

First Amendment (Law 764) Course Syllabus Spring Semester 2021

I. Instructor Contact Information

My office is Room 369 and my direct dial office telephone number is (205) 348-0420. My e-mail address is krotoszynski@law.ua.edu. My administrative assistant is Ms. Erica Nicholson, and her office is in Room 343. Her email address is enichols@law.ua.edu and her phone number is (205) 348-0173. I have an open door policy and am also happy to schedule meetings with students. You also should feel free to contact me by email or telephone; I attempt to respond to both emails and calls quickly (i.e., within 24 hours, if not sooner).

The baseline for our class meetings will be in person meetings within the School of Law. However, consistent with the policies of the University of Alabama School of Law, up to 30% of the class meetings may take place on a virtual basis (via Zoom). Because of the ongoing COVID-19 pandemic, it may be necessary for me to teach via Zoom (should it prove necessary for me to self-isolate). With respect to students, my expectation is that all students will attend in person (as noted in part III, below). ***HOWEVER, IF IT PROVES NECESSARY FOR YOU TO SELF-ISOLATE, I WILL MAKE COURSE SESSIONS AVAILABLE TO YOU.*** COVID-19 related absences ***WILL NOT*** count against a student for purposes of applying my attendance policy.

II. Course Overview

This course will survey the main doctrinal strands of the Supreme Court's First Amendment jurisprudence. We will begin by undertaking a comprehensive study of the Religion Clauses (the Establishment and Free Exercise Clauses). More often than not, the Religion Clauses are banished to the end of course syllabus, and receive a somewhat rushed or harried treatment. There is no good reason not to begin by considering the Religion Clauses (and, after all, they come first in the text of the First Amendment itself), and this is how we will proceed.

Following our consideration of the doctrinal chaos that surrounds the Supreme Court's Religion Clause jurisprudence, we will then undertake a careful and comprehensive overview of the case law arising under the Speech, Press, Assembly, and Petition Clauses, as well as the atextual

implied First Amendment right of free association. Over the course of the semester, we will examine over a dozen tests and framing devices that the Justices have applied in specific contexts to analyze free expression claims. In this course, more than in many others, it is possible to lose the forest for the trees. And what, precisely, is the “forest”? We should consider the core purposes that the Speech, Press, Assembly, and Petition Clauses exist to advance and whether the specific two, three, and four part tests that the Supreme Court has devised actually serve or advance those purposes effectively. Getting beyond the three part tests, we should attempt to isolate the facts and considerations that actually seem to drive results across cases. Although generalizations can be dangerous, are there particular kinds of concerns or issues that have serious explanatory force in free expression cases?

By the end of the semester, you will have conquered the specifics of the Supreme Court’s various and sundry tests, but you also will have a critical appreciation for both analyzing and arguing First Amendment claims. In many, if not most, serious First Amendment cases, more than one plausible outcome would be possible and fully consistent with a meaningful commitment to free speech (or religious freedom). The key, then, is to master enough of Supreme Court’s case law to facilitate advancing persuasive arguments about outcomes (even if one cannot be certain that one outcome, rather than another, will obtain). In this regard, it bears noting that with the recent major changes Supreme Court’s composition, major First Amendment doctrinal changes are more likely than not (particularly with respect to the Religion Clauses). Accordingly, mastering the zen of First Amendment reasoning and framing devices is no less important the mastering particular three- and four-part tests.

Finally, I will readily admit that the reading assignments for this course are burdensome, generally running from 20 to 40 pages per class meeting. There is no way around this, absent skipping entire topics relevant to a full survey of this area of constitutional law. I hope that the generally engaging nature of the subject matter will help. All of these topics are relevant to a nuanced understanding of the First Amendment and, from a more crass perspective, all are also fair game on the MBE. If you do the work, you really will understand the doctrine (as well as it can be understood).

III. Attendance Policy

In general, I expect students to be present and prepared for all meetings (attending while unprepared constitutes “constructive” absence). I maintain a seating chart and expect you to sign the chart and sit in your assigned seat. Failure to sign the chart will lead to involuntary withdrawal from the class. Although I expect students in the course to prepare for class and to attend class on a regular basis, I will allow two (2) free “skips” and three (3) “passes” over the course of the semester. Simply provide me with advance notice that you will be absent or do not wish to be called on for a particular class and I will honor that request. An email will suffice to provide such notice, provided that you send it *before* the class session at issue commences. Alternatively, you may convey notice that you are not prepared via an office voice mail or in writing (again, *before* class commences). Additional excused absences or passes would require providing me with good cause for the absence or lack of preparation and require *specific prior approval*. Finally, you may convert a skip into a pass, but you may not use a pass for an extra skip.

