

Department of Politics

222. FOUNDATIONS OF THE FIRST AMENDMENT



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Reading assignments are subject to change, so the online syllabus is the only definitive version. Changes in reading assignments will not be made within 24 hours immediately preceding class meetings. For your convenience in printing, a PDF file link follows: [Printer Friendly](#) Please do not neglect to consult the online syllabus frequently for changes!!

HOW TO REACH THE INSTRUCTOR: My office is South 304; my extension is 4226. The best time to see me for a brief conversation is immediately before class. Other times are available by appointment arranged before and after class or by e-mail. I rarely check my voice mail and often forward my calls to Cheryl Dake, our Departmental Administrator, so a prompt response from me is best gained by e-mail. rsutherland@cornellcollege.edu

CLASS MEETINGS: 9:30 am daily in the Paris Room of the Commons. See the [schedule](#) below.

TEXTS: J. S. Mill, *On Liberty* ([on line edition](#)); David Lowenthal, *Present Dangers* (The Cornell Bookstore is processing an order for *Present Dangers*, but those who wish to have a copy before it appears on the Bookstore shelves should order directly from [Spence Publishing](#) or from on line sources for used books, e.g. Amazon, etc.

GRADES:

- PAPER-30%
- EXAMS & QUIZZES--70%, two midterms (15, 20%) and a final exam (25%) plus various unannounced quizzes (10%). Quizzes may not be made up, except for documented (e.g. trauma center registration) emergencies. Both the final exam and the final paper remain with me for future reference in revising and improving the course. They can be picked up at my office immediately after Politics 222 is offered again.
- Portions of the *Catalog* on adding and dropping courses and portions of the *Compass* on dishonesty in academic work are incorporated here by reference. A discount of 5% per hour will be applied to the grades of late papers,

except for documented emergencies. The grading scale for the course is A = 1750-2000, A- = 1650-1749, B+ = 1550-1649, B = 1450-1549, B- = 1350-1449, C+ = 1250-1349, C = 1150-1249, C- = 1050-1149, D+ = 950-1049, D = 850-949, D- = 750-849, F = 000-749. The number of points possible on any given exam or paper can be calculated by multiplying 20 points (A++) by the value (a percentage) of the exam or paper in determining the final grade. For letter grade equivalents, multiply the percentage times: 18 = A, 17 = A-, 16 = B+, 15 = B, 14 = B-, 13 = C+, 12 = C, 11 = C-, 10 = D+, 9 = D, 8 = D-.

- [Accommodating disabilities](#)

ASSIGNMENTS--To be done before class on the day indicated:

Wk	DAY	TIME	READING	EXAM/PAPER
I	2	9:30	Shenck v. U.S. ; Brandenburg v. Ohio ; <i>On Liberty</i> , Ch. 1	
	3	9:30	<i>On Liberty</i> , Ch. 2	
	4	9:30	<i>On Liberty</i> , Ch. 2-3 R. George, "Law & Moral Purpose," First Things . Paragraphs, 1-15	
	5	9:30	<i>On Liberty</i> , Ch. 4	
II	6	9:30	<i>On Liberty</i> , Ch. 5	1st Exam
	7	9:30	<i>Present Dangers</i> , pp. ix-xxxii, 3-44	
	8	9:30	<i>Present Dangers</i> , pp. 45-86	
	9	9:30	<i>Present Dangers</i> , pp. 89-137	
	10	9:30	<i>Present Dangers</i> , pp. 138-178	
III	11	9:30	To Be Arranged	2nd Exam
	12	9:30	<i>Present Dangers</i> , pp.181-233	
	13	9:30	<i>Present Dangers</i> , pp.234-270	
	14	9:30	<i>Present Dangers</i> , pp.271-283 + George, Paragraphs 16-41	
	15	5:00	Optional Rough Draft of Final Paper Due Paper Copy Only	
IV	16	9:30	George, Paragraphs 42-58	
	17	8:30	NOTE EARLY START	Final Exam
	18	NOON	Paper Copy Only	Paper Due

FIRST AMENDMENT TEXT

"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."

STUDY GUIDE QUESTIONS & OUTLINES

Note: These questions are designed to help you get the most out of what you read. They should be largely ignored during your first reading of the assignment but carefully studied during a second reading in order to identify main ideas and to

fix them securely in mind. Notes based on these questions may be used on quizzes but not on exams.

SCHENCK V. US:

1. What is the indictment, including specific counts & the finding for each?
2. What arguments and objections were made in behalf of the defendant?
3. What conclusion does Holmes draw about their intention and expected effect?
4. Why weren't public figures that said the same things as the defendant similarly charged?
5. What is the action of the Court?

BRANDENBURG V. OHIO:

1. What is the indictment & the action of the lower court?
2. What argument was made in behalf of the defendant?
3. What principle or test does the Court invoke to decide the case?
4. What conclusion and action follows?
5. What is Douglas's caveat and by what means does he explain it?

