

**Advanced Constitutional Law:
New Issues in Speech, Press, and Religion
Spring 2019**

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Course Description:

We will examine current issues and underlying challenges in the areas of speech, press, and religious freedoms and regulations.

The course is organized around three “tentpoles”: doctrine, theory/values, and practice. Each day’s reading will aim to tee up issues related to each of those three categories, in addition to exploring a contemporary issue. (Of course, the lines between these three categories are never as clear in practice as they are in theory.) If we’ve done our jobs correctly, at the end of each session you will have learned some doctrine, explored a theoretical approach or critiqued a normative set of commitments, and discussed how the doctrine and these approaches interact with the practice of First Amendment law.

There are too many issues in religion, press, and speech for us to get them all in one semester. New and interesting topics will undoubtedly arise during the duration of the class. Because of that, we’ve purposely designed the class with a great deal of flexibility.

During the second half of the semester, you will have the opportunity to select topics of interest to discuss further, either through your own presentation or by nominating additional topics that you would like the instructors to prepare reading and discussion notes for. The class will then vote on which five to discuss as a group.

¹ In addition to serving as a professor at Harvard, Minow serves on the boards of CBS, a media company, and WGBH, a public broadcasting, media, and educational organization.

² Kendra Albert is a clinical instructional fellow at the Cyberlaw Clinic. Their legal practice includes representing and advising clients on matters related to this course, including press access to court documents and crafting internet platform policies. They also worked at the Electronic Frontier Foundation, at Cloudflare, and at Zeitgeist PC prior to joining the Cyberlaw Clinic.

Some reading material may be review for students who have taken First Amendment. Likewise, students who have not taken First Amendment may find that they need to read more carefully or look up background material prior to class.

Note that edited versions of all of the cases can be found via the H2O casebook at: <https://opencasebook.org/casebooks/114149-advanced-constitutional-law/>

Classroom Policies:

Laptop and Readings

You may use laptops and tablets for note-taking or looking up material relevant to the course, though we will periodically (with explicit indication) have exercises and other class activities where we prefer no use of laptops. You do not need an accommodation or instructor permission.

That being said, we encourage you to bring hard copies of the readings and refer to them if you are able, as we have found that students (and instructors) tend to engage better without the Internet's siren song. We will endeavor to make readings available through the copy center as far in advance as possible. Optional readings will be posted on Canvas but will not be included in course packs.

Attendance

You must notify both of the instructors via email before class if you will be absent. If you are not able to notify us before class, please do so as promptly as possible.

We understand that illness and other unforeseen circumstances occur, but every attempt should be made to attend class. If you repeatedly miss class without notice, your participation grade may be at risk.

Accessibility

Harvard Law School is dedicated to facilitating equal access for students with disabilities and to cultivating a campus culture that is sensitive and responsive to the needs of students. To request an accommodation for a disability during the course, students should contact Accessibility Services in the Dean of Students Office at accessibility@law.harvard.edu or at 617- 495-1880, or visit the office in WCC 3019. Additional information, including advice about how to register for accommodations, can be found at hls.harvard.edu/dept/dos/accessibility.

Even outside of the context of accommodations, if there's something we can do to make your learning easier, please let us know.

Names and Pronouns

If you go by a different name or set of pronouns than the one under which you are officially enrolled, please inform us. Likewise, if an instructor or a classmate mispronounces your name, please let them know so they can correct it. Students are expected to respectfully refer to each other by preferred, correctly pronounced names and pronouns during class discussions.³

Basic Needs and Childcare

If you face challenges securing your food or housing (which would, of course, affect your performance in the course), we urge you to contact the Dean of Students for support. Furthermore, please notify either of the instructors if you are comfortable in doing so. This will enable us to provide any resources that we may possess.⁴

We understand that childcare can be difficult to come by for graduate students. Dean of Students may be able to provide additional support and accommodations for you if you are a parent. Newborns are welcome in class. For older children and babies, please discuss with the instructors.

³ Name and pronoun policy is adapted from Adrienne Keene's Introduction to Critical Race Theory Syllabus, available at <https://blogs.brown.edu/amst-2220j-s01-2017-fall/syllabus/>.

⁴ Basic Needs statement is adapted from Sara Goldrick-Rab, *Basic Needs Security and the Syllabus*, <https://medium.com/@saragoldrickrab/basic-needs-security-and-the-syllabus-d24cc7afe8c9>.

