Free Speech and Free Press in the United States

First Amendment Today: Not Obsolete, But …

Public Schools and the U.S. Supreme Court

Freedom of the Press: Challenges to this Pillar of Democracy

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Editor’s note: This article was adapted from a keynote presentation delivered at the National Law-Related Education Conference, on October 20, 2018, in Chicago. The theme of the conference was “Free Speech Today.”
I was asked here today to discuss whether the First Amendment is obsolete. In some sense, the answer is obviously no, in that it still has its basic job of protecting unpopular speakers from government oppression. In the news recently was a Louisiana city whose mayor tried to prevent volunteer clubs from buying Nike products and then using city facilities after Nike aired its Colin Kaepernick ads. The federal government just tried to prosecute a woman for laughing at Jeff Sessions during his confirmation hearing for Attorney General. So, the First Amendment still definitely has its classic job, but the question of whether our First Amendment doctrine, the rules that emerge out of the case law, is fit for purpose is actually a much harder question. There I think I have to say no. I want to talk today about two big problems, which I think are linked, although I think they can be distinguished.

**Problem 1: Today’s First Amendment Doctrine Misses the Mark**

Current First Amendment doctrine protects too much speech it shouldn’t protect and isn’t sufficiently concerned with threats to speech that don’t look like classic book burning or the police showing up and dragging you away for your speech. I think this is fundamentally a crisis of epistemology, a breakdown in courts’ understanding of how we know what we know. This can be
seen with the U.S. Supreme Court’s insistence that money in politics isn’t a problem. From the Court’s perspective, if citizens distrust the ability of private parties to spend unlimited amounts of money promoting their causes and candidates so much that people lose faith in government, that’s the construction that the citizens choose to put on it, and not a reality, and not a problem for regulation to solve.

To illustrate my argument, I’m going to draw examples from something that we encounter each day: commercial speech. Commercial speech doctrine is the redheaded stepchild of First Amendment doctrine more generally. First Amendment lawyers spend most of our time talking about political speech regulation, but commercial speech doctrine is what we use to regulate ads and things related to ads. It is proving harder and harder to regulate basic out-and-out commercial fraud because of the way that doctrines are changing around free speech.

In particular, we’re in an age of judicial distrust of other fact finders, combined with perhaps unwarranted confidence in the court’s own ability to find facts or know the facts. The resulting product is a mix of relativism and certainty that tilts against the government’s ability to protect citizens and consumers from bad actors. In 2017, for example, Chief Justice John Roberts called the field of sociology “gobbledygook,” which was a double statement of contempt given the rigorous empirical model that he actually happened to be criticizing came from political science, not from sociology. It is not just a rhetorical stance. It has effects on outcomes. In a variety of consumer protection cases in recent years, federal judges have simply dismissed scientific conclusions about the weight of evidence in favor of saying that if there’s any evidence at all in favor of an advertising claim, the advertiser is allowed to make that claim, no matter what the balance of the evidence says. From an empiricist’s standpoint, this is nonsense.

The key point in these cases is a rejection of ways of knowing that don’t come from a courtroom clash of witnesses to individual events. Legislation and regulation work by taking lessons from aggregates of data. It is true that legislatures too often treat anecdotes like data, but hostility to statistically-derived knowledge inherently disadvantages the practices of legislation and administrative regulation. Not coincidentally, it also disadvantages the practice of aggregating individual wrongs in court, known as the “class action.”

**First Amendment Lochnerism**

A lot of scholars have identified a problem of so-called “First Amendment Lochnerism,” which means striking down economic regulations in the name of the First Amendment, using freedom
of speech to prevent regulation of what is a fundamentally economic activity, even though speech is the method of carrying out the economic activity. It is named after *Lochner v. New York*, the much-maligned 1905 U.S. Supreme Court case that declared limits to the number of hours that bakers could work unconstitutional under the Fourteenth Amendment. We now understand that case to be about power; the judicial power in that case to prevent the state legislature from enacting laws that redistributed economic power because of supposedly fact-indifferent neutral principles. The new form of First Amendment anti-regulation Lochnerism is often premised on a different conceptual hook than pure power: it’s knowledge, which then mediates how power can be exercised.

In 2017, the Ninth Circuit struck down San Francisco’s attempt to get soda sellers to disclose that sugary drinks contribute to obesity on the ground that the disclosure itself was misleading, in that not everyone who drinks sugary soda is obese, and obesity may occur without drinking sugary soda. The city could require such a disclosure, the court’s reasoning went, if it could prove that there was a special, unique causal connection between soda and obesity, but it didn’t, so it couldn’t. Similarly, the Second Circuit has held in recent years that it is unconstitutional for the Food and Drug Administration (FDA) to prevent prescription drug makers from making claims about their drugs that the FDA hasn’t approved unless the FDA proves that the claims are false, rather than simply proving that the claims don’t meet the FDA’s standards for what counts as scientific proof.

Another decision in this vein includes a 2011 U.S. Supreme Court decision in *Sorrel v. IMS Health*, which struck down a state attempt to reduce the influence of drug detailers (including pharmaceutical representatives who visit doctors) and the gifts that they often bring on the prescriptions that doctors write. The Court ruled that “speech in aid of pharmaceutical marketing” is protected by the First Amendment. There are more of these cases at the lower court level, including a 2012 ruling that mandating graphic color photos of the health hazards of smoking on cigarette packs violated the cigarette companies’ rights to free speech.

There is a tension in these courts’ knowledge claims, and it’s this: a classic line from early in the Supreme Court’s history, from *Marbury v. Madison* in 1803, is that “it is emphatically the province and duty of the judicial department to say what the law is.” It’s almost as accurate to say that it is emphatically the province of the judicial branch to say what the facts are. That is, even if the fact-finding enterprise is occasionally shared with other branches, resolving most cases requires some sort of statement about their facts.
If we are truly in a state of deep epistemological uncertainty that the First Amendment demands, according to some of the rhetoric, then nobody in the government should be finding facts—courts also being agents of government. Taking an example from the Second Circuit drug scenario, a drug maker can make claims about a drug not approved by the FDA for which it has support in at least one decent study, no matter how much evidence there is against it. If it makes those claims, a patient takes the drug and the patient then suffers harm, then it’s perfectly possible that under current tort doctrine the patient can make a successful products liability claim against the drug maker based on the same standards of knowledge that the FDA tried to, but was not allowed to invoke, to protect its restriction on the drug maker’s promotional speech. It’s just going to be done by the jury instead of by the FDA. Yet one might expect that the FDA will usually do a better job of evaluating the evidence than an individual jury. In that case, we would have two holdings in severe tension, if not in direct conflict, because of their assessment of the state of knowledge about the drug. (Of course, First Amendment Lochnerites may also want the patient’s tort claim to be barred by the First Amendment—but that just shows how deeply they want to cut into the classic functions of government.)