If I call on you and find you either absent or unprepared without prior notice, I will note this fact. Should this happen three times over the course of the semester, I reserve the right to lower your final grade significantly (i.e., by not less than .5 on the raw exam score, using a 0.0-4.3 grading scale). Moreover, if you are chronically absent from class, I also reserve the right to ask the law school’s registrar to drop you from the course entirely.

For any make-up session (please note that only two appear on the syllabus, I will not enforce my attendance policy. Moreover, I will arrange for an audio (or video) tape of the session to be created and also made available in law library. Accordingly, you may “attend” the make up session at a time and place that you deem convenient.

If you have a disability and require reasonable accommodations, whether for the class sessions or for the examination, please contact Assistant Dean for Students, Ms. Anita Kay Head, who can assist you with the process of obtaining ADA-mandated accommodations. The dean’s office is in the Dean’s Suite on the second floor; Dean Head’s direct dial telephone number is (205)

348-1133, and her email address is ahead@law.ua.edu. *Accommodations must be arranged through the Office of Student Services and not through the course instructor.*

IV. Final Examination & Grading

Your grade in this class will be determined by a final examination. I am open to class input on whether to have a closed book, closed notes race-the-clock examination or to use a “take home” exam. If administered on a “take home” basis, the exam will have a firm page limit (using double spaced text, with a font no smaller than Times New Roman, 12 point) and a mutually agreed time period for answering the exam questions (typically 48-72 hours). Regardless of whether the course final examination has a scheduled or take home format, I will ask at least two, and possibly three, questions (with one covering the Religion Clauses and at least one question concerning the Speech, Press, Assembly, and Petition Clauses). The law school’s mandatory grade distribution policy requires me to observe a 3.3 mean when assigning final grades for classes with an enrollment of twelve (12) or more students. If enrollment is fewer than twelve (12) students, I can assign no more “A” marks than “B” marks. I have no discretion to depart from these faculty grading policies and will, accordingly, adhere to them. I also reserve the right to adjust final grades consistent with my attendance policy (set forth above).

V. Class Assignments and Meeting Dates

All assignments refer to KROTOSZYNSKI, WELLS, LIDSKY & CORBIN, FIRST AMENDMENT: CASES AND THEORY (Aspen Publishers 3rd ed. 2017). Below is a list of our class meeting dates. A (Z) notation after the date indicates that this class session will take place via Zoom.

January 11	713-749 (Religion Clauses; Religious Exemptions)
January 13	749-784 (Modern Free Exercise Theory and RFRA)
January 20 (Z)	785-807 (Free Exercise and Church Exemptions; Resolving Disputes within Religious Entities)
January 25 (Z)	817-850 (Establishment Clause and Exemptions; Tax Exemptions for Religious Organizations)
January 27	859-887 (Government Aid to Religious Institutions; Limitations on Such Government Aid)
February 1	889-929 (Prayer in Public Schools; Religious Speech in the Public Schools)

February 3	929-964 (Government Endorsement of Religion and Power Sharing with Religious Entities)
February 8	3-47 (Introduction and Early Free Speech Cases)
February 10	47-89 (Clear and Present Danger; Incitement; Fighting Words)
February 15 (Z)	90-118 (Heckler's Veto; Content Discrimination)
February 17 (Z)	119-153 (Time, Place, and Manner Regulations; Privacy)
February 22	153-193 (Public Forum Doctrine)
February 24	193-197, 199-217 (Access to Private Property; Expressive Conduct)
March 1	217-249 (Freedom of Association)
March 3	249-269 (Compelled Speech)
March 8	270-298 (Anonymous Speech & Campaign Finance Reform)
March 10	299-332 (Commercial Speech)
March 15 (Z)	332-358 (Commercial Speech continued)
March 17 (Z)	359-404 (Newsgathering and Reporting)
March 22	404-446 (Broadcasting; Cablecasting)
March 24	446-454; 455-483 (Internet; Tort and First Amendment)
March 29	483-501; 503-516 (Other Torts; Contract and First Amendment; Mandatory Civility Norms)
March 31	516-556 (Civility Norms; Public Profanity; Hate Speech)
April 5 (Z)	556-600 (Sexually Explicit Speech)
April 7 (Z)	600-619, 621-635 (Government Speech)
April 12	635-669 (Government Speech continued; Government Employee Speech)
April 14	669-687 (Government Speech; Government Employees' Speech continued; Student and Faculty Speech)
April 19	687-709 (Curricular Speech; Libraries)
April 20	REVIEW SESSION (No reading assignment)