Class 1: February 7th

Topic: What's new and old in speech, press, and religion?

Note that the reading for the first class is lengthier than it will be for subsequent classes – it behooves you to start early!

Learning Goals:

- Introduce traditional frameworks and new challenges.
- Discuss how changes in “the real world” have shifted the environment for First Amendment rights.
- Reflect upon historical images of First Amendment practice and how they've shifted (or not) over time.

Readings:

- Speech
 - Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis* (April 2001). Cardozo Law School, Public Law Research Paper No. 41. (Part I, II and IV).
 - Monica Anderson, Skye Toor, Lee Rainie, and Aaron Smith, *Activism in the Social Media Age*, Pew Research Center, (pgs. 5-12).
 - Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018) (Parts I and III).
- Press
 - Ronnell Anderson Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 Ala. L. Rev. 253 (2014).
 - Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 Loyola 102 (2018) (Parts I, II and III).
- Religion
 - Pew Research Center, *The Religious Typology: A New Way to Categorize Americans by Religion*, (August 29, 2018) (pgs. 5-14).
 - W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in *Religious Human Rights in Global Perspective* (Johan D. van der Vyver & John Witte, Jr. eds. 1996).
 - John D. Inazu, *Peyote and Ghouls in the Night: Justice Scalia's Religion Clause Minimalism*, 15 First Amendment Law Review 239 (2017).
- First Amendment Practice
 - Mari J. Matsuda, *The Keynote Address: Progressive Civil Liberties*, 3 Temp. Pol. & Civ. Rts. L. Rev. 9 (1993-1994).
 - *ACLU Case Selection Guidelines: Conflicts Between Competing Values or Priorities* (2018) (pgs. 1-7)

http://online.wsj.com/public/resources/documents/20180621ACLU.pdf?mod=article_inline

To go in-depth further (optional reading):

- Mary Anne Franks, *Where the Law Lies: Constitutional Fictions and Their Discontents* in *Law and Lies: Deception and Truth-Telling in the American Legal System*, ed. Austin Sarat (2015) 1-6.
- Galen Stocking, Michael Barthel and Elizabeth Greico, *Sources Shared on Twitter: A Case Study on Immigration*, <http://www.journalism.org/2018/01/29/sources-shared-on-twitter-a-case-study-on-immigration/>
- Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, [[Abstract](#)], 52 *Wake Forest Law Review* 585-647 (2017), https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/wflr52&id=611&men_tab=srchresults
- Heather Weaver, *Symposium: The establishment clause strictly prohibits government preference for one faith — That could change with the Bladensburg Cross case*, *SCOTUSblog* (Dec. 12, 2018, 11:41 AM), <http://www.scotusblog.com/2018/12/symposium-the-establishment-clause-strictly-prohibits-government-preference-for-one-faith-that-could-change-with-the-bladensburg-cross-case>.

Class 2: February 14th

Topic: State action doctrine, public forums, and digital platforms

Learning Goals:

- Understand the function of the state action doctrine and how it interacts with public forums.
- Review critiques of the state action doctrine and potential alternatives.
- Look at the mechanics of how courts apply existing law to new technologies.

Readings:

- State Action
 - *Marsh v. Alabama*, 326 U.S. 501 (1946).
 - *Prager Univ. v. Google LLC*, Case No. 17-CV-06064-LH, 2018 WL 1471939 (N.D. Cal. Mar. 26, 2018). Pgs. 1-5, 9-17.
 - Erwin Chemerinsky, *Rethinking State Action*, 80 *Nw. U. L. Rev.* 503 (1985). Read 503-519, 534-557.
 - Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet*, 52 *Harv. C.R.-C.L. L. Rev.* 145 (2017). Read 159-164.
- Public Forums

- David L. Hudson, Jr., *Public Forum Doctrine*, The First Amendment Encyclopedia (2017), <https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine>.
- Ronald J. Krotosynski, Jr., *The First Amendment as a Course of Positive Rights: The Warren Court and First Amendment Easements to Private Property*, in *The Disappearing First Amendment* (ch. 3), U of Alabama Legal Studies Research Paper No. 3275655.
- *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) pgs. 541-555, 564-578.
- Additional Applications
 - *Davison v. Randall*, Case No. 17-2003, 2019 WL 114012 (4th Cir. Jan. 7, 2019).

