

**Law A 591: Free Speech**  
**Fall Quarter 2021**  
Class Meets 3:30-5:20 Mondays and Wednesdays  
**Clark Lombardi**

**Course Description**

This course examines the Free Speech clauses of the First Amendment to the U.S. Constitution, and the jurisprudence that has emerged regarding those clauses. It will make a point to explore how jurisprudence to date addresses the role of speech in divisive contemporary issues and to ask difficult questions about whether the current doctrines are appropriate for today's polarized and wired world. Students have the option of writing a research paper that satisfies the Advanced Writing Requirement or of taking an in-class exam.

**Required Texts**

- U.S. Constitution
- KROTOSZYNSKI, WELLS, LIDSKY & CORBIN, **FIRST AMENDMENT: CASES & THEORY** (Aspen Publishing 3D ED. 2017) & occasional handouts
- Other materials made available on the class web site or on reserve.

**Grading**

Quizzes	10%
Class participation	10%
Thought papers	10%
Final exam OR Final paper (See below)	[70%]

**Course Goals, Objectives and Expected Learning Outcomes:**

This course explores the theory and doctrine associated with First Amendment of the U.S. Constitution. It is structured to accomplish the following goals, objectives, and outcomes:

- Increase your understanding of the basic building blocks of free speech theory and doctrine, primarily focusing on Supreme Court cases but also reviewing emerging issues.
- Provide you with the analytic tools to assess the complex free speech issues that arise in various social and political interactions.
- Improve your ability spot First Amendment issues and analyze them orally and in writing in a timely fashion.
- Improve your ability to read and analyze U.S. Supreme Court cases and better understand how legal analysis of constitutional law issues differs from common law and statutory issues.

## **Grading and Assignments:**

### **1. Final Exam or Research Paper (as appropriate)**

Students may choose either take a final exam or to write a research paper. Students who plan to write a paper must inform the instructor by the end of the third week of the class and must clear the paper topic with the instructor. Seventy percent (70%) of your grade in this class will be based either on your score on the final exam. OR the final research paper.

- A. Final Exam, if applicable. The final exam will be an open book, in person exam during a exam week.
- B. Final paper, if applicable. Students who plan to write a paper must inform the instructor by the end of the third week of the class and must clear the paper topic with the instructor.

### **2. Thought papers**

Each student is expected to write two thought papers during the quarter—ones that will be shared with other students. Thought papers are generally three to five pages long. They are NOT supposed to summarize all of the reading for the class, nor could they in the short space provided. Rather, thought papers are supposed to highlight one (or at most two) passages in the readings that the reader found particularly insightful or provocative and then explain how those passages helped deepen the reader's understanding (or questions about) free speech . . . politics . . . law . . . whatever. They are not expected to answer definitively any question, but rather to provoke discussion within the class.

A sign-up sheet will be distributed and students will indicate which class they would like to prepare a paper for. Thought papers must be distributed 24 hours in advance of the class for which they are written.

At the start of the class, another student will start orally summarize in *no more than* 5-7 minutes the distributed paper(s) for the class and will also give some of her thoughts about her colleagues' reflections on the reading—adding, as appropriate, her own comments about the reading. Broader class lecture and discussion will follow. The preparation of thought papers will count for 10% of the final grade. A student's performance as the presenter and commenter on a thought paper will count towards their class participation grade.

### **3. Quizz(es)**

I will administer one or two quizzes during the semester. The quizzes will be given during a class period and will each consist of multiple-choice questions, short answer questions or both. The questions will cover topics we discuss in class and will also be designed to guarantee that you are reading the assigned cases. The quizzes will account for 10 percent (10 %) of your final exam score.

Schedule (I reserve the right to add a “hot topic” if a relevant one arises. ☺):

Date/Class	Topic/Hot Topic	Assignment/Readings
#1 &2 Mon. 9/27/21	<b>I. Intro: The History, Values &amp; Content of the First Amd't</b>  <i>Hot Topic: Does First Amendment Doctrine Need Reform?</i>	pp. 3-26  Read: <a href="https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html">https://www.nytimes.com/2021/01/06/opinion/trump-lies-free-speech.html</a>
	<b>II. The Foundation of Free Expression Law – The Clear and Present Danger Test</b>	
#3 &4 Wed. 9/29/2021	The World War I Cases – Evolution of Clear & Present Danger  The Red Scare – Deference & the “Association” Problem	pp. 27-39  pp.39-46
#5 &6 Mon. 10/4/21	<i>Brandenburg</i> – The Modern Formulation and Some Modern Problems  National Security Rationales Post- <i>Brandenburg</i>	pp. 56-59  pp. 59-66
	<b>III. Gov't Actions that Discriminate on Content</b>	
#7&8 Wed 10/6/21	Distinguishing Reg of Low-Value and High-Value Speech  Threats	pp.69-70  pp. 70-81 (End after problem #2)  Recommended: <a href="https://www.abajournal.com/magazine/article/threatening_words_courts_protected_speech">https://www.abajournal.com/magazine/article/threatening_words_courts_protected_speech</a>