The current strain of First Amendment libertarianism often denies other branches of government, coequal branches of government, the power to determine facts. If experts can’t agree, then there is enough uncertainty to allow the claim to be made; if you believe it, and it turns out to be wrong, tough luck. This position has the virtue of consistency, but it’s a blueprint for a truly terrible world, a nineteenth century world where businesses are essentially never liable for the harm they do to their customers or their employees.

**Problem 2: Failure to Grapple with the Bad Faith Actors**

The second big problem is also a crisis of epistemology, but it is different. It is a failure to grapple with the bad faith actors who use speech to create so much distrust and rage that ordinary communication and good faith debate breaks down. Theorists like Zeynep Tufekci in her excellent book *Twitter and Tear Gas* have suggested that the classic model of what counts as speech suppression is no longer descriptive of the biggest current threats to free and fair democratic discourse. In particular, she talks about how governments and other actors crowd out important information with trivia, pollute the information environment, encourage people to distrust news that doesn't fit preconceived notions, and rely on groups of people acting in bad faith to create chaos and disbelief. Even when government encourages these things, our free speech doctrine doesn't constrain government actors in the relevant ways.
Taking a recent example from the current administration, the courts have ordered President Trump to stop blocking Twitter users from his feed because of their viewpoints, but they haven’t ordered him to stop giving a megaphone to proven lies. It would be very hard to do so given current First Amendment doctrine and ideas about the relationship between judicial and executive power. In addition, I think that simply ordering him not to do this would be a really bad way of handling the problem. This is what makes bad faith in speech so wicked as a problem: because the solutions that we currently have on hand are just bad fits.

**Speech Challenges and Powerful Online Sources**

Relatedly, many current speech challenges are being resolved not by governments, but by ostensibly private platforms. They are still being resolved. It’s just a different set of actors ruling on what speech is okay and what speech will get a user banned. Yale Law Professor Jack Balkin argues that many of the dominant online players, Facebook and Google among them, should be treated as what he calls “information fiduciaries,” or trustees, toward their end users. That would mean that they have to exercise duties of good faith and non-manipulation of outcomes, and probably have some equal treatment and due process protections for users as well. For example, you’d have the right to know why you’re seeing a particular post, you’d have the right to contest a determination that your content shouldn’t be shown, and so on. This kind of regulation would be designed to promote free speech while also trying to limit unprotected and harmful speech, such as fraud and revenge porn.

The idea of information fiduciaries, while meant to foster free and fair public discourse, doesn’t look anything like conventional First Amendment doctrine. If anything, the platforms themselves are likely to protest that any such requirements would violate their own First Amendment rights to filter content or not filter content in any way they choose. Nonetheless, as online services become more like total institutions—places where we live so much of our lives—we, as consumers and as citizens, may want them to behave more like governments or branches of governments.

And they are behaving like governments already, just not like democracies. Facebook’s policy team has a biweekly content meeting. Different teams across the company, engineering, legal, content reviewers, and external partners provide recommendations to the content moderation team for inclusion in Facebook’s policy guidebook. The guidebook has examples of how much can you talk about beating a woman, for example, before it crosses the line to advocacy of violence against a particular woman. Noel Coward has a line in his play *Private Lives* (1930) that has been somewhat in the news recently that “certain women should be struck regularly, like gongs.” That
meets Facebook’s standards for what it keeps up. When you’re doing content moderation on such a large scale, you have to have a list, and it’s a very distressing list.

Quite tellingly, the team leader calls this Facebook meeting a “mini-legislative session.” Professor Kate Connick has examined a bunch of the big services and she has found that Facebook is not unique. Everyone’s policies have marked similarities to legal or government systems with a detailed list of rules, trained human decision-making to apply those rules, and a reliance on a system of external influence to update and amend the rules.

But Facebook isn’t the only big entity affecting the information environment. As we have seen here and in other countries, governments and movements quickly learn how to use and misuse platform mechanisms for their own benefit. When government-backed teams are overwhelming social media with trivialities in order to distract from some important political event—this is common in China, where they have 100,000 people posting on behalf of the government—what policies and algorithms can identify that kind of pattern, much less sort the wheat from the chaff?

Balkin’s idea of fiduciary treatment would require platforms to make some sorts of attempts to fix these problems to protect users against fraud, or fake news, to protect users against the kind of bad faith claims that led conspiracy theorists in 2016 to assert that a pedophile ring backed by Hillary Clinton was operating out of a Washington, D.C. pizzeria. It is worth noting that when a guy actually showed up with a gun at that pizzeria, many of the same people who had spread the false claim condemned him. This is a really powerful indication of bad faith. If you believed that children were actually being held there, certainly, you would want someone to go to the pizzeria. If you were just using this factual claim as a symbol of how bad Hillary Clinton is, and you understand that, in fact, there was no pedophilia ring, believing (and perpetuating) the bad faith claim is wrong. Once speakers are willing to make these kinds of assertions, though, the possibility of actual communication about truth claims about the world seems to have gone out the window.

A question that has puzzled me about the idea of information fiduciaries is this: if speech policies within the major platforms are truly governance structures, why would we as citizens of a democracy accept anything other than democracy in the regulation of these spaces? If we truly thought about Facebook as a government, we would have to grapple with the fact that in the United States, the First Amendment means that a government can’t regulate much of the speech that makes parts of the web a hateful cesspool. I think many of us are willing to accept more
interventionist models of content moderation because institutions like Facebook and Google are more like schools than like full governments. They are institutions that have incredibly powerful effects that are near total for some people some of the time, but there is still a much broader world outside where people interact. Schools, likewise, need to maintain sufficient connection to the overall democratic polity so that policies are, in the end, influenced both by all relevant stakeholders, but at the same time they can regulate a significant amount of speech, and the teacher can give you a bad grade for writing a bad paper even though a police officer couldn’t give you a ticket for making the very same bad argument in public. The public school system, even if it’s going to predictably fail in small ways, can be functional enough and better than the alternatives. That might be the best possible model for the larger information environment we now live in.