To go in-depth further (optional reading):

- Wilson R. Hun, *The State Action Doctrine and the Principle of Democratic Choice*, 34 Hofstra L.Rev. 1379 (2006)
https://law.hofstra.edu/pdf/academics/journals/lawreview/lrv_issues_v34no4_cc2_huhn.final.pdf (especially sections on civil rights)

Class 3: February 21st

Topic: The Press Clause, The Espionage Act, and the “Unattractive” Litigant

Learning Goals:

- Look at how First Amendment arguments (including the press clause) relates to prosecutions over leaked materials under the Espionage Act.
- Discuss whether definitional limits on “the press” would assist in giving the press clause additional meaning or definition, and if so, how to define “press.”
- Explore procedural and optical issues related to disputes between litigants, or litigants who are widely disliked. Discuss how stakeholders choose to support them, distinguish themselves, or ignore them.

Readings:

- What Does the Press Clause Even Do?
 - *New York Times Co. v. United States*, 403 U.S. 713 (1971).
 - Sonja West, *The Press, Then & Now*, 77 Ohio State L. J. 49 (2016). Pgs. 56-65.
- The Espionage Act
 - 17 U.S.C. §794, “Gathering or delivering defense information to aid foreign government”
 - Stephen P. Mulligan & Jennifer K. Elsea, *Criminal Prohibitions on Leaks and Other Disclosures of Classified Defense Information*, Congressional Research Service (March 7, 2017) <https://fas.org/sgp/crs/secretcy/R41404.pdf>. 1-17, 25-32.
- “Unattractive” Litigants and Individual/Group Dynamics

- William B. Rubenstein, *Divided We Litigate: Addressing Disputes among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L. J. 1623 (1997).
- Martine Powers, *In defending Milo Yiannopoulos, ACLU gets pushback from some of its own*, The Washington Post: Gridlock (August 10, 2017), <https://www.washingtonpost.com/news/dr-gridlock/wp/2017/08/10/in-defending-milo-yiannopoulos-aclu-gets-pushback-from-some-of-its-own/>.
- Re-read the *ACLU Case Selection Guidelines* from February 7th.
- Brief of Reporters Committee for the Freedom of the Press and Twenty One News Media Organizations in *Snyder v. Phelps*.
- *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011). Skim majority opinion and fully read Part C of Alito's concurrence.
- Julian Assange
 - Charlie Savage, Adam Goldman and Michael S. Schmidt, *Assange Is Secretly Charged in U.S., Prosecutors Mistakenly Reveal*, The New York Times (Nov. 16, 2018), available at <https://www.nytimes.com/2018/11/16/us/politics/julian-assange-indictment-wikileaks.html>.
 - Justice for Assange, <https://justice4assange.com/>
 - Matthew Walther, *Julian Assange Must be Brought to Justice*, The Week, (Nov. 19, 2018), <https://theweek.com/articles/808105/julian-assange-must-brought-justice>
 - Yochai Benkler, *Prosecuting Wikileaks, Protecting Press Freedoms: Drawing the Line at Knowing Collaboration with a Foreign Intelligence Agency*, Just Security (Nov 19, 2018) <https://www.justsecurity.org/61519/prosecuting-wikileaks-protecting-press-freedoms-drawing-line-knowing-collaboration-foreign-intelligence-agent>

To go in-depth further (optional reading):

- Derrick A. Bell, Jr. *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470 (1976).
- Marcy Wheeler, *Time Machine: 2011 to 2012 Wikileaks is not 2018 Wikileaks*, Emptywheel (Nov. 19 2018), <https://www.emptywheel.net/2018/11/19/time-machine-2011-to-2012-wikileaks-is-not-2018-wikileaks/>.
- *The Complete List of 140 Things You Can't Say About Assange or WikiLeaks*, (Jan. 7, 2018), <https://emma.best/2019/01/07/140-things-youre-not-allowed-to-say-about-assange-or-wikileaks/>

Class 4: February 28th

Topic: It's All Global Now: Hate Speech and Propaganda

Learning Goals:

- Compare US hate speech doctrine to other countries.
- Explore how content moderation systems recreate debates over hate speech.

- Discuss how online enforcement of laws against hate speech get practically executed, and how the arguments for and against regulation of hate speech shift when transposed to social media spaces, especially along the lines of cross border enforcement.

