

Duquesne University
Department of Political Science
POSC 214: Politics, Religion, and Fundamental Rights
Spring 2023
Dr. Luke C. Sheahan
sheahanl@duq.edu

Credit Hours: 3
Location: College Hall 346
Time: M, W: 3:00-4:15 PM
Walking Office Hours: M/W 1:20-1:50 PM
Office Hours: M/W: 1:50-2:50 PM (and by appointment)
Office: 505 College Hall

“Congress shall make no law respecting an establishment of **religion**, or prohibiting the free exercise thereof; or abridging the freedom of **speech**, or of the **press**; or the right of the people peaceably to **assemble**, and to **petition** the Government for a redress of grievances.”

1st Amendment, *United States Constitution*

Introduction

The First Amendment. These forty-five words appended to the Constitution of the United States in 1791 have been a source of both controversy and celebration. They are the focus of some of the most renowned as well as reviled cases in Supreme Court history. They are celebrated for the defense of what are considered quintessential American liberties and they are condemned when their interpretation purportedly departs from other American values such as morality, equality, nationalism, and progress. Of course, each of these values is itself a contested concept and all are, for better or for worse, essential elements of the American Constitutional community. The primary question we will pursue in this course is how do the rights of the First Amendment relate to the American Constitutional community?

First, we must consider possible answers to the question: what is the American Constitutional community? This question is, at least in part, sociological and historical as well as philosophical. Two of the main answers given today are from two perspectives we can dub the “political community” and the “plural community.” The political community emphasizes unity of values and the sovereignty of the state. This does not necessitate authoritarianism. In the American context, the political community is emphatically democratic and liberal. But nonetheless, there is an emphasis on the unity of liberal democratic values and the sovereignty of the democratic state. In contrast, the plural community implies plurality of values, rather than unity, and decentralization of authority, rather than sovereignty. This does not denote anarchy or a rejection of liberal democracy any more than the political community demands authoritarianism. These two conceptions of constitutional communities are less opposites than poles of a continuum with most viewpoints tending toward one pole while rarely going all the way to the extreme.

How do these two conceptions of the American Constitutional community affect our understanding of First Amendment rights? We will pursue this question by examining each of the First Amendment’s five rights in turn across four dimensions: text, history, theory, and jurisprudence. The textual dimension is the meaning of the words in the First Amendment. What

did the terms religion, speech, press, assembly, and petition denote for the Founders and their predecessors? What do they mean to us today? And, almost as important, what did they connote? What is implied by the use of a specific word or a certain phrase for a particular right? This includes a consideration of the use of the word in important historical texts other than the First Amendment. Relatedly, the historical dimension includes the social context and development of ideas surrounding the right. This means an examination of primary sources of those who drafted and developed the texts in question. It also means considering important events that inspired the texts and ideas composing and undergirding First Amendment rights.

The theoretical dimension includes philosophical and even theological reflections upon the right. Theory comes from the Greek word *theoros*, which means, “a way of seeing.” We will discuss various ways in which these rights have been *seen*, the various perspectives that have informed their historical understanding. The two primary ways we see First Amendment rights are through the lenses of the “political community” and the “plural community.” We will read various justifications for First Amendment rights and consider the perspective of the authors in terms of these types of constitutional communities. The jurisprudential dimension is how the federal Courts have treated the right. In this section we will discuss major Supreme Court cases on First Amendment freedoms. Not everyone has been happy with the prevailing theoretical and jurisprudential justifications and treatments of these rights (including your professor). We will discuss criticisms and current controversies surrounding these rights and think through how one’s understanding of the constitutional community affects how one approaches these controversies. We will conclude our discussion of each right by asking the question: has the jurisprudence done justice to the text, history, and theory of this right?

It is important to note that these dimensions are conceptually distinct, but inseparable in practice. This means that there are readings in the historical section that would fit comfortably in the theoretical section, and readings in the textual section that could be read in the historical section, and cases in the jurisprudential section are also part of the history of the right, and so on. But this course of examination—from text, to history, to theory, to jurisprudence—gives us a systematic method of analysis to explore where these rights have originated, how they have developed, what they have meant historically, and how we should understand them today.

Instructional Methods

Classes will consist of both lectures and discussions. Lectures will cover both class readings and sources outside of class readings to give students a basic understanding of important texts and concepts that will not be covered in the readings. Students are expected to come to class prepared to take notes about class topics as well as to engage in discussion over the ideas that emerge from assigned readings. Students should pay special attention to key concepts and key terms that emerge through readings and discussions. The goal is to engage students in all of their communicative faculties: hearing, seeing/reading, talking, and writing.

