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/.
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
  o Monica Anderson, Skye Toor, Lee Rainie, and Aaron Smith, Activism in the Social Media Age, Pew Research Center, (pgs. 5-12).

• Press

• Religion

• First Amendment Practice
  o ACLU Case Selection Guidelines: Conflicts Between Competing Values or Priorities (2018) (pgs. 1-7)
To go in-depth further (optional reading):


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
- Public Forums


Additional Applications


To go in-depth further (optional reading):


**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?
- The Espionage Act
  - 17 U.S.C. §794, “Gathering or delivering defense information to aid foreign government”
- “Unattractive” Litigants and Individual/Group Dynamics


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*.


- Julian Assange

To go in-depth further (optional reading):

**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?

• Efforts to Limit Hate Speech Online
  o 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).

• Collisions between Propaganda and Hate Speech

To go in-depth further (optional reading):

*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


Rebecca Ruth Gould, *Is the ‘Hate’ in Hate Speech the ‘Hate’ in Hate Crime?*, forthcoming in Jurisprudence (2018)


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**Class 5: March 7th**

**Topic:** Potential Conflicts Between Religion and Anti-Discrimination Law

**Learning Goals:**

- Discuss the potential doctrinal conflicts between free exercise jurisprudence, RFRAs and anti-discrimination law.
- Explore how free exercise and free speech intertwine.
- Consider how cases like *Masterpiece Cakeshop* have been shaped by a concerted legally 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?
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).
    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
    - *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,
  - Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation
    and the Potential for Transformative Change*, 30 Women’s Rights Law

To go in-depth further (optional reading):

- Amanda Shanor, *The New Lochner*, 2016 Wis. L. Rev. 133
- [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
  - 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)

To go in-depth further (optional reading):
- 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?
  o 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)

• Code As Law?

• Code As Conduct?

To go in-depth further (optional reading):


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
  o Erwin Chemerinsky, The First Amendment (pgs. 323-263)
• Consequences
• Reform?

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/


Overturning the "Money is Speech" Doctrine, Public Citizen, https://democracyisforpeople.org/page.cfm?id=19

To go in-depth further (optional reading):


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:
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)?
  - Philip Klein, Trump is Wrong: State-Run Media is Not the Answer to Liberal Media, Washington

- What about Public Media?
  - Corporation for Public Broadcasting, FAQ, https://www.cpb.org/faq#1-2

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
- Feminist Majority Foundation v. Hurley, 911 F.3d 674 (4th Cir. 2018)

• National Rhetoric and Tactics in Campus Speech Fights
  - 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)

• Local Rhetoric and Tactics in Campus Protests
  - Lawrence S. Bacow, What Kind of Community Do We Want to Be?, The Harvard Crimson (April 9, 2019)
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.