Readings:

- Regulating Hate Speech?
 - RAV v. City of St. Paul, 505 U.S. 377 (1992).
 - Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).
 - Franciska A. Coleman, *They Should Be Fired: The Social Regulation of Free Speech in the U.S.*, 16 First Amend. L. Rev. 1 (2017).
 - Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis* (April 2001). Cardozo Law School, Public Law Research Paper No. 41. Available at SSRN: <https://ssrn.com/abstract=265939> or <http://dx.doi.org/10.2139/ssrn.265939> (Parts III and IV).
 - *Hate Speech Laws in India*, National Law University, Delhi, (2018), available at <https://drive.google.com/file/d/1pDoIwlusnM3ys-1GAYbnTPmepU22b2Zr/view>. pgs. 14 – 54.
- Efforts to Limit Hate Speech Online
 - Daphne Keller, *Internet Platforms: Observations on Speech, Danger, and Money*, Hoover Institution (June 13, 2018).
 - European Commission, *Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online* (Sept. 28, 2017).
 - NetzDG Wikipedia Page, <https://en.wikipedia.org/wiki/Netzwerkdurchsetzungsgesetz>.
 - Google Transparency Report, *Removals under the Network Enforcement Law, YouTube*, <https://transparencyreport.google.com/netzdg/youtube>.
- Collisions between Propaganda and Hate Speech
 - Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar's Military*, The New York Times (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html?action=click&module=Top%20Stories&pgtype=Homepage>.
 - Patrick Kingsley and Benjamin Novak, *The Website That Shows How Free Press Can Die*, NY Times, <https://www.nytimes.com/2018/11/24/world/europe/hungary-viktor-orban-media.html>

To go in-depth further (optional reading):

- Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name Calling*, 17 Har. Cr.Cl. 133 (1982), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000918.
- *R. v. Keegstra*, 3 S.C.R. 697 (Supreme Court of Canada, 1990)
- Legal Restriction on Hate Speech in Canada, <https://cfe.ryerson.ca/key-resources/guidesadvice/legal-restriction-hate-speech-canada>
- J. J. McCullough How Canada Bans Books (April 3, 2018), <https://www.nationalreview.com/2018/04/canada-laws-crack-down-on-hate-speech/>
- Rebecca Ruth Gould, Is the 'Hate' in Hate Speech the 'Hate' in Hate Crime?, forthcoming in *Jurisprudence* (2018)
- Post No Evil, <https://www.wnycstudios.org/story/post-no-evil>

Class 5: March 7th

Topic: Potential Conflicts Between Religion and Anti-Discrimination Law

Learning Goals:

- Discuss the potential doctrinal conflicts between free exercise jurisprudence, RFRA and anti-discrimination law.
- Explore how free exercise and free speech intertwine.
- Consider how cases like *Masterpiece Cakeshop* have been shaped by a concerted legal strategy, and what historical analogues exist.
- Discuss whether compromise between the competing value sets present in these cases is possible (or even desirable.)

Readings:

- Cakes, Flowers, and ... Employment?
 - *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 38 S. Ct. 1719 (2018) (skim).
 - *Baker Claims Religions Persecution Again*, Wash. Post (Aug. 8, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/08/15/baker-claims-religious-persecution-again-this-time-after-denying-cake-for-transgender-woman/?utm_term=.e271beee9b09
 - Associated Press and Sara Shilling, *Justices rule on Colorado same-sex wedding cake case. What does that mean for Arlene's Flowers?*, City Herald, (June 04, 2018), <https://www.tricityherald.com/news/local/article212484464.html>
 - *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).
 - Rose Saxe, *It's Always Been About Discrimination for LGBT People*, ACLU Speak Freely Blog, (Dec. 1 2017) <https://www.aclu.org/blog/lgbt-rights/lgbt->

nondiscrimination-protections/its-always-been-about-discrimination-lgbt-people.