Goals of the Course

Upon successful completion of the course, students will know and understand:

- The text of the First Amendment and its predecessors.
 - Textual provisions almost always have predecessors of some sort. The provisions of the First Amendment are no different. Students will study and learn the textual predecessors to the textual rights of the First Amendment.
- The historical foundations of First Amendment rights.

- Whatever the philosophical reasons for rights, they often develop in response to historical events. Students will study and understand the historical events and documents that led to the articulation of First Amendment rights.
- Key concepts in the theoretical treatment of these rights.
 - Rights are often justified philosophically. Students will study and understand the philosophical justifications for the rights in the First Amendment.
- The essential cases in the jurisprudence of First Amendment rights.
 - The Supreme Court has ruled many times on the rights of free exercise, free speech, and free press, less so on the rights of assembly and petition. Students will study and learn landmark cases associated with each right in the First Amendment.
- How these rights fit into various understandings of the American constitutional community.
 - How we understand the type of constitutional community we have forms the backdrop and the foundation for how we understand the rights we have under our Constitution. Students will understand the two types of constitutional community we use in this class and how they apply to our understanding of First Amendment rights.

*Progress towards goals will become clear through class discussions, homework assignments, and papers.

Recommended Texts:

The Federalist Papers. Any edition. Available free online.

Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding, edited by Daniel L. Dreisbach and Mark David Hall. (Liberty Fund, 2009).

Course Requirements

- 10% Participation.
 - Attendance to all classes unless prearranged with the instructor. **1% deduction for each unexcused absence.**
 - Come to class prepared to discuss readings.
- 25% Reading Prompts and In-Class Assignments.
- 50% Five 3-page papers. Papers will focus on each of the rights we discuss in class.
- 15% Final Exam.

Academic Integrity

Academic integrity is not merely avoiding plagiarism or cheating, but it certainly includes those things. More than anything, having academic integrity means taking responsibility for your work, your ideas, and your effort, and giving credit to others for their work, ideas, and effort. If you submit work that is not your own – whether test answers, whole papers or something in-between – the instructor has a responsibility to hold you accountable for that action. The instructor also has a responsibility to treat you with respect and dignity while doing so.

The following sanctions are presented in the University procedures related to Student Academic Dishonesty: *Violations of academic integrity-whether or not they are the result of a*

deliberate intent to deceive-are subject to academic sanctions, including (but not limited to) lowered grade or failure on an assignment; lowered course grade; course failure; suspension or dismissal from a course; suspension or dismissal from the College or School or from the University; and/or revocation of a degree. If a student is accused of an academic integrity violation before the published course withdrawal deadline, he or she may not withdraw to avoid a course grade sanction. If a student is guilty of violating academic integrity, information regarding the violation and sanction will be maintained by the Office of the Provost.

<https://www.duq.edu/academics/university-catalogs/2019-2020-undergraduate/academic-policies/academic-integrity>

Manners

Phones should be set to *silent* during class. During tests, they should be turned *OFF*. Sartorial practices should be appropriate for the academic environment.

Grades will be determined as follows:

A	= 93-100	C+	= 78-79
A -	= 90-92	C	= 73-77
B+	= 88-89	C-	= 70-72
B	= 83-87	D	= 60-69
B-	= 80-82	F	< 60

Grade	Description	Explanatory Comments
A	Truly Exceptional	All work meets or exceeds highest expectations for the course
A-	Outstanding	Superior work in all areas of the course
B+	Very Good	Superior work in most areas of the course
B	Good	Solid work across the board
B-	Above Acceptable	More than acceptable, but falls short of solid work
C+	Acceptable	Meets all the basic requirements and standards for the course
C	Acceptable	Meets most basic requirements and standards in several areas
C-	Acceptable	Work falls short of meeting basic standards in several areas
D	Minimally Passing	Work just over the threshold of acceptability
F	Failing	Unacceptable performance

* This syllabus may be altered at the instructor's discretion.

COURSE SCHEDULE

Week 1

- January 9th
Readings: ***The First Amendment and the American Constitutional Community***
CS Lewis, "Learning in War-Time"
John D. Inazu, Introduction, *Confident Pluralism*
- January 11th
Readings: ***The Political Community and the Plural Community***
Robert Nisbet, "The Political Community," *The Social Philosophers*
(pgs. 93-100)
Robert Nisbet, "The Plural Community," *The Social Philosophers*
(pgs. 385-390)
John D. Inazu, Ch. 1, *Confident Pluralism*
Justice Stephen Breyer, "The Theme Considered," *Active Liberty* (2005)