I know these examples have been depressing. I do apologize for that, but the one benefit of talking about epistemology at an education and First Amendment-related event is this: knowing how to know and teaching how to know are core elements of our jobs. This is our mission, and it is a huge one. If there is anyone who has the tools to re-establish effective and persuasive ways of knowing, it’s going to be educators.

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I think of two vital institutions in American society—the public school and the U.S. Supreme Court. It is difficult to understand the one if you don't understand the other. That is to say, it's impossible to understand public schools if you don't know the background of constitutional rights that have shaped the nation's public schools. Students have, of course, free speech rights. There are rights
involving due process. There are criminal procedure rights. There are equal protection rights at issue. Of course, there are free exercise and Establishment clause concerns involving religion in the public schools. And each of these areas takes a particular form in the public school that are different than exist for minors when they are in public parks across the street after school. We want to understand these things and think about how the school is a legal entity. That is how you have to think about the public school being informed by the Constitution.

It is also my contention that you can't really understand the Supreme Court unless you pay attention to the cases involving education. I think they offer a particularly vivid snapshot of the Supreme Court's capacity for shaping the nation's public schools in positive ways, as well as American society. And I think that offers an overly anemic conception of the Supreme Court's capacity for shaping American society.

Let me give you examples from the non-free speech context in order to illuminate how this works. There is a Supreme Court case from 1982 called *Plyler v. Doe*. This is a case that involved a Texas statute that sought to exclude unauthorized immigrants from public school. And the Supreme Court, in a 5-4 decision, said that is unconstitutional. Some of my colleagues in the Academy argue that Texas statute the decision rendered unconstitutional really wasn't that important. Texas was the only state in the nation that had such a statute at that time. Therefore, it was just getting rid of an outlier. In my view, that is not a credible view of that case. Had the Supreme Court not invalidated that measure and nipped it in the bud, there's no doubt but that it would have been adopted in many other states across the country. Indeed, Alabama enacted a measure that was invalidated by a lower court. And California adopted a similar measure that was also invalidated by a lower court. We know today very well that anxieties about unauthorized immigrants are far from confined to the border. Indeed, there is polling data that suggests that a majority of Americans believe that those laws should be constitutional. I believe that decision is responsible for allowing millions of people to expand their minds and horizons and make valuable contributions to American society.

A second example of a similar phenomenon at work is a lesser-known case called *Stone v. Graham* (1980). There, Kentucky wished to have the Ten Commandments posted in every classroom in the state. The Supreme Court of the United States invalidated that measure, said it's a violation of the Establishment Clause. Again, Kentucky was the only state in the nation that had such a measure, but there's no doubt that the appeal of such a statute would have extended beyond the state of Kentucky.
I'm going to talk about the free speech in public schools squarely. Specifically, I'm going to talk about five cases from the Supreme Court, and then I'll close out by speaking about the pressing issues that I see in this area.

**West Virginia v. Barnette (1943)**

This was a really important case. West Virginia, along with many other areas, sought to require all students to pledge allegiance to the United States. Jehovah's Witnesses, in particular, said that they wished not to do so because it violated their free exercise rights. They viewed it as a violation of their beliefs. There's a prohibition about worshipping graven images, and they regarded this as requiring them to violate their faith. The U.S. Supreme Court upheld such a provision in 1940 in a decision called *Minersville School District v. Gobitis*, but in 1943, the Court invalidated these sorts of measures.

It was an incredibly important opinion by Justice Robert Jackson, maybe the most eloquent opinion in the history of the Supreme Court of the United States. In this opinion, he reconceptualized the right at issue from being about the freedom of religion, free exercise of religion, and instead suggested we needed to view this as a free speech case. He says that the freedom of speech involves a corollary right: the right not to speak. This statute, in effect, compelled people to speak. And this is an important opinion for our purposes because Justice Jackson said that public schools are particularly important places to honor constitutional rights, because if we discount them, we will teach the youth to disregard constitutional principles as mere platitudes. He said, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”

In effect, he's saying that was un-American to say that people have to pledge allegiance to the United States. It's a marvelous opinion. That's the first real instance where the Supreme Court honored students' constitutional rights within the nation's public schools. It was an open question at the time as to whether this violated the Constitution. At the time of *Gobitis*, in 1940, schools in 15 different states were expelling students. By the time of *Barnette*, in 1943, schools in all 48 states were expelling Jehovah's Witnesses. This is an opinion that I believe protected minority rights and resisted the majoritarian sentiment, especially at the height of World War II. You have to imagine that many people would have disliked this opinion intensely.
Flash forward two decades to the single-most important decision in this area, and that of course, is *Tinker v. Des Moines Independent Community Schools*. The facts of *Tinker* arose in 1965, and the decision came down another four years later. That was important because the facts in 1965 were quite distinct from when the Supreme Court ultimately issued an opinion.

In December of 1965 there were students in Des Moines, Iowa who wished to wear black armbands in protest of the Vietnam War. School officials got wind of this plan and they said no. This is an incredibly hot button issue. There was a student who was a graduate of Des Moines High School who died in Vietnam. His classmates were still in this school. School officials reasoned that if they permitted students to wear black armbands, his former classmates would view that as being disrespectful to his sacrifice. Thus the Tinkers were prohibited from returning to Des Moines schools until they agreed to take off the black armbands. Mary Beth Tinker was just 13 years old.
And one of the things that was important for me is to shine a light on the incredible sacrifices and, indeed, courage that's demonstrated by students when they are trying to vindicate their constitutional rights. They are oftentimes standing up against, not only their schools, but also their surrounding communities. The Tinkers' front door was splattered with red paint. The evident implication was that only a communist would oppose the Vietnam War. They received harassing phone calls and letters saying, "you're raising these children to be terrible members of society" and "shame on you." So, it really did require tremendous courage to take this all the way to the Supreme Court of the United States.

In 1969, Justice Abe Fortas wrote the opinion for the Court, and it was significant. This opinion was different from the *Barnette* decision because, in effect, *Barnette* only acknowledged the right not to speak. Here, we're thinking about whether students have the affirmative ability to be able to introduce their own ideas into the school setting. He said:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.

