

## **Free Speech: from Mill to Social Media—Proposal for Advanced Undergraduate or Graduate Course**

**Course Description:** In theory, freedom of speech is a cornerstone of liberal democracy. In practice, freedom of speech is a constant source of controversy—a site of struggle between governments and citizens, majorities and minorities, and nowadays between social media platforms and their users. The goal of this class is to probe the theoretical justification(s) for the liberal democratic commitment to free speech and conflicts that arise as a result of this commitment. We will consider the status of free speech as a fundamental right, the benefits and harms that speech promotes, and the difficulties that come along with upholding this right in the novel context of the internet.

### **Part I: Classic Free Speech Theory**

We begin with two commonly adduced arguments in support of free speech: its tendency to promote truth and its essential tie to democratic self-government. We also introduce some legal case studies that show the difficulty of applying free speech principles in practice.

Readings:     Mill, *On Liberty*, chapters 1–2  
                  Meiklejohn, *Free Speech and Its Relation to Self-Government*  
                  *Schenck v. United States* [U.S. Supreme Court]  
                  *Whitney v. California* [U.S. Supreme Court]

Optional: Kalven, *A Worthy Tradition*, Part One

### **Part II: Fundamental Rights and Highest-Order Interests**

John Rawls formulates a systematic account of fundamental rights, or liberties, including the right to free speech. We ask how the “priority” of the basic liberties in Rawls represents the fundamental status of certain rights, and why the right to free speech in particular deserves fundamental status in the Rawlsian framework.

Reading:       Rawls, *A Theory of Justice*, sections 1–4, 8–9, 20–26, 31–39  
                  Hart, “Rawls on Liberty and its Priority”  
                  Rawls, *Political Liberalism*, Lecture VIII  
                  Cohen, “Freedom of Expression”

Optional: Rawls, “Kantian Constructivism in Moral Theory”

### Part III: More Speech Interests

We further refine the structure of the right to free speech, asking in particular how this structure is defined by an array of interests that are served by speech. We ask whether these different accounts of free speech are in competition or instead complementary.

Readings: Scanlon, “Freedom of Expression and Categories of Expression”  
Raz, “Free Expression and Personal Identification”  
Shiffrin, “A Thinker Based Approach to Freedom of Speech”  
Baker, *Human Liberty and Freedom of Speech*, chapters 1–6

Optional: Scanlon, “A Theory of Freedom of Expression”

### Part IV: Harm, Hate, and Pornography

Speech is sometimes harmful, and these harms must be weighed against the benefits of speech to determine the limits of the right to free speech. Hate speech and pornography are considered by many people to be very harmful kinds of speech, while others dispute the nature and extend of these harms, questioning whether we may permissibly restrict such speech.

Readings: Waldron, *The Harm in Hate Speech*, chapters 1–5  
MacKinnon, *Only Words*, (all)  
*R. v. Butler* [Canadian Supreme Court]  
Howard, “Dangerous Speech”

Optional: Waldron, chapters 6–8; MacKinnon, “Francis Biddle’s Sister”;  
Grimm, “The Holocaust Denial Decision of the Federal Constitutional Court of Germany”; Sumner, “Incitement and the Regulation of Hate Speech in Canada”

### Part V: Social Media and Content Moderation

Social media platforms are “the new governors” of free speech, in Kate Klonick’s memorable words. Rather than government censorship, the new worry is social media censorship. How far can—or should—platforms go in moderating content?

Readings: Gillespie, *Custodians of the Internet*, chapters 1–3  
*Miami Herald Publishing Co. v. Tornillo* [U.S. Supreme Court]

Klonick, “The New Governors: The People, Rules, and Processes Governing Online Speech” [skim this long article]

*Joseph R. Biden v. Knight First Amendment Institute*, Thomas J. Concurring [U.S. Supreme Court]  
Craig, *Mainstreaming Porn*, chapters 1–3

Meta (Facebook) Oversight Board:

“Criminal Allegations Based on Nationality” [09/25/24]  
“Cartoon About Rape” [09/12/24]  
“Explicit AI Images of Female Public Figures” [07/25/24]  
“Dehumanizing Comments About People in Gaza” [04/18/24]  
“Holocaust Denial” [01/23/24]  
“Claimed Covid Cure” [01/28/21]

Optional: Douek, “The Meta Oversight Board and the Empty Promise of Legitimacy”; Wu, “Is the First Amendment Obsolete?”; Whitney, “Search Engines, Social Media, and the Editorial Analogy”; Goldman, “Of Course the First Amendment Protects Google and Facebook (and It’s Not a Close Question)”; Volokh, “Treating Social Media Platforms Like Common Carriers?”

## **Part VI: Social Media and Democracy**

We conclude by returning to the Meiklejohnian idea that free speech has a special relation to democratic self-government. We ask what dangers social media platforms pose to democracy, as well as what the prospects are for social media to strengthen democratic deliberation.

Readings: *Packingham v. North Carolina* [U.S. Supreme Court]  
Sunstein, *#Republic: Divided Democracy in the Age of Social Media*, chapters 1–3  
Balkin, “Cultural Democracy and the First Amendment”  
Cohen and Fung, “Democracy and the Digital Public Sphere”  
Landmore, “Open Democracy and Digital Technologies”

Optional: Habermas, *The Structural Transformation of the Public Sphere*, chapters 1–5

## **Assignments**

This class will have two assignments. You can either write two 7-page papers, or you can write one 7-page paper and then extend it into a 15-page paper. Students must propose their own paper topics, but they are more than welcome to ask the instructor for assistance.