ON LIBERTY

Chapter #1--

1. What has been the progress of liberty up to Mill's day? (3 stages)
2. What is the gravest threat to further progress; what question must be answered before the threat can be addressed?
3. Why has so little additional progress been made? (4 reasons)
4. In what sense is religion an exception?
5. What answer does Mill give to the questions referred to in #2 above?
6. What exceptions apply? What limitation?
7. What three implications may be drawn from the answer?
8. How urgent is the need for further progress?

Chapter #2--

1. What are four objections to free speech for dissenters who are right in what they say and how does Mill reply to each?
2. What are three objections to free speech for dissenters who are wrong? Mill's replies?
3. Which relationship between right and wrong is most common in politics and what conclusion does Mill draw from its prevalence?
4. How is the common relationship of right and wrong reflected in American politics and why is Robert George so dismissive of it in "Law and Moral Purpose?"

Chapter #3-- Also Robert George, "Law & Moral Purpose," Paragraphs 1-15

1. What force stands opposed to individuality, what is Mill's criticism of it, and what objection does he anticipate?
2. What is the utility of individuality to the one who has it?
3. What two great benefits does individuality offer to those who don't have it?
4. What truth does George acknowledge in Mill's argument in behalf of individuality?
5. Why does George refuse to join those who carry Mill's argument to a "strict libertarian position?"
6. Are Mill and George in agreement about the importance of moral truth to their writing on politics and morality?

Chapter #4--

1. How does Mill respond to the charge that he promotes "selfish indifference?" To what extent does Mill agree with George on moral truth and political morality?
2. What response is appropriate in the case of objectionable self-regarding actions?
3. What objection does he anticipate to the distinction between self & other regarding actions?
4. What two replies does Mill offer to it? What examples support the second?

Chapter #5--

1. What two maxims form the subject here?
2. What limitations pertain to which?
3. What issues lie on the boundary between them?
4. What self-regarding actions are forbidden?
5. What "misapplied notions (at least two) of liberty" does Mill address in this chapter?
6. What three reasons does Mill give for restrictions on government interference?
7. Review the [Libertarian Party](#) website in some detail. What connection to *On Liberty* continues in the Party's [statements](#) and activities?
8. To what extent do George and Mill agree on libertarianism?

Present Dangers

First Assignment, pp. ix-xxxii, 3-44

1. What three questions form the "basis for the tripartite organization of this book?" p. xxiii
2. What is the "internal coherence" of the 1st Amendment and how is it related to Locke's philosophy of government?
3. How are "founders" distinguished from "framers"? Who is a "libertarian"?
4. Why has the author put his discussion of religion and the 1st Amendment last rather than first and how is the shift related to recent events?
5. What is the more general purpose of the book and why should it be read, even by those who disagree with some of the author's specific interpretations?
6. What is the current understanding of the 1st Amendment's protection for revolutionary groups and why is it dangerous to freedom?
7. What understanding preceded the current one and why is more likely to preserve freedom? Be specific about Blackstone as a source of such understanding and how it was reflected in the the constitutions of both the US and the states but also in the Alien and Sedition Acts of 1798? What was Hamilton's understanding of the "liberty of the press?" To what extent was it still recognized as late as 1917?
8. What early sources provided a partial basis for the current understanding? What "constitutional revolution" led to the current understanding, who led it, when and how did it succeed?

Second Assignment, pp. 45-86

1. Who is the "new founding father" and how faithful was he to either the basic principle of independence he asserts or to the Declaration of Independence? What expectations render his creation flawed from the beginning?
2. How was the reinterpretation of the Constitution accomplished? What was the key concept and who were its promoters?
3. Why is it fair to consider the results dangerous? What is the danger and how does Justice Jackson attempt to address it in *Dennis*? To what extent is it confirmed by Berns?

4. How does history and current events confirm their concerns?
5. What are the ten defects of the "clear and present danger" rule?
6. What does the author propose doing and why?

Third Assignment, pp. 89-137

1. What is the "moral revolution," how long ago did it become a force, and what promotes it?
2. How do Washington and Jefferson point the nation in a very different direction?
3. Against what background must the Supreme Court's consideration of obscenity be understood?
4. What cases apply, what standards do they offer, and how adequate are they in the face of the harm done by obscenity, especially in the mass media?
5. What role have D. H. Lawrence, the Kronhausens, and J. S. Mill played in preparing the way for the direction in which Justice Douglas would lead the Court and the nation?