This is really striking language and strong language. This opinion was not unanimous. To the contrary, Justice Hugo Black issued a vehement dissent. He spoke for more than 20 minutes from the bench that day. He said, during the course of this 20-minute denunciation of the Supreme Court's opinion and *Tinker*: "I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent."

At the time people were very concerned about the youth and protests in our society. And Justice Black was so sort of frothing at the mouth that some of his colleagues found it remarkable, even by Supreme Court standards. Some people have said that what made Black so angry was a matter from his personal life. He had a grandson, named Sterling, who wrote an underground newspaper, and it was quite critical of school administrators. Young Sterling was suspended. There's evidence that Justice Black wrote a letter to his daughter-in-law saying the school did exactly the right thing. This happened roughly contemporaneously with the oral argument and the conference where the justices got together to decide *Tinker*. But to view Black's statement as merely one
grandfather’s fit of pique, just sort of a cranky old man, doesn’t do justice to the deep wellspring of anxiety that Justice Black was tapping into. There was polling data that existed at the time that I found that suggests that Justice Black spoke for far more Americans than Justice Fortas did. Many people believed, at the time, that students were there to learn, not to teach, and thought it an outrage that they should have any free speech rights whatsoever.

*Fraser v. Bethel School District (1986)*

This was a case where a student gave a long nominating speech for his buddy to the student council. The speech was laced with sexual innuendo. He wrote it in such a way, he said, to appeal to his fellow students who were all listening. And this kid won—the candidate that Fraser supported—won. Matthew Fraser figured that he must have done something right. Instead, he was suspended for this speech and prohibited from being able to speak at the graduation ceremony.

This was the first of what, in effect, we can regard as three exceptions to the *Tinker* regime. Chief Justice Warren Burger wrote the opinion in a quite confused way. I should step back for a moment to say what the rule was in *Tinker*.

The rule that emerged from *Tinker* was that if there is a reasonable forecast of a substantial disruption, then it is permissible to discipline students for speech. I think that was an important decision, a real step forward, and a valuable intervention. In this case, Fraser spoke at a student assembly. There was some hooting and hollering during the speech, but it would be difficult—indeed, impossible—to say that this caused substantial disruption because people hooting and hollering at student gatherings, assemblies, that’s what they do, right?

The Court, instead of saying this caused a disruption or it was foreseeable that this speech would have caused a disruption, said that this was explicit speech, and used all sorts of relatively confusing language in this front. If a student is speaking in a lewd way, then it’s permissible to discipline the student for that speech. Interestingly, the subsequent disciplining of Fraser over the speech led to a real backlash. Some of the students had signs that supported Matthew Fraser, and used sexual innuendo in order to try to suggest that the school acted too harshly. “Don’t be hard on Matt,” for example.

It is worth noting that the famously prudish *New York Times* printed the speech in its entirety. It is also true, and importantly for our purposes, that the student newspaper also printed the speech in
its entirety. So, if you have some doubts about how upsetting this actually was, I think I share those doubts with you.

*Hazelwood v. Kuhlmeier (1988)*

This is one involving student journalists. The facts of the case are really remarkable. There was a school newspaper in Missouri where students wrote articles and, as a matter of course, they would offer the draft of the school newspaper to the principal, who would review it. After doing this for the next issue, the draft was returned, and the students realized that two entire pages of the six-page edition had been excised. The principal didn't tell them about this in advance and, instead, he just removed the two pages and said there wasn't enough time for a lot of back and forth.

There were two articles that attracted his attention and, indeed, his concern, and maybe even his ire—things that he thought would have been inappropriate for a school newspaper. The first article spoke about the issue of divorce, where there was a particular quotation from a student suggesting “my parents got divorced because my dad was playing cards with the guys all the time and he was never home, and my mom just had enough.” The principal thought that was an unfair quote, and perhaps, bad journalism, because the student in question was named and they should have at least gone to the father in order to get some sort of response. Was he actually playing cards all the time? The second article involved young women who got pregnant and delivered children. There had been an effort to anonymize the young women, but the principal found that was ineffective because there were, in effect, distinguishing details that would have revealed their identities.

In my view, this principal, displayed spectacular ineptitude by simply removing the articles altogether when there were other possible solutions. These issues were so important for student newspapers at that time. If these were not being covered in a student newspaper, what could be more important? In one, Cathy Kuhlmeier revealed that she thought her parents' divorce was her fault and realized that was not the case. This was the 1980s, a time when divorce and teen pregnancy were really surging. To be able to offer a sense of community for people who were going through that in their lives couldn't be more important, in my view.

Nevertheless, I think that it was correct, as a constitutional decision, to say that this did not violate the First Amendment. It's important keep in mind that just because something is unwise and even foolish does not mean that it's unconstitutional. The Court wrote a sort of convoluted opinion here, but basically suggested that this was government speech. It's the basic idea that the
government can decide what it wants to say on a particular topic. When a document has the school's insignia and the school's imprimatur on it, the school gets to be able to say what it wishes to say.

There were several states around the nation that in reaction to this decision, passed legislation that offered more protection to student journalists. With this decision the Supreme Court was articulating a constitutional floor below which entities cannot fall. There's nothing that prohibits school boards or legislatures from offering more protection above that constitutional floor.

**Morse v. Frederick (2007)**

For the facts of this case, we're in Juneau, Alaska in 2002. There was a parade outside of a school in honor of the 2002 Winter Olympic torch relay that was making its way through the city. Joseph Frederick, an 18-year-old senior, decided unfurled a banner that says “Bong Hits 4 Jesus.” The principal saw this banner across the street from the school, marched right over, snatched it out of his hand, and suspended him.

Chief Justice Roberts wrote a highly unusual opinion for the court. The rule that he articulated was if the principal believed that speech is designed to promote illegal drug use, then it's permissible to punish the student for that speech. That is incredibly unusual from a First Amendment
perspective because the hallmark of the First Amendment is the requirement of viewpoint neutrality—you can't silence one side of the debate.

Joseph Frederick made a mistake, in my view, in how he sought to frame what he was trying to do with his message. What does “Bong Hits 4 Jesus” actually mean? He said lots of things, including, “I was trying to attract the attention of television cameras.” It would have been much wiser for Joseph Frederick to say that he wished to enter a debate about the legality of marijuana, to make it more political speech. It would have been more difficult to disrespect that speech in the way that Chief Justice Roberts' opinion did.

