

**FIRST AMENDMENT: FREE EXPRESSION**  
**LAW 164 - FALL 2023**

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**I suggest that you read this entire document before finally deciding whether you wish to be enrolled in the class.**

**COURSE SCHEDULE/MEETING TIMES/TYPE:**

This is an in-person course that meets on Mondays and Wednesdays from 1:50 to 3:15 PM.

**COURSE OVERVIEW/DESCRIPTION:**

The goal of this course is to help you develop a sophisticated understanding of the evolution and content of the legal doctrine concerning freedom of expression under the First Amendment to the U.S. Constitution.

**General note concerning the content and tone of this course:**

Freedom of expression generally does not become a legal issue unless someone is seeking to express something that someone else regards as false, dangerous, corrupting, threatening, defamatory, bigoted, offensive, hateful, blasphemous, obscene, or otherwise harmful. If you take this course, the odds are extremely good that you will encounter materials involving viewpoints that you strongly regard as falling into one or several of those categories. I am not going to ask you to leave your personal beliefs at the door, but I am going to ask you to consider and take seriously the possibility that a reasonable person of good faith might disagree with you as to either the value of the speech in question or the advisability of suppressing it. Likewise, the odds are quite good that we will encounter viewpoints that you consider to be true, harmless, salutary, righteous, and/or morally-necessary—and that you will be asked to consider and take seriously the perspective from which someone else regards their expression as worthy of suppression. While such exercises are uncomfortable for anyone, they are necessary if we are to have a meaningful discussion about the justification and scope of the principle of freedom of expression.

That said, the purpose of this class is **not** to encourage, condone or engage in gratuitous provocation. While I don't believe anyone can be exempt from confronting uncomfortable ideas in class, I do think class should be a place where no-one is subjected to hectoring, personalized attacks, or careless and demeaning dismissal of values they hold dear. That, my friends, is a tricky balance to strike, and if you choose to take this course, I ask that you do so with the good faith intent of helping me to strike it. Doing so will involve as much art as science, but here are a few guiding principles that I think should help.

- Whatever you may be used to, do not assume that I have, or that this class espouses, a

correct or accepted view on any moral, ideological or policy question that becomes relevant to our discussion. At no time is the fact that I articulate a given viewpoint, or post materials that do so, to be interpreted as an endorsement of the truth, validity or desirability of that viewpoint or speaker. The only subject matter with respect to which I will posit certain binding objective truths (and even those will be highly debatable on the margins) is the description of the positive content of the legal doctrine we are studying.

- The same goes for you and your classmates. I would like all of you to feel safe to explore ideas and arguments to see where they might lead, without fear of being judged as a proponent of the viewpoint you are exploring. I would like all of you to take it as a given that everything you say in class is preceded by the standing disclaimer “This isn’t necessarily my view, but someone might believe that...” (It will save us a lot of time if you don’t all feel compelled to say it every time you speak.) If you want to be an effective lawyer—or even, I would suggest, a truly thoughtful human being—you should cultivate the art of sympathetic engagement with opposing viewpoints, *especially* those you actually believe to be wrong and harmful. That means cultivating the ability to articulate not merely a straw man caricature, but an account that highlights whatever elements of truth and honestly-felt concern motivate the viewpoint’s most thoughtful adherents, such that they would adopt your articulation as their own.
- At the same time, keep in mind that this is not a game. Assume that every viewpoint you discuss affects some of your classmates where they live. Interrogating a belief doesn’t mean you need to be insensitive to the people who hold it. Seriously engaging a belief doesn’t mean you need to be insensitive to the people who feel threatened by it. We should all be cultivating the ability to be challenging and rigorous without being dismissive or disrespectful, to critique the views of others in the same tone we want used when they critique ours.

### **LEARNING OUTCOMES:**

By the end of the course students should be able to:

- Apply current First Amendment doctrine to provide cogent analysis of a variety of legal problems.

### **REQUIRED TEXTS/READING ASSIGNMENTS:**

The texts used will be:

- Hellman, Araiza, Baker & Bhagwat, *FIRST AMENDMENT LAW: FREEDOM OF EXPRESSION AND FREEDOM OF RELIGION*, Fifth Edition (Carolina Academic Press) & 2023 Supplement (available [here](#)).
- Supplemental materials to be posted online.

I will frequently (not necessarily always) post in the Course Materials section of TWEN individual assignment sheets in advance of each class. When I do, always make sure to read them as the first step in class preparation. My goal will be, as far as compatible with coverage

goals and maintaining coherent blocks of subject matter, to keep the reading for each class somewhere in the vicinity of 35-40 casebook pages, but YMMV. Some readings will be significantly longer. The assignment sheet will usually provide guidance to help focus your attention. The following is a **preliminary** list of class readings; it may be revised during the term. Should you wish to get a head start however, you can be certain that the first three assignments will be as listed here.