- Historical Analogues and Litigation Strategy
 - Martha Minow, In *Brown's Wake: Legacies of America's Educational Landmark 85-90* (2010).
 - *Newman v. Piggie Park Enterprises, Inc.*, 256 F. Supp. 941 (D.S.C. 1966). 942-946.
 - Sherrilyn Ifill, *Symposium: The First Amendment protects speech and religion, not discrimination in public spaces*, SCOTUSblog (Jun. 5, 2018, 1:13 PM), <http://www.scotusblog.com/2018/06/symposium-the-first-amendment-protects-speech-and-religion-not-discrimination-in-public-spaces/>
- Religion or Compelled Speech?
 - Jim Campbell, *Compelled Speech in Masterpiece Cakeshop*, 19 *Federalist Society Review* 1 (Sept. 24, 2018).
 - *Note that Campbell represented Jack Phillips in Masterpiece Cakeshop and the printer in Hands On Originals.*
 - *Harper v. Poway Unified School Dist.*, 445 F. 3d 1166 (9th Cir. 2006)
 - *Schools Cannot Engage in "Viewpoint Discrimination" When Students Wish to Form Political, Religious Clubs*, NYSASA (Aug. 11, 2017), <https://www.nysasa.org/index.php/news/6558-schools-cannot-engage-in-viewpoint-discrimination-when-students-wish-to-form-political-religious-clubs>
- Perspectives on "Compromise"
 - H.R.3222 - Do No Harm Act
 - Peter Sprigg, *Can There Be "Compromise" Between Sexual Orientation/Gender Identity Non-Discrimination Laws and Religious Liberty Protections?*, Family Research Center, <https://downloads.frc.org/EF/EF16B15.pdf> (Feb. 2016).
 - Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation and the Potential for Transformative Change*, 30 *Women's Rights Law Reporter* 288 (2009). 288-299, 303-309.

To go in-depth further (optional reading):

- Amanda Shanor, *The New Lochner*, 2016 *Wis. L. Rev.* 133
- *Burwell v. Hobby Lobby*, 573 U.S. ____ (2014)
- [U.S.] Attorney General, *Memorandum for All Executive Departments and Agencies, Federal Law Protections for Religious Liberty*
- Julie Zauzer, *Top Senate Democrats introduce bill to amend Religious Freedom Restoration Act* https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/22/top-senate-democrats-introduce-bill-to-amend-religious-freedom-restoration-act/?utm_term=.f3fb9b78b8de

Class 6: March 14th

Topic: CDA 230 And Platform Design After FOSTA

Learning Goals:

- Examine the function of CDA § 230 and its impact on platform design, as well as its state post-FOSTA.
- Discuss the effects of FOSTA as well as potential First Amendment challenges.

Readings:

- CDA 230 and Designing Platforms
 - Daphne Keller, *Internet Platforms: Observations on Speech, Danger, and Money*, Hoover Institution (June 13, 2018). Review pgs. 9-13, 16-20.
 - Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016). Read pages 12-28.
 - Oliver Sylvain, *Discriminatory Designs on User Data*, Knight First Amendment Institute at Columbia, (April 2018)
<https://knightcolumbia.org/content/discriminatory-designs-user-data>
 - Brief of Amicus Curiae Upturn in Support of Plaintiff's opposition to Facebook's Motion to Dismiss First Amended Complaint, *Mobley v. Facebook*, N.D. Cal. Case No. 5:16-CV-06440-EJD.
https://www.upturn.org/static/files/2018-11-16_Upturn_Facebook_Amicus.pdf
- FOSTA
 - Annotated text of FOSTA (available on Canvas)
 - Aviva Stahl, *'We're Monumentally Fucked': Trans Sex Workers on Life Under FOSTA/SESTA*, *Broadly* (Aug. 2 2018).
https://broadly.vice.com/en_us/article/ev8ayz/trans-sex-workers-on-life-under-fosta-sesta
 - *Woodhull Freedom Found. v. United States*, 334 F. Supp. 3d 185 (D.D.C. 2018).

To go in-depth further (optional reading):

- Hacking Hustling, <http://melissagiragrants.com/hackinghustling/>
- Jane Doe v. Facebook, Initial Complaint,
 - <https://assets.documentcloud.org/documents/4996380/Doe-v-Facebook.pdf>

Class 7: March 28th

Topic: Code as speech? Or code as something else?

Learning Goals:

- Examine current contexts in which code gets treated as speech, and learn about how that influences courts' analysis of the constitutionality of regulatory regimes.

- Discuss whether considering code in other ways might be more useful for First Amendment analysis.