Justice Clarence Thomas wrote a remarkable opinion in this decision. Justice Thomas is an originalist, and he pined for the “good old days” when teachers commanded and students obeyed:

In light of the history of American public education, it cannot seriously be suggested that the First Amendment “freedom of speech” encompasses a student’s right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. He very much resurrected Justice Black's dissenting opinion in *Tinker* and said Justice Black had it exactly right: “Justice Black may not have been ‘a prophet or the son of a prophet,’ but his dissent in *Tinker* has proved prophetic. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools.”

Justice Stevens wrote a really terrific dissenting opinion. In one of the most powerful passages, he thinks back to his own youth when he can remember Prohibition:

...our antimarijuana laws in particular, [are] reminiscent of the opinion that supported the nationwide ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as ordinary articles of commerce, their use was then condemned with the same moral fervor that now supports the war on drugs. The ensuing change in public opinion occurred much more slowly than the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state basis over a period of many years. But just as Prohibition in the 1920's and early 1930's was secretly questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of voters in each of the several States that tolerate medicinal uses of the product, lead me to wonder whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs. Surely our national experience with alcohol should
make us wary of dampening speech suggesting—however inarticulately—that it would be better to tax and regulate marijuana than to persevere in a futile effort to ban its use entirely.

Now, from the vantage point of 2018, Justice Stevens' seems only more prescient about the way that marijuana has been legalized in several jurisdictions.

One area to keep an eye on along the frontier of constitutional law in public schools is that of religious speech. There's a case out of Texas involving cheerleaders who want to be able to have religious scripture on a banner that students run through at events. There are also issues concerning student speech on the internet. One is out of the Second Circuit involving a person named Avery Doninger, who wrote a blog and was punished by her school for her blog posts. The Second Circuit found that that did not violate her free speech rights even though this is something that she didn't say at school.

An area that the Supreme Court has not gotten involved in yet involves dress codes and school uniforms. A lot of them are very vague. They have language that says you can't wear anything too “baggy” or too “form-fitting.” It's very unusual, outside of the military or the prison context, to be able to tell people what they can put on their bodies in a free and democratic society, including restrictions on allowing students to wear T-shirts.

One judge out of the Seventh Circuit, Judge Ilana Rovner, wrote a magnificent opinion on this matter that could serve as a takeaway:

>Youth are often the vanguard of social change. Anyone who thinks otherwise has not been paying attention to the Civil Rights Movement, the Women's Rights movement, the antiwar protests for Vietnam and Iraq and the 2008 presidential primaries. The young adult to whom the majority refers as kids and children are either already eligible or a few short years away from being eligible to vote, to contract, to marry, to serve in the military and to be tried as adults in criminal prosecutions. To treat them as children in need of protection from controversy is contrary to the values of the First Amendment.

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Freedom of the Press: Challenges to this Pillar of Democracy

by Stephen J. Wermiel
“Our liberty depends on the freedom of the press, and that cannot be limited without being lost,” Thomas Jefferson wrote to a friend in 1786.

More than two centuries later, is the news media still seen as a pillar of freedom, a bulwark against tyranny?

The role of the news media in our society has become a constant battleground. In a Gallup Poll last October, only 45% of Americans had a high degree or a fair amount of trust in the news media to fairly report the news. President Donald Trump attacks the credibility of the media almost daily. Cable organizations are labeled as liberal or conservative instead of just news. Information flows on social media and Internet sites at lightning-fast speed with no way to verify accuracy.

What is the role of the news media in our society today? What rights and legal protections guard the news media against encroachment by government? To whom do protections for news media apply in an era in which the Internet and social media platforms make everyone a potential publisher?

To explore these questions, let us start with some background.

What became the First Amendment was introduced by James Madison in the first U.S. House of Representatives in 1789 and ratified by the states in 1791. The language of the First Amendment relevant to this discussion, says, “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” That is not the way the text began. Madison’s early draft discussed more fully the protections for the written word. He wrote, “The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.” The U.S. Senate pared the language closer to the final result of what we now know.

**Freedom to Criticize the Government**

An essential concept in the history of freedom of the press and freedom of speech, predating the First Amendment, has been much debated: the freedom to criticize the government. In 1735, long before the creation of the United States, John Peter Zenger, printer of the *New York Weekly Journal*, a newspaper critical of then Governor William Cosby, was tried for seditious libel – the crime of ridiculing the government, or as practiced in England, ridiculing the king. A jury acquitted Zenger after his lawyer persuaded them of what was then a novel concept – that Zenger should be
allowed to demonstrate that the statements were true as a defense. This outcome raised consciousness in the colonies about the importance of a press that was free to criticize government.

Not long after the First Amendment was ratified, however, Congress passed the Sedition Act of 1798, which allowed for the criminal prosecution of those who brought the president or the government into disrepute and ridicule. Passed by the Federalists under President John Adams, the law was used to convict some ten Republicans loyal to Thomas Jefferson. When he assumed the presidency, Jefferson pardoned the convicted.

Noteworthy in that deeply partisan struggle is that newspapers of the day identified largely with one party or the other, as did pamphlets and other writings that served as the catalyst for the prosecutions.

The constitutionality of the Sedition Act of 1798 under the First Amendment was never tested in the U.S. Supreme Court at the time. It would be another 166 years before the Court, in New York Times v. Sullivan (1964), would declare, “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”

**Actual Malice**

The ruling in New York Times v. Sullivan was a critical step in the Supreme Court’s protection for freedom of the press. First, the Court appeared to bury, decisively and perhaps for all time, the idea that individual speakers or publishers could be punished for criticism of government under a theory of seditious libel. The ideal, the Court said, was “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”

Second, the Court set a very high bar for public officials, later extended to public figures, to be able to recover damages from the news media for false and libelous statements. The Court adopted the “actual malice” test that requires a public figure to demonstrate either recklessness or deliberate falsehood by the news media. This standard makes it difficult for those in the public eye to win libel verdicts, but there are still regularly some who try and who complain about the high standard. When the subject of alleged libel is a private person or topics that are not of general public interest, the Supreme Court has afforded substantially less protection for publishers and speakers. But the focus of debate today remains the tough actual malice standard.
President Trump has on more than one occasion been one of those complainers, vowing a year ago “to take a strong look at our country’s libel laws, so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts.” Although libel is a matter of the laws of the 50 states, over which the President has no authority, he continued, “Our current libel laws are a sham and a disgrace and do not represent American values or American fairness.” It is important to note that Trump’s criticism of libel law thus far has attacked the actual malice standard but has not formally proposed reviving the concept of seditious libel.

