Poli. Sci. 470, “The First Amendment”

"Congress shall make no law respecting the 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."

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The readings for this course comprise one book and a series of additional readings posted on Canvas. The Canvas readings may be accessed at https://canvas.wisc.edu/courses/137964. The book is Howard Schweber, Speech, Conduct and the First Amendment, available at the University Bookstore.

COURSE CREDITS and GRADED ASSESSMENTS

This is a 4-credit course. In accordance with university policies, that means there are expected to be 4 contact hours per week, and at least 40 pages of written work over the course of the semester. These requirements are satisfied by the scheduled lectures and discussion section meetings, and by the take-home exams and additional written work assigned in section.

The work for the course will consist of two midterm exams, a moot court exercise, and a final exam. The moot court exercise is conducted with teams of two. Details of the moot court exercise will be distributed, but there will be graded written component and an ungraded oral participation component. While participation in the oral exercise will not be graded, participation is mandatory. The graded, written component will comprise a brief submitted jointly by the two team members. Team members may be from different discussion sections, but must have the same TA. There will be make-up sessions for students who have conflicts with the dates.

The midterm and final exams will be take-homes. For the exams, you are permitted but not required to work in pairs, in which case one exam will be turned in with both students’ names on it, and the grade will be the same for both. As in the case of the moot court exercise students working in pairs must work have the same TA, although they need not attend the same discussion section. Each of the midterms and the moot court brief will count 20% of the course grade, the final exam will count for 30% of the course grade, and the remaining 10% will be based on work and participation in section.
Exam and moot court schedule:

- First mid-term distributed Feb. 8, due Feb. 14
- Second mid-term distributed March 1, due March 8
- Moot Court Exercise: briefs due April 5, Moot Court Exercise April 5-6.
- Final exam distributed May 3, due May 10

LEARNING OBJECTIVES

The goal of this course is to give students a broad knowledge of the historical development of First Amendment principles as well as an introduction to comparative treatments of those principles (primarily in the European Court of Human Rights). Students are expected to develop familiarity with the terms and vocabulary of both modern and historical First Amendment debates, and a knowledge of a substantial body of constitutional law and some of the relevant philosophical literature. In the process of conveying this information it is expected that students will enhance their skills of critical reading, legal and constitutional reasoning, and writing in a specialized and technical area.

ACADEMIC INTEGRITY

By enrolling in this course, each student assumes the responsibilities of an active participant in UW-Madison’s community of scholars in which everyone’s academic work and behavior are held to the highest academic integrity standards. Academic misconduct compromises the integrity of the university. Cheating, fabrication, plagiarism, unauthorized collaboration, and helping others commit these acts are examples of academic misconduct, which can result in disciplinary action. This includes but is not limited to failure on the assignment/course, disciplinary probation, or suspension. Substantial or repeated cases of misconduct will be forwarded to the Office of Student Conduct & Community Standards for additional review. For more information, refer to studentconduct.wiscweb.wisc.edu/academic-integrity/.

ACCOMMODATIONS FOR STUDENTS WITH DISABILITIES

McBurney Disability Resource Center syllabus statement: “The University of Wisconsin-Madison supports the right of all enrolled students to a full and equal educational opportunity. The Americans with Disabilities Act (ADA), Wisconsin State Statute (36.12), and UW-Madison policy (Faculty Document 1071) require that students with disabilities be reasonably accommodated in instruction and campus life. Reasonable accommodations for students with disabilities is a shared faculty and student responsibility. Students are expected to inform Prof. Schweber and Rebecca Anderson of their need for instructional accommodations by the end of the third week of the semester, or as soon as possible after a disability has been incurred or recognized. We will work either directly with the student [you] or in coordination with the McBurney Center to identify and provide reasonable
instructional accommodations. Disability information, including instructional accommodations as part of a student’s educational record, is confidential and protected under FERPA.

**DIVERSITY & INCLUSION**

The UW has adopted the following institutional statement on the subject of diversity: “Diversity is a source of strength, creativity, and innovation for UW-Madison. We value the contributions of each person and respect the profound ways their identity, culture, background, experience, status, abilities, and opinion enrich the university community. We commit ourselves to the pursuit of excellence in teaching, research, outreach, and diversity as inextricably linked goals. The University of Wisconsin-Madison fulfills its public mission by creating a welcoming and inclusive community for people from every background – people who as students, faculty, and staff serve Wisconsin and the world.”

1/22 **Introduction:** historical background, current controversies, and the search for a unified meaning

I. **Freedom of Speech**

A. **Background Principles**

1/24 Why Speech?