Readings:

- Code As Speech?
 - Apple Inc's Motion to Vacate, *In the Matter of the Search of an Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, <https://www.documentcloud.org/documents/2722199-5-15-MJ-00451-SP-USA-v-Black-Lexus-IS300.html>. (Skim pgs. 1-14 as background, fully read 32-34)
 - *Universal City Studios Inc v. Eric Corley*, 273 F.3d 429 (2d Cir. 2001) as edited at <https://opencasebook.org/casebooks/114149-advanced-constitutional-law/resources/6.2-universal-city-studios-inc-v-corley>
 - David Golumbia, *Code is Not Speech*, <https://www.uncomputing.org/?p=1716>
- Code As Law?
 - Lawrence Lessig, *Code is Law: On Liberty in Cyberspace*, Harvard Magazine (January 1, 2000), available at <https://harvardmagazine.com/2000/01/code-is-law-html>.
- Code As Conduct?
 - *United States v. O'Brien*, 391 U.S. 367 (1968), as edited at <https://opencasebook.org/casebooks/114149-advanced-constitutional-law/resources/6.3-united-states-v-o-brien>
 - Eugene Volokh, *Speech As Conduct*, 90 Cornell L. Rev. 1277 (2005). Please read 1336-1348.

To go in-depth further (optional reading):

- Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Plaintiff Appellants, *Defense Distributed vs. United States Department of State*, available at <https://www.eff.org/files/2015/12/17/fileddefensedistributedamicus.pdf>.
- Eugene Volokh, *Speech As Conduct*, 90 Cornell L. Rev. 1277 (2005).

Class 8: April 4th

Topic: Money As Speech

Description: Money (and other non-speech actions) have been considered speech by the US Supreme Court in many contexts (most notably, *Buckley v. Valeo* and *Citizens United*). What are the strengths, weaknesses, and prospects of current proposals to assess or modify the doctrine?

Learning Goals:

- Discuss the cases that led to Citizens United.
- Evaluate how much of an impact it appears to have had on elections.
- Look at various reform proposals and assess their constitutionality.

Readings:

- Cases and Interpretation
 - Erwin Chemerinsky, The First Amendment (pgs. 323-263)
 - Michael W. McConnell, Reconsidering Citizens United as a Press Clause Case, 123 Yale L. J. 266 (2013), <https://www.yalelawjournal.org/essay/reconsidering-citizens-united-as-a-press-clause-case>
- Consequences
 - Scott Blackburn, Money Doesn't Buy Elections, "Dark Money" Keeps Falling, and Other Lessons from the 2018 Midterms, Institute for Free Speech (Nov. 9, 2018), <https://www.ifs.org/blog/money-doesnt-buy-elections-dark-money-keeps-falling-and-other-lessons-from-the-2018-midterms/>
 - Karl Evers-Hillstrom, Raymond Arke & Luke Robinson, A look at the impact of Citizens United on its 9th anniversary, OpenSecrets.org (Jan. 21, 2019), <https://www.opensecrets.org/news/2019/01/citizens-united/>
 - Thomas O. Melia, Citizens United = Russian Money in American Campaigns, American Interest (Jan. 26, 2018), <https://www.the-american-interest.com/2018/01/26/citizens-united-russian-money-american-campaigns/>
- Reform?
 - Scott Casleton, It's time for liberals to get over Citizens United, Vox.com (May 7, 2018), <https://www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries>
 - Akela Lacy, In Democrats' First Bill, There's A Quiet Push to Make Public Campaign Finance a Reality, The Intercept (Dec. 2, 2018), <https://theintercept.com/2018/12/02/public-campaign-finance-hr1/>
 - David Cole, How to Reverse Citizens United, The Atlantic (April 2016), <https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/>
 - Natalie Simpson, Reform the Right Way: Efforts to Overturn Citizens United, Common Cause Massachusetts (June 29, 2018), <https://www.commoncause.org/massachusetts/democracy-wire/reform-the-right-way-efforts-to-overturn-citizens-united/>