Week 2

- January 16th
January 18th
Readings: **NO CLASS**
Freedom of Religion: Text
English Act of Supremacy (1534)
English Act of Uniformity (1559)
Thirty-Nine Articles of the Anglican Religion, XXXVI-XXXVII (1571)
And American Revisions (1801)
Providence Agreement (1637)
An Act Concerning Religion, Maryland (1649)
Frame of Government of Pennsylvania (1682)
The Fundamental Constitutions of Carolina (1669)
The Northwest Ordinance (1787)
Laws and Liberties of Massachusetts (1647)
State Constitutional Provisions on Religion (circa 1776)
Proposed Drafts of the Religion Clauses (Witte, App. 1)
US Constitution
First Amendment
Article I, Section 7, Paragraph 2
Article VI, Section 3
Article VII

Week 3

- January 23rd
Readings: ***Freedom of Religion: History***
Ambrose, *Sermon Against Auxentius* (386)
Augustine of Hippo, *City of God* (410-26)
Gelasius I, *Letter to Emperor Anastasius* (490's)
Thomas Aquinas, *On Government of Princes* (1267)
Gregory VII, "Lay Investiture" (1075)
Magna Carta, Pt. 1 (1215)
Martin Luther, "Temporal Authority: To What Extent It Should be Obeyed" (1523)
The Schleithem Confession of Faith (1527)

John Calvin, *The Institutes of the Christian Religion*, Bk IV, Ch. 11, 20 (1559)

Separation of Church and State

Richard Hooker, *Of the Laws of Ecclesiastical Polity* (1590's)

Roger Williams, Letter to John Cotton (1644)

Danbury Baptists, Letter to Thomas Jefferson (1801)

Thomas Jefferson, Letter to Danbury Baptists (1802)

Thomas Jefferson, Second Inaugural Address (1805)

Thomas Jefferson, Letter to Rev. Samuel Miller (1808)

January 25th

Freedom of Religion: Theory

Readings:

Westminster Confession of Faith (1646)

Elisha Williams, "The Essential Rights and Liberties of Protestants" (1744)

First London Baptist Confession of Faith (1646)

Roger Williams, "The Bloody Tenant" (1644)

Isaac Backus, "An Appeal to the Public for Religious Liberty" (1773)

John Locke, "Letter on Toleration" (1689)

Virginia Bill of Rights, Articles 15-16 (1776)

George Washington, "Farewell Address" (1796)

George Washington, "Letter to the Clergy of Different Denominations" (1796)

John Adams, "Letter to the Officer of the First Brigade" (1798)

Week 4

January 30th

Freedom of Religion: Jurisprudence

Readings:

Russell Hittinger, "The Supreme Court v. Religion," *The First Grace*

Everson v. Board of Education (1947)

Employment Division v. Smith (1990)

Rosenburger v. University of Virginia (1995)

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC (2012)

FIRST PAPER DUE

February 1st

Freedom of Speech: Text

Readings:

US Constitution

First Amendment

Article I, Section 6, Paragraph 1

English Bill of Rights, Section 9 (1689)

State Constitutions and Colonial Charters (circa 1776)

Alien and Sedition Acts (1798)

Week 5

February 6th

Freedom of Speech: History

Readings:

Cato's Letters #15 (1721)

Virginia and Kentucky Resolutions (1798)

Madison's report on the Virginia Resolutions (1799-1800)

February 8th
Readings: Frederick Douglas, "Plea for Freedom of Speech in Boston" (1860)
Freedom of Speech: Theory
John Milton, *Areopagitica* (1644)
John Stuart Mill, *On Liberty* (1859)
Thomas Emerson, "The System of Free Expression," in *Civil Rights and Civil Liberties* (1969)
Stephen Breyer, "Speech," in *Active Liberty* (2005)

Week 6

February 13th
Readings: ***Freedom of Speech: Jurisprudence***
Abrams v. United States (1919), J. Holmes Dissenting
West Virginia Board of Education v. Barnette (1943)
Brandenburg v. Ohio (1969)
Texas v. Johnson (1989)
February 15th
Readings: ***Freedom of Speech: Criticism and Current Issues***
Russell Kirk, "Pornography and Free Speech," in *Rights and Duties*
Nadine Strossen, "Overview," in *Hate*

SECOND PAPER DUE

Week 7

February 20th
Readings: ***Freedom of the Press: Text***
US Constitution, First Amendment
Licensing Order of 1643
Act for Preventing the Frequent Abuses in Printing (1662)
February 22nd
Readings: ***Freedom of the Press: History***
Leveler Tract, "To Parliament" (1648)
Crown v. Peter Zenger (1735) (summary in Levy, *Emergence of a Free Press*, pgs. 37-45)
John Wilkes, *The North Briton* #45 (1763)
William Blackstone, *Commentaries* (1765)
Federal Farmer, No 16 (1788)

