

Constitutional Law II Outline

Part 1

I. What Speech is Unprotected?

A. Freedom of Expression & Association

1. 1st Amendment

a. “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 gov’t for a redress of grievances.”

i. Why protect speech?

1. Historical reasons- “recent” history demonstrated need for protected political speech.
2. Framers were also looking forward to encourage free discussion of ideas in this new “free” society (Political, marketplace of ideas)
3. Instrumentality of gov’t b/c voice of people influences functioning of gov’t
4. Intrinsic reasons – art, music, etc...are intrinsically valuable

ii. What types of speech are protected & to what varying degrees (ever-changing)

1. Political
- 2.

B. Advocacy of Illegal Action

1. Schenck: Character of protected speech depends on circumstances in which it was expressed . Question is whether words were used in such circumstances and were of such a nature as to create a CLEAR & PRESENT DANGER that they would bring about substantive evils that Congress has a right to prevent.
2. Debs: Court added PROBABLE EFFECT (is violation of laws) element to the C&PD test.
3. Abrams: Holmes dissent introduced “marketplace of ideas”
4. Gitlow: 1st Amendment now applied to states via 14th Amendment. Freedom of speech & press weren’t absolute rights, but were subject to reasonable limitations by states
5. Whitney: Association for accomplishment of unlawful ends unprotected.

Brandeis concurrence very important