- Emerson essay and background material (3-30)
- Bork, “Some Neutral Principles” (canvas)
- Marcuse, “Repressive Tolerance” (canvas)
- Purdy, “Beyond the Bosses’ Constitution” (Canvas)

The first thing to recognize about freedom of speech is that it is not only about “speech”: other forms of expression are protected, as is the freedom to hear others’ speech, the right to have access to public settings for purposes of expression, and a whole slew of sometimes complicated other rights that exist as “penumbras” to “speech.” The second thing to recognize is that “freedom of speech” is a term of art: it means some set of expression-related freedoms recognized in law. So identifying an act as “speech” is only the beginning of the exercise; the big question is whether that particular act is contained within the “freedom of speech.” The concept of freedom of speech is both broader and narrower than “speech”: not all speech is included in this freedom just as activities other than speech are protected by this freedom. (The word “property” is a good analogy: there is no property before there is property law, and the rights that go with ownership of property are defined by law.) So the question become what scope of freedom of expression the law should protect. The most ardent libertarian in the world does not think that freedom of expression
includes a right to reveal military secrets to an enemy in a time of war—what else is not protected? How would you formulate an argument one way or the other?

The Emerson essay is a classic statement of the multiple reasons why we might want to attach a high priority to freedom of expression. In response, Bork argues from an originalist perspective that only a narrow sub-set of expression is genuinely protected by the First Amendment. Marcuse’s essay is a famous exercise in justifying restrictions on expression as the condition for true liberty. And Purdy points to the ways in which arguments about freedom of expression are inextricably entwined with arguments about equality.

B. Historical Approaches

1/29 historical materials:
Mass. Body of Liberties of 1641,
Cato’s Papers,
the Zenger Case,
Alien and Sedition Acts,
Jefferson Second Inaugural (canvas)

1/31 From Bad Tendency to Clear and Present Danger to the Categorical Approach (31-52,
55-57)
Schenck v. United States (1919)
Abrams v. United States (1919)
Gitlow v New York (1925)
Chaplinsky v. New Hampshire (1942)
Brandenburg v. Ohio (1969)

The historical background to modern free expression jurisprudence is interesting in at least two ways. First, this background illustrates other approaches that were tried and discarded; the earlier readings suggest alternative routes that were not taken. Second, our understanding of modern free expression jurisprudence is often informed by reference back to these historical practices. To be sure, these efforts often devolve into “law office history” (cherry-picking the historical record for items to support a pre-determined policy conclusion).

The early historical materials going back to the 17th century provide a glimpse at the original roots of the arguments. In the second lecture we will look at actual US First Amendment jurisprudence, a body of law that does not actually come into being until the 1920s. Our primary focus in the first lecture will be on the ways in which historical understanding of freedom of expression are sharply in contrast with our own. In the second lecture we will focus on the two cases that announced the beginning of the modern approach, Chaplinsky and Brandenburg.

C. Regulating Protected Expression
Notes on Time, Place and Manner Restrictions (canvas)

The most basic rules that limit expression are “time, place, and manner” regulations. For an example, consider noise ordinances. There is no theory of the First Amendment that says that a city may not ban rock concerts at 3 a.m. in a residential neighborhood. Zoning laws are another example. A second key area of focus has to do with “forum doctrine”. This is the legalistic way of expressing the commonsense observation that my living room is different from a city sidewalk. You have no free speech rights in my living room: if I don't like what you are saying, as the owner of the home I have the right to tell you to leave and if you refuse to do so you are trespassing (see earlier comment re legal construction of property rights!) That is because my living room is a "private forum", as are the offices of a business. A city sidewalk, by contrast, is a “public forum”. And there are a variety of settings that seem to fall in between: how shall we describe an airport or a shopping mall?

There is an interesting connection to ideas of a right to privacy, here. The more private the forum, the weaker the free speech rights but the less authority the government has in the first place; the more public forum, the greater the government authority but the stronger the protections of free expression against the exercise of that authority. The divide between public and private is fundamental to liberalism; does the First Amendment imply a constitutionally protected right of privacy? What would “First Amendment privacy” look like?