SPRING BREAK: NO CLASS February 27th and March 1st

Week 8

March 6th
Readings: ***Freedom of the Press: Theory***
Matthew Bacon, "What is Libel" (1740)
David Hume, "Freedom of the Press" (1742)
Cato's Letters #32, #100, #101 (1720s)
March 8th
Readings: ***Freedom of the Press: Jurisprudence***
New York Times v. US (1971)
Citizens United v. US (2010)

THIRD PAPER DUE

Week 9March 13th***Freedom of Assembly: Text***

Readings:

US Constitution

First Amendment

Ninth Amendment

Tenth Amendment

Conventual Act of 1664 (renewed 1667)

States Constitutions, Laws, and Colonial Charters

March 15th***Freedom of Assembly: History***

Readings:

William Penn, *Freedom of Conscience* (1670)

Declarations and Resolves of the First Continental Congress (1774)

Constitutional Debates on Assembly (1789)

Sedition Act (1798)

Week 10March 20th***Freedom of Assembly: Theory***

Readings:

Abraham Kuyper, "Calvinism and Politics" (1898)

Russell Hittinger, "Reasons for Civil Society," *The First Grace*March 22nd***Freedom of Assembly: Jurisprudence***

Readings:

DeJonge v. Oregon (1937)*NAACP v. Alabama* (1958)*Roberts v. Jaycees* (1984)"The Missing *Roberts* Dissent," John Inazu, *Liberty's Refuge***Week 11**March 27th***Freedom of Assembly: Criticism and Current Issues***

Readings:

John D. Inazu, *Confident Pluralism*, Ch. 2**FOURTH PAPER DUE**March 29th***Right of Petition: Text***

Readings:

US Constitution, First Amendment

Magna Carta, Pt. 61 (1215)

Tumultuous Petition Act (1661)

English Bill of Rights (1689)

Resolutions of the Stamp Act (1765)

Declarations and Resolves of the First Continental Congress (1774)

Declaration of Independence (1776)

States Constitutions, Laws, and Colonial Charters

Articles of Confederation II, IV, IX

Week 12April 3rd***Right of Petition: History***

Readings:

The Case of the Seven Bishops

Declaration of Indulgence of King James II, April 27, 1688

Petition of the Seven Bishops, May 18, 1688
Trial of the Seven Bishops, June 29-30, 1688
Slavery and the Right to Petition (Section 3341-3)
(*Hinds' Precedents of the House of Reps of the United States*)
John Quincy Adams, "The Right of the People, Men and Women, to
Petition" (1838)

April 5th

Right of Petition: Theory

Readings: Thomas Paine, *Rights of Man*, Ch. 4, Pt. 1
Ronald J. Krotoszynski, "The Jurisprudential Contours of the Petition
Clause," *Reclaiming the Petition Clause*

EASTER BREAK

Week 13

April 10th

Right of Petition: Jurisprudence

Readings: *Adderley v. Florida* (1966) (J. Douglas, Dissenting)
McDonald v. Smith (1985)

FIFTH PAPER DUE

April 11th

Current Issues: Tax Exemptions

Readings: 26 U.S.C. §501(c)(3)
26 U.S.C. §170
Philip Hamburger, *Liberal Suppression*, "Conceptual Foundations"
Nelson Tebbe, "Government Subsidy and Support," *Religious Freedom in
an Egalitarian Age*

April 12th

Current Issues: Religious Exemptions

Readings: Michael McConnell, "Accommodating Religion"
Mark Tushnet, "Questioning the Value of Accommodating Religion"

Week 14

April 17th

Current Issues: National Security

Readings: Floyd Abrams, Ch. 6, "The Soul of the First Amendment"

Current Issues: Civility

Norman Rockwell, "Freedom of Speech" (painting)
"Report of the Committee on Freedom of Expression," Committee on
Freedom of Expression at the University of Chicago
Hustler v. Falwell (1988)

April 19th

Current Issues: Private Forums and Social Media

Readings: 47 U.S.C. § 230
Baylen J. Linnekin, "Tavern Talk and the Origins of the Assembly
Clause"
John D. Inazu, *The Hedgehog Review*, "Virtual Assembly and the Legal
Limits of Digital Dualism"
Genevieve Lakier and Nelson Tebbe, *Law and Political Economy Project*,
"After the 'Great Deplatforming': Reconsidering the Shape Of The
First Amendment"

Biden v. Knight First Amendment Institute (2021) (J. Thomas, Concurring)

Week 15

April 24th

Readings:

Conclusion

John D. Inazu, *Confident Pluralism*, Conclusion

Communist Party v. SACB (1961) (J. Black, dissenting)

FINAL EXAM: Friday, April 28, 2023, 11AM