Yet while the President does not seek to revive seditious libel, a lawsuit filed last fall accuses him and the Trump Administration of using federal power to retaliate against journalists whose reporting he does not like. The writer’s organization, PEN America, alleged in a complaint filed in U.S. District Court in Manhattan that “journalists who report on the president or his administration reasonably believe they face a credible threat of government retaliation for carrying out the duties of their profession. President Trump has thus intentionally hung a sword of Damocles over the heads of countless writers, journalists and media entities.” This pattern of activity violates the First Amendment, the lawsuit alleges.
No Special Protections

New York Times v. Sullivan is also one of numerous examples of an important principle that the Supreme Court has followed regarding freedom of the press, namely that the press is not really entitled to special protections that are separate from or more extensive than the public generally. In ruling that L.B. Sullivan, Police Commissioner of Montgomery, Alabama, could not recover damages from the New York Times for errors in a published civil rights advertisement because there was no actual malice, the Court applied the same First Amendment standard to repel his damage claims against four individual ministers who were leaders of the civil rights movement and whose names appeared in the advertisement. In the libel context, most lawsuits still seem to involve some form of news media defendant, and the law of actual malice has developed largely in a media context.

But this important principle that the news media is not entitled to special privilege has arisen in numerous other contexts, as well. When the Supreme Court recognized in Richmond Newspapers v. Virginia (1980) that the First Amendment protects access to attend criminal trials, it was the right of the press and the public on which the justices opined. The Court has said that providing the news media access to information and events may serve as a proxy for general public access, but the right belongs to the public, not exclusively to the news media.

The practical result of this principle in recent decades is to mute the separate impact of the freedom of the press clause and effectively merge it with the guarantee of freedom of speech. This focus on the public right, rather than the media’s, figured prominently in two important Supreme Court decisions, one in 1972 and the other in 1991.

In Branzburg v. Hayes (1972), the Supreme Court ruled that news reporters have no absolute First Amendment right to refuse to comply with grand jury subpoenas, that journalists must obey the law like anyone else called to give evidence and cannot decline because they have confidential sources. While many states have since passed shield laws protecting reporters and their sources, the First Amendment treats the press and the public the same. The Supreme Court extended this principle in another ruling, Cohen v. Cowles Media (1991), holding reporters and their newspaper liable for breaching a promise to keep the identity of a source confidential. The promise was legally enforceable like those made by any citizen, the Supreme Court said.

Prior Restraint
For much of the nation’s history, the free press clause saw relatively little action. As ratified in 1791, both this clause and the free speech clause served only to protect rights from interference by the federal government and not by the states. It was not until 1925 (Gitlow v. N.Y.) for the free speech clause and 1931 (Near v. Minnesota) for the press clause, that the Supreme Court also applied those protections to limit the power of state governments.

The case of Near v. Minnesota was the first to formally recognize one of the most widely accepted principles of freedom of speech and freedom of the press in this country: that the First Amendment prohibits prior restraints by government to prevent speech or publishing from taking place. A prior restraint is a government order – it could be from a court, a government official, or a legislative body – that prohibits expression before it occurs. In Near, the Supreme Court invalidated a Minnesota law which was used to get an injunction to prevent The Saturday Press from future publication after it printed stories tying politicians to gangsters. The Court drew a line of demarcation, saying that a publication might be stopped from disseminating the dates and times of troopship sailings during war because that information in the hands of our enemies would jeopardize the safety and security of troops. But criticism of government, even “reckless assaults,” the Court said, could not be stopped from publication. “The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege,” the Court said.

After Near, the most famous case of prior restraint involved the publication in 1971 by the New York Times, the Washington Post and other newspapers of articles based on the top secret Pentagon Papers, a study commissioned by the U.S. military of the history of the Vietnam War. The papers were leaked to the news media, and President Richard Nixon’s Justice Department went to Court repeatedly to block publication of secret details. Ultimately the Supreme Court ruled strongly in New York Times Co. v. United States (1971) that court orders blocking publication were an unconstitutional prior restraint in violation of the First Amendment. But a majority of Justices indicated in separate opinions that under some extreme circumstances, especially if there were a genuine threat to national security, a prior restraint might be justified.

Thus while the general prohibition against prior restraints remains a bedrock principle of the First Amendment, skirmishes break out from time to time over whether and when a court may issue such an order.
Where do these basic principles leave protection for the news media today? What does freedom of the press mean 228 years after the First Amendment officially became part of the Constitution?

There are many challenges that strain the capacity of the Supreme Court and the First Amendment. Perhaps foremost among them is the question of how to fit the ever-changing landscape of social media and Internet information sites into an existing First Amendment framework.

One issue that is a subject of constant debate is how to treat social media platforms for free speech purposes. The First Amendment by its terms and by Supreme Court interpretation applies only to limit government regulation of speech and press. That means that in today’s world, some of the biggest forums for expression, like Facebook and Twitter, are not subject to the First Amendment and may permit or prohibit speech as they see fit.

But what happens when government officials, like President Trump, use Twitter to make what appear to be official pronouncements. There is much uncharted water here. Last May, a federal judge in New York ruled that President Trump violated the rights of seven Twitter users whom the white House blocked from access to @realdonaldtrump because they had criticized him. The Justice Department has appealed that ruling.

This is just one example of the many kinds of First Amendment issues that will challenge traditional notions of freedom of speech and freedom of the press. The Supreme Court has scarcely scratched the surface of these forms of communication. In a decision in June 2017, Packingham v. North Carolina, the Supreme Court invalidated a state law that barred a convicted sex offender of accessing any sites on the Internet where minors might be present or might maintain their own pages. In an opinion by Justice Anthony Kennedy, who has since retired, the Supreme Court observed that the state law “bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”

The First Amendment guarantee of freedom of the press has stood the test of time through vast changes in technology and communications, proliferation of the forms of expression, and dramatic and perpetual changes in societal values. What lies ahead will continue to challenge the strength of this pillar of democracy.
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Freedom of Speech

In this lesson, students analyze a photo of Robert Kennedy speaking outside the U.S. Department of Justice on June 14, 1963, and use it to discuss freedom of speech as a constitutional right in the United States, and human right around the world.