- Congressman Ted Deutch Press Release, Bipartisan Constitutional Amendment to Overturn Citizens United Introduced (Jan. 4, 2019), <https://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=399461>
- Kent Greenfield, Corporations are People Too (And They Should Act Like It), Harvard Law School Forum on Corporate Governance and Financial Regulation, <https://corpgov.law.harvard.edu/2019/01/30/corporations-are-people-too-and-they-should-act-like-it/>
- John Yoo & James C. Phillips, 'Free Speech' Means Just That, National Review (Dec. 21 2018), <https://www.nationalreview.com/2018/12/constitution-free-speech-clause-supreme-court-interpretation/>
- John O. McGinnis, Liberals are dangerously wrong about Citizens United: Money is speech, The Los Angeles Times (May 20, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-mcginnis-money-speech-liberals-20160522-snap-htmlstory.html>.
- Overturning the "Money is Speech" Doctrine, Public Citizen, <https://democracyisforpeople.org/page.cfm?id=19>

To go in-depth further (optional reading):

- Nikolas Bowie, Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston, 36 L. and His. Rev. 943 (2018), <https://www.cambridge.org/core/journals/law-and-history-review/article/corporate-democracy-how-corporations-justified-their-right-to-speak-in-1970s-boston/70495E878096B369526F2C12E535874F>

Class 9: April 11th

Topic: Private Actors as Retaliators

Description: First Amendment retaliation doctrine bars the government from punishing individual speakers for their political speech. Should the First Amendment apply when a private organization punishes an individual because the government has hinted it will retaliate against the organization if it doesn't?

Learning Goals:

- Review the history of how the state action doctrine interacts with holding private actors accountable.
- Examine how the tests applied by circuit courts might apply to modern circumstances involving threatened retaliation by private actors.

Readings:

- Lombard v. State of La., 373 U.S. 267 (1963).
- Frank D. Lomonte & Linda Riedeman Norburt, *Failing New York Times v. Trump: Is There A First Amendment Claim for Official Condemnation by Tweet?*, Communications Lawyer, Winter 2018.
- Okwedy v. Molinari, 333 F.3d 339 (2d Cir. 2003).

To go in-depth further (optional reading):

- Nat'l Rifle Ass'n of Am. v. Cuomo, 350 F. Supp. 3d 94 (N.D.N.Y 2018).
- Backpage v. Dart, 807 F.3d 229 (7th Cir. 2015).

Class 10: April 18th

Topic: Emergence and Implications of State-Run Media

Recent critics charge that contemporary media (notably Fox News, but also MSNBC and CNN) have become functionally state-media. How do we assess that charge in light of First Amendment doctrine and values, how does the charge relate to debates over “echo-chambers” in the contemporary media ecosystem, and where if at all does public media (PBS, NPR) fit in the picture?

Learning Goals:

- Look at modern relationships between the media and the federal government.
- Lay out arguments for and against funding of public media.

Readings:

- The Fifth E(STATE)?
 - Jane Mayer, *The Making of the Fox News White House*, *The New Yorker*, <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house>
 - Alvin Chang, *We analyzed 17 months of Fox & Friends transcripts*, *Vox*, <https://www.vox.com/2017/8/7/16083122/breakfast-club-fox-and-friends>
 - Zeke Miller, *Obama Says Sony ‘Made a Mistake’ Pulling The Interview*, *Time*, <http://time.com/3642459/sony-hack-the-interview-barack-obama/>
 - David Dayen, *The Android Administration: Google’s Remarkably Close Relationship with the Obama White House*, *The Intercept*, <https://theintercept.com/2016/04/22/googles-remarkably-close-relationship-with-the-obama-white-house-in-two-charts/>
 - Philip Klein, *Trump is Wrong: State-Run Media is Not the Answer to Liberal Media*, *Washington*

Examiner, <https://www.washingtonexaminer.com/opinion/trump-is-wrong-state-run-media-is-not-the-answer-to-liberal-media>

- What about Public Media?
 - Corporation for Public Broadcasting, FAQ, <https://www.cpb.org/faq#1-2>
 - Wikipedia, Corporation for Public Broadcasting: Political composition, https://en.wikipedia.org/wiki/Corporation_for_Public_Broadcasting.
 - Jay Zawatsky, Public Broadcasting is Hardly Public, *The National Interest*, <https://nationalinterest.org/feature/the-corporation-public-broadcasting-hardly-public-18932>
 - Amy Mitchell, Which News Organization Is the Most Trusted, Pew Research Center, <https://www.pewresearch.org/fact-tank/2014/10/30/which-news-organization-is-the-most-trusted-the-answer-is-complicated/>
 - Katerina Eva Matsa, Across Western Europe, public news media are widely used and trusted sources of news, Pew Research Center, <https://www.pewresearch.org/fact-tank/2018/06/08/western-europe-public-news-media-widely-used-and-trusted/>
 - *FCC v. League of Women Voters*, 468 U.S. 264 (1984)