Fourth Assignment, pp. 138-178

1. What advances in the Court's understanding of obscenity are reflected in the *Paris Adult Theater* and *Miller* cases and what were the practical effects?
2. To what extent does the author both agree and disagree with Justice Burger's principles in these cases and why is a renewal of judicial federalism an attractive prospect?
3. What changes in the definition of obscenity does the author propose?
4. What impact on movies and television are projected by the author in the reregulation of obscenity?
5. What kind of statutes would advance efforts to renew society and how might they be related to Milton's understanding of moral education?
6. What are the leading concerns of civil libertarians at the [ACLU](#) and in the [Progressive](#)?

Fifth Assignment, pp. 181-233

1. What is the "wall of separation" principle, what are its origins, and what extensions or applications of it did advocates of the principle on the Court wish to see?
2. What was Jefferson's understanding of the relation between religion and public education and how does it differ from later efforts to advance other principles?
3. What did the "establishment of religion" and "free exercise" clauses mean to the generation who first embraced the Constitution?
4. What variety in uses of the term "religion" characterized our early decades and what singular conviction underlay such variety. Why is that conviction important for the debate between public and private morality?
5. What recent opinions have undermined such a basic conviction?
6. What is the "incorporation" controversy and why is it important for the establishment provision of the First Amendment?

Sixth Assignment, pp. 234-270

1. Explain briefly Lowenthal's account of the Constitution's "establishment clause" and the simplest issues arising from its national application.
2. Explain also federal aid to education in parochial schools and to religion itself.
3. Explain the issues at stake in public school prayer and other activities associated with democratic citizenship.
4. What errors does Lowenthal claim to find in Justice Black's opinion for *Engel v. Vitale*?
5. How does Lowenthal's position escape, in his view, the equal protection requirements of the 14th Amendment?
6. What does the Court understand "free exercise" to mean in *Cantwell v. Connecticut*, why is it important, and what concerns does Lowenthal express with it?

7. Why does Lowenthal insist that the Court is likely to make matters worse in future flag salute cases rather than better?
8. What evidence of judicial "presumption" does Lowenthal cite in the last 12 pages of the chapter?

Seventh Assignment, pp. 271-283 Also, George, "Law & Moral Purpose," Paragraphs 16-41

1. What background does Lowenthal offer to his assessment of the modern Court's interpretation of the 1st Amendment?
2. What is the fundamental error that Lowenthal finds underlying the Court's treatment of 1st Amendment questions?
3. What simple remedy does Lowenthal propose and how does it directly lead to a better interpretation of the 1st Amendment?
4. Be specific about the improvement Lowenthal would expect in a variety of case law subjections, from incorporation to obscenity.
5. In what two areas (see Paragraphs 20-24 and 25-41), does George expect the law to intersect with morality and produce statutes and cases that will need to be decided in the near future?
6. In each area, explain what the moral issue is and how the law can best be served by clarifying the moral principle that should serve as the basis for good law.
7. What developments in microbiological research policy concern George the most and why?

George, "Law & Moral Purpose," Paragraphs 42-58

1. What developments in marriage concern George the most and why?
2. Clarify first the moral understanding that serves as the foundation of marriage, according to George, and explain what distinguishes such understanding from the ideas advanced by advocates of same sex marriage.
3. What role does George advocate for the Supreme Court and why?
4. What concerns does George express about "civil unions" and "domestic partnership schemes"?

TOPIC: Contrast the philosophical foundations of opposing positions on the law governing same-sex marriage, as they are reflected in the writings of Mill and his successors as well as Robert George. Conclude your essay with a critical assessment of each position, highlighting the strengths and weaknesses of each.

INSTRUCTIONS:

- No additional research needed.
- Quality counts much more than quantity; most papers will be about 1000 words..
- Be sure to proofread your paper well; grammar, style, and usage count in this assignment.
- Documentation requirements are simple: use page references in parentheses in the text, if the title of the source from which you are borrowing is clear from the context.

CRITERIA FOR EVALUATING PAPERS

An "A" paper has the following elements:

1. Good, clear, complete discussion of major parts of the topic
2. A penetrating thesis statement connecting the parts,
3. Accurate, skillful use of argument and evidence in supporting the thesis,
4. A strong conclusion anchored in a tightly drawn organization of thesis, argument, and evidence, plus
5. No more than one error per page of the sort outlined in *English Simplified*.

A "B" paper has the following:

1. Adequate discussion of the parts, using familiar phrases from the class discussion & the readings,
2. Clear thesis but more weakly stated than in an "A" paper,
3. Argument and evidence systematically offered but not finely gauged to the difficulty or complexity of the issue; transitions become increasingly tentative,
4. Broad, general conclusion based on adequate organization with no more than two errors per page of the sort outlined in *English Simplified*.

A "C" paper has:

1. Incomplete discussion with weak thesis followed by loosely related arguments or evidence to which objections are obvious, missing transitions,
2. Brief conclusion, sketchy organization, no more than three errors per page

A "D" paper: Garbled, inaccurate discussion, no thesis, little evidence or argument, abuse of quotations, assertion in place of conclusion, gaps in organization, no more than four errors per page

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