Expressive Conduct, Indecent Speech, Commercial Speech (127-45, 89-106, 118-22)

United States v. O'Brien (1968)
Barnes v Glen Theater (1991)
Reno v ACLU (1997)
44 Liquormart v. Rhode Island (1996)

Aside from the limits on permissible regulation of fully protected speech there are other, less restrictive rules regarding the regulation of what might be called “less protected” expression. Notable examples are expressive conduct (as opposed to “pure speech”), expression that is “indecent” (as in rules about words one cannot say on television), and commercial speech (does the First Amendment secure a right to engage in false advertising?) In lecture we will focus primarily on O'Brien, Texas v. Johnson, Reno v ACLU, and 44 Liquormart.
D. Regulating Unprotected Expression

2/12 obscenity (74-79, 373-79)
   Miller v. California (1973)
   Stanley v. Georgia (1969)
   Ashcroft v. Free Speech Coalition (2002),
   American Booksellers Ass’n v. Hudnut (7th Cir. 1985)
   Alberta, “How the GOP Gave Up on Porn” (canvas)
   Catharine MacKinnon, “Pornography, Civil Rights, and Speech” (canvas)
   Frederick Schauer, “Causation Theory and the Cause of Sexual Violence” (canvas)

2/14 Defamation, harassment, fighting words, threats (51-55, 106-18)
   Beauharnais v. Illinois (1954)

The premise of the categorical approach is that there are “certain narrowly defined”
categories of expression that are not covered by the First Amendment. Over a period of
time the Court has arrived at a list of these categories of unprotected expression, and has
repeatedly resisted efforts to expand or narrow the list. The list of unprotected categories
is as follows: fighting words, obscenity, defamation, harassment, threats, child
pornography, incitement to imminent lawless action. There is also a general category of
crimes committed by speaking, such as blackmail, fraud, treason, conspiracy, perjury,
obstruction of justice, tax evasion…the list is nearly endless.

The first question to ask is why these categories? And why not others? To cite one very
popular example, why is “hate speech” not an unprotected category but “commercial
disparagement”) is one of those categories? Why are governments permitted to regulate
sexual content but not violent content? The second question is how are these various
categories defined? This is where we get into the formal legal tests for “obscenity” or
“fighting words”. Finally, does describing these categories as “unprotected” mean anything
goes, or are there still First Amendment limits on how government may regulate these
forms of expression? In the first lecture we will focus especially on Miller and Hudnut as
well as the secondary sources. In the second lecture we will focus on Beauharnais, R.A.V.,
and Vir. v. Black.

*** First Mid-Term due Friday, Feb. 14***

E. Special Issues of Freedom of Expression
compelled speech (145-50)

_Vir. Bd. Of Educ. V. Barnette_ (1943)
_Abood v. Detroit Bd. Of Educ._ (1977)
_Janus v AFSCME_ (2018) (canvas)

On Barnette Justice Jackson gave us the authoritative formulation of the right not to be compelled to speak: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” The word “confess” conveys a distinctly religious connotation to Jackson’s statement, but the rule applies across the board. The principle is unquestionably attractive, but what is its source? It is extremely difficult to come up with anything like a historically grounded justification for this particular implied right outside the context of criminal self-incrimination (which is dealt with separately in the Vth Amendment); it is the creation of 20th century revulsion at the Axis powers and later the Soviet Union, and the recognition that our own practices were not always free of the same tendencies toward authoritarianism. Leaving that aside, what does this principle of freedom from compulsion to speak mean in practice? What counts as compulsion, and what counts as expression?

_2/21 government speech 258-72_

_NEA v. Finley_ (1998)
_Legal Services Corp. v. Velazquez_ (2001)

The basic rule is simple: when the government speaks it may convey any message it wishes: in the memorable words of Chief Justice Rehnquist, “When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.” As always, though, the challenge lies in working out the limits to that principle and how it applies in particular contexts. We will particularly focus on _Garcetti_, which announced a new approach that applies in a broad range of context (that have not as yet been incompletely

_2/26 free speech and academic freedom on campus_

_Wendell, "A Moderate Defense of Hate Speech Regulations on University Campuses"_ (canvas)
_Bair v. Shippensburg Univ._ (M.D. Penn., 2003) (canvas)
Campus free speech issues are very much in the news these days. There have been a half dozen books on the topic in just the past two years. Unfortunately, most of these books tell us more about what the authors believe should be done than about what the First Amendment permits. It goes without saying that freedom of inquiry and expression are important; it also goes without saying that restrictions on expression are no less necessary in the setting of a college or university than in other settings. The question is what the First Amendment tells us about the special requirements that might apply and how the addition of the idea of academic freedom changes the discussion. Part of the reason these questions are so complicated is forum analysis: what kind of “forum” is our classroom? Bascom Mall? My office? The common areas of a dorm?