Class No.	Date	Pages (est. reading length)	Topic
1	8/21	Jud Campbell, <i>Natural Rights and the First Amendment</i> (edited version posted) (c.30 skipping footnotes)  Note that the assignment sheet for this class contains an unusually lengthy and dense amount of substantive information, probably equivalent to 8 casebook pages.	Free Speech at the Framing
2	8/23	“The Forgotten Years” (excerpted section from introduction of David M. Rabban, <i>Free Speech in Its Forgotten Years</i> ) (posted) (7)  Casebook: 3-36 (33).	Subversive advocacy
3	8/28	Casebook: 37-63; 67-69 (29).	Subversive advocacy, con’t
4	8/30	Casebook: 64-65, Supp. 1-5; 71-94 (30)	True threats; Fighting words; libel
5	9/6	Casebook: 95-130 (35)	Public figures; emotional distress; Invasion of privacy
6	9/11	Casebook: 130-160 (30)	The lewd and the obscene
7	9/13	Casebook: 161-204 (42)	Offensive language and images; child pornography
8	9/18	Casebook: 204-238 (34)	Commercial speech
9	9/20	Casebook: 238-270 (32)	End of categorical balancing
10	9/25	Casebook: 271-312; Supp 7-8 (42)	Prior restraints; overbreadth and vagueness

11	9/27	Casebook: 313-350 (37)	Content-based regulation
12	10/2	Supp. 10-21; Casebook: 351-71 (31)	Content-based con't; Time, place and manner
13	10/4	Casebook: 371-99; Supp. 22-23 (30)	Time, place and manner
14	10/10	Casebook: 401-434; Supp.24 (33)	Expressive conduct; secondary effects
15	10/11	Casebook: 434-448; 449-475 (40)	Expression/conduct con't; Public forum
16	10/16	Casebook: 475-517 (41)	Forum con't
17	10/18	Casebook: 519-554 (35)	Compelled expression
18	10/23	Supp. 25-40 Casebook 555-77 (37)	Compelled expression con't; Freedom of Association
19	10/25	Casebook: 577-602 (25)	Freedom of Association
20	10/30	Casebook: 603-626 (23).	Campaign Finance
21	11/1	Casebook: 626-652; Supp. 41-43 (28)	Campaign Finance
22	11/6	Casebook: 653-678; Supp. 43-45 (28)	Government employees
23	11/8	Casebook: 679-712 (33)	Public schools
24	11/13	Casebook: 713-738 (25)	Government speech
25	11/15	Casebook: 738-753 Supp 46-57 (26)	Government speech
26	11/20		Current topic. To be announced.

### **BASIS OF EVALUATION & ASSESSMENTS:**

Grades will be determined based on two factors:

- Class participation (in-class and online)
- Final exam

Class participation:

In-class:

Over the course of the term each of you is expected to **sign up four times** to be on-call for a particular class session. There are TWEN sign-up sheets for this purpose. Signing up is a representation that you have done all the assigned reading and have given sufficient thought to the discussion questions identified in the assignment sheet to have a constructive conversation about them. Don't overthink this—you are not expected to have perfectly mastered the material or to have fully articulated theories in response to every question. You're just preparing to contribute thoughtfully and usefully to class discussion, the way ideally you would every day. The point is to avoid cold-calling people who for whatever random reason aren't at their usual level of preparedness that day and try to ensure a critical mass of people who are ready to have a high-quality conversation. Since you're adults, I assume I don't need to explain the inadvisability of blowing off the reading for the class sessions in which you will not be on-call.

To get credit for signing up, you need to do it by 30 minutes before the start of class. There will be seven sign-up slots available for each class—first come, first served. If you don't sign up in advance, you may not find enough slots available toward the end of the term to satisfy your requirement, which will cost you in class participation. Should circumstances make it necessary, you can withdraw your sign-up on TWEN so long as you do so prior to the 30-minute cut off. No explanation is necessary or desired.

Don't sign up more than four times. People who don't sign up won't be cold-called that day, but are always welcome and encouraged to raise their hands and spontaneously participate in class discussion. Signing up doesn't guarantee you'll be called that day, but over the course of the term I'll try to make sure everyone does get called an even amount.

**I am not yet paternalistic enough to ban laptop use in class, but I regard it as a serious breach of etiquette to engage in online communication with others during class. We are trying to have a conversation, and you should be focused on engaging in it. If you have comments or criticism on what is going on, you should exhibit the courage and courtesy of raising your hand and doing so openly.**

Online:

Class time is a very limited resource, and I do not want those limitations to prevent us from carrying on conversations about whatever aspects of the materials interest you. Ideally I would like our TWEN discussion forums to function as an extension of class in which we can pursue trains of thought as far as people wish to take them.

I have created three different forums for our use. The Timely Articles forum is for posting and discussing relevant news articles or op-eds we run across. The "Class Discussion" forum is for posting discussion topics that arise directly out of class materials or discussion. I don't intend these two forums to be hermetically sealed from each other in terms of what gets posted where—that would probably be impossible. The idea is simply that there are so many relevant news items these days that I thought it would be good to have a place where you can just post a link with or without comment, so that the Class Discussion forum isn't swamped with them. So if your main purpose in posting is just to say, "Here's a relevant article I saw," use the Timely Articles forum, and if your purpose in posting is to pose some specific doctrinal question for discussion, use Class Discussion. If it's somewhere in between, use your own judgment.

