movie, "American Porn"**

26 **Obscenity**

Stone, 215 - 240

- *Miller* (
- *Paris*

Suggested:

Stone, 259-60, "Violence as Obscenity"

Feinberg: "Obscenity as Pornography," 127-164 ("OBSCEN~1") The first half of this reading

Feinberg, "Pornography and the Constitution" 165-187 ("JFPornConstitution")

MacKinnon, Chapter 3 from *Only Words* ("MacKinnonEqualityandSpeech")

Ronald Dworkin, "*MacKinnon's Words*" ("DworkinMacKinnonsWords")

C. Content-Neutral Restrictions

31 **General Principles and Symbolic Conduct: Draft Card Burning and Flag Burning**

Stone, 422 - 441

- *United States v O'Brien* (listen to oral arguments)

Suggested: Kent Greenawalt, *Fighting Words*, Chapt. 3, "Flag Burning" ("KGFlag")

November

7 **General Principles and Symbolic Conduct: "Adult" Entertainment**

Stone, 283 – 290; 441-451

- *Young*
- *Alameda*
- *Barnes v Glenn Theater* (listen to oral argument)
- *Erie v PAP's AM*

9 **Review**

14 **Second Mid-term Exam**

16 **Visit to Special Collections, Norlin Library, for exhibition and talk on banned books and art**

21 -23 **Fall Break**

E. The Religion Clauses: Establishment and Free Exercise

28 **Historical Overview and the Anti-Coercion Principle**

Stone, 649 -684

Lee

30 **The Non-Endorsement Principle and De Facto Establishments**

Stone, 684 - 701

- *Lynch*

December

5 Facially Neutral Statutes that Aid Religion

Stone, 707 - 729

- *Mueller*
- *Zelman*

7 The Free Exercise Clause: Required Accommodations

Stone, 731 -751

- *Reynolds*
- *Braunfeld*
- *Sherbert*
- *Yoder*
- *Employment Division, Dept. of Human Resources v. Smith* (and listen to oral arguments)

12 Review

14 Catch-Up Day

TBA Final Exam