2/28  free speech in schools  
  *Bethel Schl. Dist. V. Fraser* (1986)
  *Morse v. Frederick* (2007) (canvas)
  *Palmer v. Waxahachie Ind. Schl. Dist.* (5th Cir. 2009) (canvas)
  *Saxe v. State College Area Schl. Dist.* (3d Cir. 2001) (canvas)

In 1969 *Tinker v. Des Moines* the Court made a grand pronouncement: children in schools have full First Amendment rights, subject only to such limitations as are necessary to prevent disruption. Ever since then the courts have been chipping away at that principle. Does anything remain of *Tinker*’s protection of free expression rights in public secondary schools? Do secondary school teachers have academic freedom? Should they?

***Second Mid-Term distributed Friday, March 1***

3/5  campaign finance  
  *Buckley v Valejo* (1976)

One question that comes up again and again is what counts as “speech” (or “expression”?) In the campaign finance context we start from a highly debatable proposition that the act of spending money is expression. Except that we certainly don’t believe that generally; otherwise every commercial regulation or law regulating economic activity (i.e., most of all laws) would have First Amendment implications. So what exactly is the argument for the proposition that expenditures and contributions are “speech acts”, and what is the vision of democratic politics that this interpretation of the First Amendment implies? Is there a danger that the Free Speech Clause will swallow the rest of the Constitution, or is the true point of the First Amendment to ensure that “money talks”?

3/7  comparative perspectives: hate speech
Kevin Boyle, "Hate Speech—the United States Versus the Rest of the World" (canvas)
Claudia Haupt, “Damned if You Do and Damned If You Don’t: Lessons Learned From Comparing the German and U.S. Approaches” (canvas)
ECtHR - Otto Preminger Institut v Austria (1994) (canvas)
ECtHR – Perencik v Switzerland (2015) (canvas)

“Hate speech” is simultaneously one of the most popular and one of the most conceptions formulation in discussions of freedom of expression. There is no unprotected category named “hate speech” in American constitutional law: should there be such a category? In these readings we look at the ways other jurisdictions have approached this question, including two case analyses from the European Court of Human Rights.

*** Second Mid-Term due Friday, March 8***

II. ASSOCIATION

3/12 negative and positive association, 150-63
NAACP v Alabama (1958)
Runyon v McRary (1976)
Newman v. Piggie Park Enterprises (1968) (canvas)

Rumsfeld v. FAIR (2006)
ECtHR - Refah Partisi v. Turkey (canvas)

First Amendment jurisprudence is full of the discovery of implied rights: “Speech” turns out to include all forms of expression, with or without the element of language; “freedom of speech” is discovered to include freedom from compelled speech, the right to be heard, and various requirements of content and/or viewpoint neutrality. The right of association cannot even be directly connected to the term “speech”, it is entirely a judicial discovery. Yet no democratic policy could do without a robust right of association, nor would other rights of speech and assembly be meaningful of a right of association were not implied in their guaranty. And of course, following the logic of the speech cases if there is a right to associate there is a right to refuse to associate: does that right require exemptions from antidiscrimination laws similar to the kinds of accommodations that used to be required by the Free Exercise Clause? Can the government require universities to provide a platform for their message by welcoming military recruiters onto campus?
Here’s a more general question: are rights of association the same as speech rights including the right against compelled speech, rights of expressive conduct, or analytically independent from either? In the first lecture we will particularly focus on *Jaycees, Hurley,* and *Dale.*

**SPRING BREAK**

**PRESS**

3/26  Prior restraints, libel, invasion of privacy (292-321)

*Near v. Minnesota* (1931)
*Bartnicki v. Vopper* (2001)

The 2018 World Press Freedom Index produced by Reporters Without Borders paints a grim picture. The murder of Jamal Kashoggi was not an aberration, in much of the world it is standard practice. The courage of those who nonetheless persist in pursuing the truth and conveying it to the rest of us is beyond admirable, at times it is astonishing. All of which is to emphasize the point made by President Reagan: “There is no more essential ingredient than a free, strong and independent press to our continued success in what the founding fathers called our ‘noble experiment’ in self-government.”

