

## **Seminar on *Confident Pluralism***

### **Sample Syllabus**

*This syllabus is designed for a seminar that meets for at least nine weeks. It assumes the integration of small writing assignments and a research-based term paper that builds on one of the themes. Selected readings can be tailored to make this seminar more appropriate for undergraduates, law students, or graduate students.*

#### **Class 1 – Introduction**

Our deep differences call into question our constitutional aspiration for “a more perfect union,” our national metaphor of a great “melting pot,” and the promise of our nation’s seal, *E pluribus unum*. Our differences pervade our backgrounds, preferences, and allegiances. They affect not only what we think, but also *how* we think, and how we see the world. John Rawls called it the “fact of pluralism.” The fact of pluralism creates a practical problem in need of a political solution. Rousseau offered one possibility: “it is impossible to live at peace with those we regard as damned.” But perhaps Rousseau was wrong. Even if we can’t attain the elusive goal of *E pluribus unum*, perhaps we can live together in our “many-ness.”

Readings:

- *Confident Pluralism*, Introduction
- John Rawls, “The Idea of an Overlapping Consensus,” *Oxford Journal of Legal Studies* 7, no. 1 (1987)
- Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorn (Princeton, NJ: Princeton University Press, 2008) (chapter excerpt)
- Ruth Padawer, “When Women Become Men at Wellesley,” *New York Times* (October 15, 2014)

#### **Class 2 – Our Modest Unity**

We retain some minimal agreement about our society even in the midst of our deep differences. Part of this agreement recognizes the wisdom of individual rights to guard against state-enforced orthodoxy. Individual rights like speech, assembly, and the free exercise of religion give us the space to create meaning apart from majoritarian norms. Our modest unity includes two basic premises: inclusion and dissent. The inclusion premise is that we seek for those within our boundaries to be part of the political community. The dissent premise is that we allow for people to dissent from the norms established by that community.

## Readings:

- *Confident Pluralism*, Chapter 1
- *West Virginia v. Barnette*, 319 U.S. 624 (1943)
- *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)
- *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)
- *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. \_\_\_ (2012)
- Peter Westin, "The Empty Idea of Equality," 95 *Harvard Law Review* 537 (1982)
- Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 2012) (selected chapters)

## **Class 3 – The Right of Association**

One of the most important constitutional commitments for a pluralistic society is the protection for individuals to form and gather in groups of their choosing. These protections are under pressure from modern changes to the right of association that focus on intimacy and expressiveness. Intimate association protects very few actual groups. Expressive association lacks a coherent framework and leaves certain groups deemed "non-expressive" particularly vulnerable.

## Readings:

- *Confident Pluralism*, Chapter 2
- *Roberts v. United States Jaycees*, 468 U.S. 609 (1984)
- *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)
- *Christian Legal Society v. Martinez*, 561 U.S. 661 (2011)
- Ashutosh Bhagwat, "Associational Speech," 120 *Yale Law Journal* 978 (2011)
- Dale Carpenter, "Expressive Association and Anti-Discrimination Law after *Dale*: A Tripartite Approach," 85 *Minnesota Law Review* 1515 (2001)

## **Class 4 – The Public Forum**

Public forums are government-provided spaces where viewpoints become voices. They allow citizens and the groups that they form to advocate, protest, and witness in common spaces—and they are insufficiently protected under current constitutional doctrine. We have seen these weaknesses exposed in a variety of settings, including the crackdown of protests in Ferguson, Missouri, restrictions against labor activism, and regulations of anti-abortion protesters. Correcting these weaknesses will require greater attention to the shortcomings of time, place, and manner restrictions, and to an emerging doctrine known as government speech. A separate challenge arises because public forums are not the only places where we enact the aspirations of living together in a pluralistic society—privately owned spaces like coffee shops, parks, and online service providers increasingly serve this function.