Time needed: 30-45 minutes

Materials needed:

Photo of Robert Kennedy speech, June 14, 1963 (copies or projected)

Activity

1. Ask students to look at the photo. Students should discuss what they see and what they think is happening. The following questions might generate discussion:

   A. What do you notice first?

   B. Are the people inside or outside? Where do you think the people are?

   C. Who might be the man standing to speak? How does he look compared to the people in the crowd? (dress, age, attitude)

   D. What are people in the crowd doing?
Explain to students that the photo was taken in Washington, DC, in front of the U.S. Department of Justice on June 14, 1961, identify the man speaking as Attorney General Robert Kennedy, and point out the Congress of Racial Equality (CORE) sign. Discuss the gathering with students:

A  What do you think the CORE was?

B  Why might they have been gathered?

Ask students to consider the phrase “freedom of speech.” Clarify the meaning of those words as needed, and discuss the following questions:

A  Do you think the man speaking to the crowd in the photo has freedom of speech? How about the people in the crowd?

B  Do you think it is important that they have freedom of speech? How might that freedom have facilitated their gathering?

C  Do you think the people in the photo have freedom of speech when they leave the gathering shown in the photo? When they go home?

D  Do you have freedom of speech like the people in the photo?

E  Where do you think our freedom to speech comes from?

Depending on students’ understanding of the U.S. Constitution, the Bill of Rights, or concepts of law, explain that freedom of speech is included in the U.S. Constitution. Discuss the following questions:

A  Do you think freedom of speech is important to you? To everyone in your class or school? Your community?
5 Wrap up discussion with an emphasis on how freedom of speech is not only valued in the United States and guaranteed under the First Amendment of the Constitution, but also recognized as an important right for people around the world.

Note

The Congress of Racial Equality (CORE), founded in 1942, became one of the leading activist organizations in the early years of the American civil rights movement. In the early 1960s, CORE, working with other civil rights groups, launched a series of initiatives: the Freedom Rides, aimed at desegregating public facilities, the Freedom Summer voter registration project and the historic August 1963 March on Washington.
This lesson teaches students, through a simulation related to government-sponsored Confederate monuments, about the government-speech doctrine under the First Amendment. In particular, this lesson aims to (1) introduce students to the issue of government speech; (2) teach the doctrine; (3) apply the doctrine in a contemporary context; and (4) critically analyze the doctrine.

Time needed: 60-90 minutes

Materials needed:

- Chalkboard, white board, or flip chart, with writing utensils
- Copies of handouts for each student, for Parts 1-3, as needed:
  - Part 1—Small Group Handouts
  - Part 2, Option 1—Interest Group Handouts
  - Part 2, Option 2—Debate Handouts

Introduction

Under Supreme Court First Amendment precedent, government speech is a relatively simple doctrine. In short, government can say whatever it wants. (In other words, the Free Speech Clause...
does not restrict government speech.) But the doctrine’s simplicity can be deceiving, especially in the context of some of today’s hot button issues. For example: Can government forbid government grantees and employees from talking about abortion in government family planning programs? Can government compel teachers to teach “intelligent design” or other alternatives to Darwinian evolution? Can government set qualitative standards for grantees of government arts grants? Can government fund news media (as in PBS's NewsHour or Frontline, or National Public Radio), or entertainment (as in Sesame Street)? Or, as in this lesson, can government erect, or take down, certain monuments that pay tribute to certain figures, movements, or periods in our history that are deeply controversial? As to each of these: If the government can do these things, must it also present a contrary or opposing view? These issues are not easy, even if the First Amendment doctrine is.

The following cases offer more background:

Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009)


In addition to setting out the law—that government can say what it wants, without restraint under the Free Speech Clause—these cases also review the arguments around government speech in different contexts. Here’s a quote from Pleasant Grove that sums up the doctrine:

If [the government] were engaging in [its] own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to “speak for itself.”

Indeed, it is not easy to imagine how government could function if it lacked this freedom. “If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”

But even though the Free Speech Clause does not restrict government speech, there may be other constitutional restraints on government speech. For example, government speech cannot violate the Establishment Clause. So while the government can say whatever it wants under the Free Speech Clause, it may be restrained in what it can say under the Establishment Clause (or some other constitutional provision).
This lesson aims to introduce middle and high school students to some of these tough questions through the stages of Bloom’s Taxonomy. (If you’re not familiar with Bloom’s Taxonomy, you can readily find excellent summaries and resources online. Vanderbilt University’s Center for Teaching has a useful and accessible summary.) In short, this means that the lesson aims to guide students through remembering, understanding, applying, analyzing, evaluating, and creating around the government speech doctrine.

The activities and times listed in this lesson are a suggestive guide, and not a rigid agenda. You should adapt the lesson plan to your own classroom, your own students, your classroom resources, your time constraints, and, most importantly, your own style.

Note

The core topic of this lesson is government-sponsored Confederate monuments. This topic has been all over the news, and many students will have strong views, one way or the other. Views may differ significantly by region, area, classroom, and even within an individual classroom. Please be sensitive to the students’ various views in your classroom so as to engage your entire class (and not alienate any portion of it). (If you’d like to catch up on the Confederate-monuments debate, google “Confederate monuments,” “Jefferson Davis monuments,” “Civil War statutes,” and the like. This is a fast-moving issue.

Activity

**Introduction (3 to 5 minutes)**

1. Say briefly why you are teaching today: to share some information about free speech under the First Amendment, and, in particular, government speech.

2. Ask students briefly about their own experiences with the law or the Constitution, e.g.:
   
   **A** Raise your hand if you know a lawyer. Who? How did you meet her or him? What does she or he do?
   
   **B** Who can tell me a fact about the Constitution? Who can tell me something that is in the Constitution? Who can tell me where they’ve seen the Constitution referenced in the news?
Part 1: Introduction to Basic Free Speech Principles (10 to 15 minutes):

This exercise is designed to warm-up your students and introduce them to basic free speech ideas, with an eye toward government speech. This exercise goes to remembering and understanding in Bloom’s Taxonomy.

1. Divide students into five small groups. Assign each group one purpose of free speech, and distribute the corresponding Small Group Handouts:

   A  to discuss and advocate politics and public policy
   B  to discover the truth (through the give-and-take of a “marketplace of ideas”)
   C  to learn, explore, and develop as individuals and as a society
   D  to express our individuality and define ourselves
   E  to promote tolerance for unpopular views by protecting the expression of those views.