It would be tempting to stop there: a grand declaration of support for press freedoms, possibly implying political criticisms of our current politics, an ennobling call to arms. And yet... like every other subject in this course, as soon as you get past the headlines things get much more complicated. What does “freedom of the press” actually require? Observing the past 20 years are we satisfied that U. S. courts have struck the right balance between protecting a free press and protecting the rest of us from a nightmare of unwanted and unwarranted public embarrassment? Never mind the Russias and Saudi Arabias of the world: why is it that none of the other nations who share our British constitutional heritage have chosen to follow the American lead? On lecture we will focus particularly on *New York Times v. Sullivan,* *Gertz,* and *B.J.F.*

3/28  Old media, new media: the challenge of the internet (333-40)

*Red Lion Broadcasting v. FCC* (1969)
*Ex Parte Jones* (Texas State Ct. Appeals, 2018) (canvas)
Once upon a time there was no Internet. Also no cable television. Also no UHF stations (does anyone have any idea what I’m talking about here?). There were three television networks and a few hundred radio stations, and that was that. In that context the FCC developed “the fairness doctrine”, an attempt to avoid precisely the kind of partisan media bubbles that define the current landscape. It sounds quaint, doesn’t it? What would it mean to conceive of media corporations as serving a public function and their licenses as privileges?

Today of course we inhabit the landscape of the internet, and the wonderful new words it has given us: “trolling”, “doxing”, and many others. Is the First Amendment necessarily a declaration that from now on the incels of 8Chan will determine our collective standards of decent behavior, or is there room and a need to reconsider our categories?

*** Third Mid-Term distributed Thurs. March 28***

RELIGION - ESTABLISHMENT

4/2 support
Everson v. Bd. of Educ. of Ewing Township (1947)
Abington Schl. Dist. V. Schempp (1963)
Lemon v. Kurtzman (1971)

4/4 support, “the new neutrality” (179-89)
Agostini v. Felton (1997)

One of the recurring themes in the course is that there was a certain way of doing things from the 1920s until the 1990s, and then there was this dramatic shift into a new and different era. There is no context in which that narrative applies more powerfully than the Establishment Clause. From the 1940s until the 1990s there was a clear dominant approach, captured in the 3-part test described in Lemon. Starting in ___ a new vision emerged, described as the “new neutrality”. Today when we confront questions concerning the provision of government resources to support religion we work from a clear set of formal rules that identify permissible government support and an entirely unclear set of prescriptions for determining when government goes too far in its support for religion.
generally, for one religion over other religions, or for religious actors’ participation in the
 provision of otherwise secular public services. One clear principle: many things that were
 rejected as beyond the pale in the 1940s, 1950s, and up through the 1980s are not
 perceived as harmless. Conversely, the new neutrality affirmative requires government to
 provide religious actors’ access to support in ways that would have been thought to violate
 core principles of the Establishment Clause in an earlier period.

*** Third Mid-Term due Friday, April 5***

4/9 endorsement: public displays (203-211)
  County of Allegheny v. ACLU (1989)
  Van Orden v. Perry (2005)
  Pleasant Grove v. Summum (2009)
  American Humanist Ass’n v. Maryland Park and Planning Comm’n (4th Cir. 2017)

4/11 endorsement: public prayers (190-203)
  Engel v. Vitale (1962)
  Wallace v. Jaffree (1985)
  Lee v. Wiseman (1992)
  Santa Fe Independent Sch. Dist. V. Doe (2000)
  Town of Greece v. Galloway (2014) (canvas)

These two lectures both address an issue that Justice O’Connor named the “endorsement”
 problem. Earlier when discussing government speech we presented the basic starting
 principle that when the government speaks it is free to determine the message it wishes to
 convey. Does the Establishment Clause create an exception to this principle? Put another
 way, does the Establishment Clause contain an implicit exception to general free
 expression principles as they apply to government speech? As always, naming the principle
does not answer any of the really difficult and important question. What if anything
 constitutes an impermissible government “endorsement” of religion? In the first lecture we
 will focus particularly on Capitol Square and American Humanist Ass’n; in the second
 lecture we will focus on Lee, Newdow, and Town of Greece.

4/16 indoctrination: school curriculum (212-17)

Schools have been ground zero for the most contentious forms of constitutional politics
since at least Roberts v. City of Boston (1850), a case that asked whether the Mass.
Constitution permitted racial segregation in public schools. (The answer was “yes”: the
Commonwealth of Massachusetts responded by desegregating its schools in 1855.) Upon
reflection there are good reasons why this should be so: schools are the most direct point of interaction between “the government” and our children, with the implicit threat that the government’s agents (the teachers) will change our children into strange and unfamiliar adults. That’s a challenge at any psychological level: add issues of religion it becomes a war. But while it is entirely understandable that parents might resist the government’s efforts to use public schooling to indoctrinate schooling in the ideology of some national creed, there is also the opposite concern of when schools go too far in responding to parents’ desires by indoctrinating children in a religious ideology. As you read these cases, consider the fact that Barnette and other compelled speech cases were not about religion, they articulated an argument that government should never be able to compel any expression. Is there a way to make those rulings consistent with the rulings in the cases we are reading in this section? How do issues of compelled speech, religious free exercise, academic freedom, and government speech come together (and possibly collide) when the question is one of constitutional limitations on the design of public school curricula?