**Posting something in the Timely Articles forum does NOT imply endorsement of the viewpoint expressed, the speaker, or the publication. It merely means that the item posted provides some form of data point relevant to a topic we are studying.**

I have also created a forum entitled Problems. This is to provide you with an opportunity to try your hand at writing legal analyses of the sorts of issues we are studying. Our casebook contains numerous Problems, and I highly encourage you at least once or twice over the course of the term to actually write out an answer to one. You don't have to turn it into a research project or an LRWA exercise—you can just treat it as you would an exam answer, and try applying the authorities that have been introduced in the casebook up to that point. Post your answer in the Problems forum as a new topic (do not email it to me separately), and I will provide you with written comments. You have nothing to lose grade-wise from doing this; the purpose is to give you a free chance to get feedback on your approach that may help you improve your exam performance. To maximize your learning, I highly encourage you to choose a Problem, and to argue a position on that problem, that cuts against your personal beliefs or policy preferences. I also highly encourage you to post counter-arguments to each other's posts, using this as an opportunity to practice legal argumentation and civil discourse.

Grade adjustments for class participation:

People who stand out over the course of the term as notably helpful contributors through either oral class participation (whether on-call or volunteer), and/or online discussion may receive a positive grade adjustment. "Notably helpful" is about quality, not quantity—it means the sort of contributions that show thoughtful engagement and enrich our collective consideration of the topics at hand. **Failure to sign up four times for on-call participation, or failure to be adequately prepared on a day when you do sign up, may result in a negative adjustment.**

Final exam:

Most of the grade will be determined by the final exam. Similar to the casebook problems, the exam will pose fact patterns (albeit more elaborate ones) and ask you to write a legal analysis applying the doctrines we have studied over the course of the term. The final will be an in-class, three-hour exam during which you will not be able to access the internet or computer files. The only materials you will be able to use are the casebook and an outline of your own making. The best way for you to find out what I am looking for in an exam answer is to post a practice answer to a Problem and get feedback. I will also post a sample exam from a prior year.

**COMMUNICATION/OFFICE HOURS:**

This class has a TWEN page, which is where class assignments and sign-up sheets will be posted. You will be regarded as having constructive notice of anything posted there.

I highly encourage use of the discussion forums on TWEN to ask questions and carry on conversations related to class. This enables everyone to participate in the conversation whenever temporally convenient for them, and provides practice in clear written communication about legal issues.

As for live office hours, I usually make a practice (barring conflicts) of remaining available after each class to discuss whatever students wish. If you would like to schedule an individual meeting for any reason, feel free to email me. As a general matter, feel free to email me about any concerns or personal matters.

#### Class concerns:

If you have any concerns about what is happening in the classroom, I strongly encourage you to reach out directly to me through email. I promise you that you have nothing to fear in doing so. But in case I haven't yet earned your confidence in that regard, or you have a comment that you would like everyone to see, I have also created an online forum called Class Concerns. You are empowered to post there anonymously if you wish. Whatever you post there is visible to the entire class, and others will be able to respond, also anonymously should they wish. I trust that each of you will use this forum constructively and responsibly.

#### Web Links:

I have started compiling a page of class-related web links to explore. Again: inclusion does **NOT** constitute endorsement of the various viewpoints or organizations that may be represented. It means only that I find them somehow relevant or useful. I encourage you to explore them all with an open and critical mind, and if you want to suggest other links that you think I should include, by all means let me know.

#### **CLASS RECORDINGS PROHIBITED:**

Pursuant to Academic Regulation 4-2.2, no portion of a class session or an examination may be preserved by means of a recording device such as an audio recording device or camera. Any exceptions to this policy must be expressly permitted in writing by me. Upon request, I may record a class session for the benefit of a student who has a valid reason for unavoidable absence.

#### **ACADEMIC INTEGRITY:**

It is expected that students adhere to the Antonin Scalia Law School Honor Code. The Honor Code prohibits lying, cheating, or stealing. This includes a student obligation to never represent the work of another as their own, and to never provide or accept unauthorized assistance on any school related assignment. The Honor Code is available here: <https://sls.gmu.edu/honor/>.

#### **CLASSROOM ACCOMMODATIONS:**

Disability Services at George Mason University is committed to providing equitable access to learning opportunities for all students by upholding laws that ensure equal treatment of people with disabilities. If you are seeking accommodations for this class, please visit <http://ds.gmu.edu/> for detailed information about the Disabilities Registration Process. Faculty may not receive or respond to requests for an accommodation. All requests must be handled by the office of Disability Services. You may contact Disability Services directly via email at [ods@gmu.edu](mailto:ods@gmu.edu) or phone at (703) 993-2474. If you have any questions about how in-class or

testing accommodations are implemented at the law school, please contact the Assistant Dean, Student Academic Affairs for more information.