Class 11 + 12: April 25th: Double Session including Dinner, 5-9 pm

Topic: Campus Speech and First Amendment Tactics

For our final topic of the semester, we'll take up a contentious and local one – campus speech. How does First Amendment protection apply to campus speech, and when it does, how does this interact with other goals that colleges and universities might wish to advance? How is the First Amendment used rhetorically in debates about speech and protest tactics on campus? And finally, how does that relate to the materials we discussed on the first day of class about how things are changing (and not changing) for speech?

Learning Goals:

- Review two current circuit court cases involving live issues with online speech and its interaction with campus regulation.
- Discuss the rhetorical role of the “campus speech crisis” in the First Amendment and how different parties have attempted to shape it.
- Dig into how protest tactics and First Amendment rhetoric collide.
- Reflect upon whether campus speech debates provide a good microcosm for the broader question of whether First Amendment jurisprudence is adapting well to the current issues faced by American society.

Readings:

- Applying the First Amendment to Online Speech Environments Around Campuses

- Keefe v. Adams, 840 F.3d 523 (8th Cir 2016).
<https://opencasebook.org/casebooks/114149-advanced-constitutional-law/resources/9.1-keefe-v-adams>
- Feminist Majority Foundation v. Hurley, 911 F.3d 674 (4th Cir. 2018)
<https://opencasebook.org/casebooks/114149-advanced-constitutional-law/resources/9.2-feminist-majority-foundation-v-hurley>
- Noelle Lilley, Is Social Media Normalizing Campus Racism? The Nation (May 21, 2018) <https://www.thenation.com/article/is-social-media-normalizing-campus-racism/>.
- National Rhetoric and Tactics in Campus Speech Fights
 - Cecilia Capuzzi Simon, *Fighting for Free Speech on America's Campuses*, The New York Times (Aug. 1, 2016)
<https://www.nytimes.com/2016/08/07/education/edlife/fire-first-amendment-on-campus-free-speech.html>
 - Sebastian Torres, *Trump's executive order helps but the real free speech is on the ground*, The Washington Examiner (April 9, 2019)
<https://www.washingtonexaminer.com/red-alert-politics/trumps-executive-order-helps-but-the-real-free-speech-fight-is-on-the-ground>
 - Jeffrey Adam Sachs, *The 'Campus Free Speech crisis' is a myth. Here are the facts*, The Washington Post (Mar. 16, 2019)
https://www.washingtonpost.com/news/monkey-cage/wp/2018/03/16/the-campus-free-speech-crisis-is-a-myth-here-are-the-facts/?utm_term=.9e0ec5863bc7
- Local Rhetoric and Tactics in Campus Protests
 - Joshua Kahn Russell, *Principle: Put your target in a decision dilemma*, Beautiful Trouble, <https://beautifultrouble.org/principle/put-your-target-in-a-decision-dilemma/>
 - Jonah S. Berger & Molly C. McCafferty, *Harvard Faculty Demand Bacow Host Forum on Divestment*, The Harvard Crimson (April 3, 2019)
<https://www.thecrimson.com/article/2019/4/3/bacow-divestment-forum-demand/>
 - Alexandra A. Chaidez & Amy Y. Li, *Divestment Protesters Interrupt Bacow Talk at Kennedy School, Forcing Event Location Change*, The Harvard Crimson (April 5, 2019)
<https://www.thecrimson.com/article/2019/4/5/protestors-interrupt-bacow-talk/>
 - Lawrence S. Bacow, *What Kind of Community Do We Want to Be?*, The Harvard Crimson (April 9, 2019)
<https://www.thecrimson.com/article/2019/4/9/bacow-what-kind-of-community/>

- Alexandra A. Chaidez, *Bacow Makes Surprise Appearance at Harvard Fossil Fuel Divestment Forum*, *The Harvard Crimson* (April 12, 2019)
<https://www.thecrimson.com/article/2019/4/12/bacow-surprise-panel/>

Please also re-familiarize yourself with Mari Matsuda's Progressive Civil Liberties and Michel Rosenfeld's Hate Speech in Constitutional Jurisprudence: A Comparative Analysis from Class One.