Readings:

- *Confident Pluralism*, Chapter 3
- *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939)
- *Hill v. Colorado*, 530 U.S. 703 (2000)
- Gregory P. Magarian, “The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate,” 73 *George Washington University Law Review* 101 (2004)
- Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge University Press, 2008) (selected chapters)

## **Class 5 – Public Funding**

Some forms of government funding are indispensable to the group’s of civil society. The government’s discretion with its money—or rather, with our money—is not unlimited. When government actors create and maintain generally available funding that facilitates a diversity of viewpoints and ideas, they should not constrain that funding based on viewpoint or ideology.

Readings:

- *Confident Pluralism*, Chapter 4
- *Big Mama Rag, Inc. v. United States*, 494 F. Supp. 473 (D.D.C. 1979)
- *Bob Jones University v. United States*, 461 U.S. 574 (1983)
- Robert M. Cover, “The Supreme Court, 1982 Term—Foreword: Nomos and Narrative,” 97 *Harvard Law Review* 4 (1983)
- Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 2012) (selected chapters)

## **Class 6 – Civic Aspirations**

We can move closer toward mutual coexistence by striving to embody three civic aspirations. *Tolerance* is the recognition that people are for the most part free to pursue their own beliefs and practices, even those beliefs and practices we find morally objectionable. *Humility* takes the further step of recognizing that others will sometimes find our beliefs and practices morally objectionable, and that we can't always "prove" that we are right and they are wrong. *Patience* points toward restraint, persistence, and endurance in our interactions across difference. Importantly, we can pursue these aspirations without agreeing on the reasons for doing so.

Readings:

- *Confident Pluralism*, Chapter 5
- Rebecca L. Brown, "Common Good and Common Ground: The Inevitability of Fundamental Disagreement," 81 *University of Chicago Law Review* 397 (2014)
- Bernard Williams, "Toleration: An Impossible Virtue?" in *Toleration: An Elusive Virtue*, ed. David Heyd (Princeton University Press, 1996)

## **Class 7 – Speech**

The First Amendment's free speech right allows us to say almost anything to almost anyone. But that freedom places a great deal of responsibility on us for what we choose to say. On most of the deeply contested issues at the core of our divisiveness, our efforts toward common ground are hindered by speech that breeds social intolerance by stigmatizing people instead of challenging ideas. We can choose to avoid this stigmatizing speech and instead pursue what law professor James Boyd White calls "living speech."

Readings:

- *Confident Pluralism*, Chapter 6
- *Hustler v. Falwell*, 485 U.S. 46 (1988)
- *Snyder v. Phelps*, 562 U.S. 443 (2011)
- Greg Lukianoff, *Unlearning Liberty: Campus Censorship and the End of American Debate* (Encounter Books, 2013) (selected chapters)

## **Class 8 – Collective Action**

Collective action directed against our fellow citizens (including boycotts, strikes, and protests) reveals an inherent and perhaps irresolvable tension for notions of pluralism. On the one hand, collective action can resist and challenge forms of majoritarian power. On the other hand, collective action directed at other private citizens and their institutions exerts a kind of power that silences certain viewpoints. The aspirations of tolerance, humility, and patience do not point to a bright-line rule for our collective action, but they do offer some guidance.

Readings:

- *Confident Pluralism*, Chapter 7
- *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982)
- Lawrence A. Alexander and Maimon Schwarzschild, “Consumer Boycotts and Freedom of Association: A Comment on a Recently Proposed Theory,” 22 *San Diego Law Review* 555 (1985)
- Ross Douthat, “The Case of Brendan Eich,” *New York Times* (April 8, 2014)

## **Class 9 – Relationships Across Difference**

Relationships across difference are not always possible—sometimes the best we can do is coexist. But in many cases, we can work together toward common ground in spite of our differences. In fact, these common efforts may not actually bridge any ideological differences—we may remain uncompromising or unchanged in our own views. That’s not to say that either compromise or change is impossible. But it does suggest that meaningful relationships for the sake of shared interests do not depend on either one.

Readings:

- *Confident Pluralism*, Chapter 8 and Conclusion
- Robert D. Putnam, “E Pluribus Unum: Diversity and Community in the Twenty-first Century,” *Scandinavian Political Studies* 30, no. 2 (2007)
- Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Vintage Books, 2012) (selected chapters)