<p>#7&amp;8 'Ctd Mon. 10/11/21</p>	<p>Fighting Words versus Offensive Speech</p> <p>Methodological Problems in “identifying low value speech”</p>	<p>pp. 82-87, 523-32 (from Chapter 10)</p> <p>95-97</p>
<p>#9 Wed. 10/13/21</p>	<p>When Can Hostile Audiences Shut Down a Speaker?</p> <p>Content Discrimination and High-Value Speech</p> <p><i>Hot Topic: Hate Speech – Where does it Fit?</i></p>	<p>pp. 88-95</p> <p>pp. 99-114; Skim 115-118</p> <p><a href="https://www.cato.org/publications/policy-analysis/hate-speech-laws-ratifying-assassins-veto">https://www.cato.org/publications/policy-analysis/hate-speech-laws-ratifying-assassins-veto</a></p>
<p><b>Mon. 10/18/21</b></p>	<p><b>Quiz &amp; /Discussion of paper topics (for those writing research papers)</b></p>	
	<p><b>IV. Content-Neutral Regulations of Speech and the Public Forum Doctrine (i.e. Regulation of Speech on Public Property)</b></p>	
<p>#10 &amp;11 Wed. 10/20/21</p>	<p>“Content Neutral” Time, Place and Manner Restrictions</p>	<p>pp. 119-120</p> <p>pp. 126-53</p>
<p>#11 'ctd Mon. 10/25/21</p>	<p>Permissible Modes of Regulation in the Public Forum</p> <p><i>Hot Topics:</i></p> <p><i>(A) Laws Restricting Protests</i></p> <p><i>(B) McKesson v. Doe and Liability for Protest Violence</i></p>	<p>pp. 153-56</p> <p><a href="https://time.com/5882735/tennessee-law-protest-voting-rights-felony/">https://time.com/5882735/tennessee-law-protest-voting-rights-felony/</a></p> <p><a href="https://www.scotusblog.com/2020/11/justices-send-black-lives-matter-case-back-to-lower-court-for-new-look/">https://www.scotusblog.com/2020/11/justices-send-black-lives-matter-case-back-to-lower-court-for-new-look/</a></p>
<p>#12 Wed.</p>	<p>When is Government Property a Public versus a Non-Public Forum</p>	<p>pp. 157-158: “Introductory Note”</p>

10/27/21	(and Why It Matters)	167-70: (Skip Notes #2 & 4)  171-182  185-193  (Recommended but not required Skim 183-185)
#13		
	<b>V. Regulation of Mass Media</b>	
#14 Mon. 11/01/21	Reg of Press/Newsgathering	pp. 359-373 (through note #3)
#15 Wed. 11/03/21	Access to Courts  Access to Gov't Institution	pp. 377-87  pp. 387-392
#16 Mon. 11/08/21	Prior Restraints	pp. 393-413
	<b>VI. Tort Law &amp; the 1st Amd't</b>	
#17 -18 Wed. 11/10/21	Regulation of Broadcasters, Internet & New Media	pp. 413-418 (End after Note #2)  pp. 446-450 (End after Note #6  452-454 (Note on Net Neutrality)
#20-21 Mon. 11/15/21	Defamation	pp. 455-82

#22 - 23 Wed. 11/17/21	Intentional Infliction of Distress  Privacy	pp. 483-91  pp. 491-501
Mon. 11/22/21	<i>Quiz</i>	
#24 Wed. 11/24/21	Guest Lecture TBD	
Thurs. 11/25/2021	<i>Thanksgiving</i>	
	<b>VII. The Gov't as Speaker, Employer, Educator</b>	
#25 Mon 11/29/21	Government Subsidized Speech and Government Speech	pp. 621-648
#26 Wed. 12/01/21	Speech by Government Employees	pp. 650-673
#27 Mon. 12/06/21	Public Schools and Libraries  <i>Hot Topic: Norris v. Cape Elizabeth Sch. Dist., No. 19-2167 (1st Cir. Aug. 6, 2020).</i>	pp. 674-709
#28 Thurs. 12/08/21	<b>REVIEW DAY</b>	