This introductory discussion could also be conducted as a full class, with the class considering the five purposes of speech.

1. Ask each group, or the class, to think of three or four examples of speech that correspond to each purpose. Ask each group to share these examples with the rest of the class, and collect responses on the board.

2. Ask students to rank these broad purposes of free speech. You might ask students simply to vote and raise hands for each option; or you might ask them to get up and physically move to different designated parts of the room to indicate their choices. Tally the results, and rewrite the purposes in rank order. Remember: The Supreme Court has said that political speech is the most important—and thus most protected—kind of speech in our democracy.
Ask students if they can think of examples of when the government speaks. You may need to prompt them with your own examples, e.g.: a government web-site that describes the work of an agency; official government statements and reports on various topics; government officials’ officially sanctioned statements (including things like instructions from a police officer, or lessons presented by your teacher); government-funded media and arts; and even things like instructions on how to complete a driver’s license application or your voter application.

Discuss with students:

A Does government speech have the same purposes as other speech?
B What are the purposes of government speech?
C Should government have more freedom in speaking, or less freedom, than other speakers?
D Should the government have any restraints on its speech?

Part 2: Confederate Monuments (40 to 50 minutes)

This exercise challenges students to apply government-speech doctrine to a contemporary and controversial problem, Confederate monuments. This exercise has two options. Both options go to applying, analyzing, evaluating, and creating in Bloom's Taxonomy.

Option 1: Interest-Group Advocacy

Divide the class evenly into the following four groups (4-5 students each, depending on class size, create two sections of each group), and distribute the corresponding Interest Group Handouts:

A City Council
B Supporters of Confederate Heritage (an interest group)
C Opponents of Racial Oppression (an interest group)
D Advocates for Free Speech for All (an interest group)
2 Instruct each interest group to develop arguments consistent with their instructions, with an eye toward the purposes of free speech in a democracy. (Allow students ten minutes to complete their arguments.) Ask each group to elect a spokesperson. (Rotate among the groups to engage, answer any questions, and keep students on track.)

3 Instruct the City Council to anticipate the likely arguments of each group and to prepare critical questions for each group.

4 Instruct each interest group spokesperson to present the group's arguments to the City Council. (Allow each group five minutes to present its arguments.) Members of the City Council may ask questions during each presentation.

5 Instruct the City Council to deliberate publicly and arrive at a final decision.

**Option 2: Debate**

1 Divide the class into an even number of small groups of 4-5 students each. Assign each group to represent monument **supporters** or monument **opponents**. Distribute the corresponding Debate Handouts to each group.

2 Instruct each group to develop arguments supporting its position, with an eye to the purposes of free speech in a democracy. (Allow ten minutes for this.) Instruct each group to elect a spokesperson. (Rotate among the groups to engage, answer any questions, and keep students on track.)

3 Instruct each group to present their arguments to the entire class. (Allow five minutes for each group to present.) Other students may ask questions.

4 Take a vote of the entire class: Which side presented the better arguments? How would students vote?

**Part 3: Closing (5 to 10 minutes)**

Based on Exercise 2, ask students to think, and then write, whether the government-speech doctrine (that government can say whatever it wants) is a good idea. Do we want a government that can say whatever it wants? Should there be any restraints on government speech? If so, what are they? Ask for volunteers to share their answers.
If there's time, ask students to write down one idea, argument, or principle that they took away from this lesson. If time permits, ask for volunteers to share their responses. Share your own thoughts on what you took away from the lesson.

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Free Press and SCOTUS: Incorporating Case Studies in the Classroom

This lesson will ask students to engage with landmark freedom of press case studies exploring how the Supreme Court has ruled on First Amendment issues and has tried to balance competing values in our democracy.

Grade Level: High School
Time Needed: 60-90 minutes

Materials Needed:

Free Press and SCOTUS PowerPoint>
Case Studies>>

- Near v. Minnesota (1931)
- Curtis Publishing Co. v. Butts (1965)
- Branzburg v. Hayes (1971)
- New York Times Co. v. United States (1971)
Note: Depending on the class, you may want to concentrate on only one or several of the case studies at a time.

Part 1: Introduction with Walk the Line Activity

Ask students to line up against one wall. Ask students to step forward if they agree with the following statement. Note: Have each of the statements ready to display. After each statement, ask several students to share why they agreed or disagreed.

- First Amendment free press protections should be absolute.
- Private individuals should have a greater right to privacy than celebrities.
- States should have the ability to determine their own protection (shield) laws for journalists.

Part 2: Reviewing the First Amendment

Display text of First Amendment

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 Government for a redress of grievances.

Review the definition with students and ask students to identify the parts of the text that specifically reference free speech and free press. You may want to ask students the following questions:

- Why do you think the founders included free speech and free press in the very First Amendment to the Constitution?
- Do you think that freedom of the press is important to have in a democracy? Why or why not?

Part 3: Free Press and the Supreme Court – Case Study Jigsaw

The following case studies reflect how the Supreme Court has grappled to apply “Congress shall make no law … abridging the freedom of speech, or of the press.” These cases show the Court’s considerations when creating protections for speakers and the press in light of the many restrictions placed on speech and the press under principles of English common law. These principles were adopted by the early American Republic.
Split the class into six groups and assign each group a case. Give the groups twenty minutes to read and discuss their case. Each group should then present an overview of the facts of the case, the issue before the Court, the Court ruling, and their case-specific focus questions.

*Note: Groups should present cases in chronological order and the teacher should be prepared to help introduce each case by presenting the backgrounds provided in the case studies to the entire class before each group transitions to their part of the presentations.*

**Additional Resources:**

Short animated videos on *New York v. Sullivan*

- Quimbee, [https://www.youtube.com/watch?v=jmxIHwh-OJc](https://www.youtube.com/watch?v=jmxIHwh-OJc)
- Federalist Society, [https://www.youtube.com/watch?v=QeZ1mFTtn8s](https://www.youtube.com/watch?v=QeZ1mFTtn8s)


C-Span Landmark Cases: *New York Co. v. United States* (1971)

Short animated video on *Gertz v. Robert Welch* (1974)
[https://www.youtube.com/watch?v=ULFJLBnJG0g](https://www.youtube.com/watch?v=ULFJLBnJG0g)