4/18 access (278-91)


The “new neutrality” approach move our focus away from the potential tension between the Establishment and Free Exercise clauses in favor of a focus on tensions between the Establishment Clause and the (reconceived) Free Speech clause. That new focus is exemplified in the cases covered in this section. In all three cases, the question is framed as one of a conflict between a State agency’s desire to exclude religious endorsement (in order to avoid violating the Establishment Clause) and the rights of religious actors to have the same access to public resources as anyone else (on Free Speech grounds). The most important of these cases is *Rosenberger*.

4/23 Comparative perspectives

*ECtHR - Lautsi and Others v. Italy* (2011) (canvas)
*ECtHR - Cha’are Shalom ve Tzedeck v. France* (2000) (canvas)

There is a popular conceptions that European authorities are hostile to religion compared to American authorities. As a comment on popular attitudes this seems to be true: polling data suggests that Europeans across the board are far less church-going, theistic, or inclined to profess belief in ideas like an afterlife or the Devil than Americans. From a legal and constitutional perspective, however, the picture is somewhat different. Here are two cases in which the European Court of Human Rights considered cases that would present clear issues of religious establishment under American constitutional law. What do you think of the ECtHR’s approach in these cases?
RELIGION - FREE EXERCISE

4/25 Incidental Burdens and Accommodation (225-57)
   Torcaso v. Watkins (1961)
   Wisconsin v. Yoder (1972)
   Goldman v. Weinberger (1986)
   Smith v. Employment Division (1990)
   City of Boerne v. Flores (1997)
   Masterpiece Cakeshop revisited (2018) (canvas)

Issues of free exercise rarely arise directly. That is, it is extremely rare to find a legislature passing a law or the government taking action directly aimed at preventing the exercise of religion. Where issues arise is over questions of accommodation: given a generally applicable law, is the government required to make an accommodation for religious practice? An “accommodation” in this context means an exemption from an otherwise generally applicable law. This is the question of an “incidental burden”, the flip side to the question of incidental benefits that we discussed in the context of the Establishment Clause.

An initial question is what counts as “religion”? Beyond that, what counts as religiously motivated conduct? Should courts rule on which is the officially accepted version of a religion and only grant accommodations for practices required by members of that version? Should courts test the sincerity of claims of religious belief and practice? On the other hand, should courts simply accept any assertion of a religiously required practice at face value? Does it matter if, say, my “church” was created yesterday and has exactly one adherent? Torcaso stands as a declaration that courts will not involve themselves in any questions of this kind, and will instead lean very strongly toward accepting assertions of religious conviction or religion-like commitments at face value (although as we will this may be a commitment more honored in the breach than in the observance).

Accepting that a particular conduct is religiously required, is the government required to provide accommodations for that conduct? Prior to 1990, the general answer was that the government bears the burden of justifying its own failure to provide an accommodation for religious practice. Individuals might assert religious objections to complying with the draft, or the requirement to pay taxes, or the effects of antidiscrimination statutes (see Piggy Park under the “Association” heading). In Sherbert v Verner the Court went even farther, ruling that the government—State or federal—would have to satisfy strict scrutiny in order to justify its failure to provide accommodations for religious practices. That all changed abruptly in 1990 with Smith v. Employment Division. In lecture we will focus on Yoder and Smith as well as the aftermath to Smith the Religious Freedom Restoration Act and City of Boerne. We will finish with a consideration of the implications for Masterpiece Cakeshop and other current controversies.

4/30 comparative perspectives
   UKSCt 2018 - Lee v Ashers Bakeshop
Free Exercise questions strike at the heart of the constitutional balance among various private and public concerns. It is not surprising that the European Court of Human Rights has had repeated occasion to consider questions of this kind. Is there anything that our courts should learn from the ECtHR? Alternatively, does the ECtHR’s treatments of these issues confirm the wisdom of the US approach(es)? If you were asked to write a new constitution, which set of precedents would you find more useful and informative?

5/2 Conclusion: Three Views of the First Amendment (363-99)

***Final Exam distributed Friday, May 3***

***Final Exam due Friday, May 10***