# Summary

**The USFG should limit First Amendment freedom of speech.**

**Elevator Pitch**

**Free speech dominates political debates right now. Bipartisan groups are seeking to repeal Section 230, dark money groups spend unlimited cash on elections, hate speech is on the rise, books are getting banned, and "free expression" is becoming a judicial excuse for discrimination. But while the ignorant banty the phrase about, the actual scope of the First Amendment and the legally recognized exceptions we create to it often go unexplored – we can create time, place, manner restrictions on speech, find exceptions to the First Amendment, or change the level of scrutiny required for a limitation to pass muster.**

**This makes the discussion of how and when the government regulates speech arguably THE most salient "legal" conversation out there right now. The examples listed above are just a few of the potential Affirmative areas to explore – and law review literature exists for all of them. The negative has stable generic arguments about holding the line on the First Amendment generally, but also access to specific case neg for specific proposals and in many cases law professors lay out dueling articles critiquing one plan and offering counters. This gets students into law libraries (or Lexis as the case may be) and actually researching legal concepts as opposed to the policy literature that dominates most topics.**

**Slightly Longer… Escalator Pitch**

**1- Unique educational opportunities**

**This direction (limiting) the First Amendment provides balanced ground. Unlike expanding First Amendment rights, there is a uniform base of negative case literature. There's robust academic literature from First Amendment fundamentalists opposing limits to the First Amendment. No such similar base of literature exists on the flip side.**

**It also doesn't pigeon hole debaters into a particular ideology. There are conservative, liberal, and more radical arguments for limiting the First Amendment.**

**2-Impact Variety**
**Excellent ground exists for performance debates centered around hate speech and Charlottesville, policy affs that overturn the Supreme Court's decision in Citizens United to stop Russian influence in US elections, or affs that aim to stop terrorism by banning ISIS sympathizing videos from the internet.**

**3- Great Generic Neg Ground**
**There is a solid core of academic literature from First Amendment fundamentalists that would argue ANY limit on the 1A would be terrible -- a built in slippery slope DA where the aff's erosion of a fundamental right could be linked to a more severe attack on personal liberties. And because of the relatively small size of First Amendment academics, authors respond to one another in a way that makes for great debate.**

**The topic also does not divide aff and neg ground along traditional left/right lines providing neg case cards from multiple angles. And you can run affs from a wide variety of political perspectives-- from critical race theorists to security experts. As we, as a community, struggle with how to construct a topic that everyone can be comfortable with making sure we select a topic that has quality aff and neg ground from all sides of our community is essential.**

**Does It Legal?**
**The option of using the Supreme Court as an actor provides debaters with unique educational opportunities teaching different procedural issues and students learn the difference of what 'normal means' means for different branches of government. Additionally, this mechanism provides variety in standard generic positions.**

**Affs can overturn prior Court decisions or they can have the Court rule a particular action or set of facts is not protected by the First Amendment. These actions also open up actor counterplan ground, and the neg would be able to access benefits of the legislative process/disads to the legal precedential value the Aff creates by using the Court.**

# Potential Wordings

**The United States Federal Government should limit the freedom of speech protections of the First Amendment.**

**The United States Supreme Court should overrule one or more of the holdings in one of the following cases (see key cases list).**

**The United States Supreme Court should curtail the First Amendment protections of the United States' Constitution by overruling one or more of its current holdings in the area of pornography/obscenity, hate speech, animal cruelty, national security and/or campaign finance.**

# Hate Speech

## There's a body of literature that says alt-right/neo-Nazi's access to free speech protections needs to be curtailed. As viewpoint discrimination these restrictions are anathema in legal circles, but the boldness of the far right has led to thought leaders advocating limiting 1A rights.

## The way First Amendment jurisprudence currently exists is an expression of white supremacy that stands as an example of American exceptionalism and corrupts our very souls.

**Hansford**, Justin, January 20, 20**18,** Yale Law Journal, The First Amendment Freedom of Assembly as a Racial Project, https://www.yalelawjournal.org/forum/the-first-amendment-freedom-of-assembly-as-a-racial-project

To many, **the First Amendment stands out as the central example of American legal exceptionalism**, the foundation for all our other freedoms.[18] If so, perhaps **what the First Amendment suggests about American identity should** not inspire us, but rather **outrage us**.

The First Amendment in the popular imagination purports to protect almost all species of dissent, irrespective of political content. Purportedly, protestors in both Charlottesville[19] and Ferguson enjoy its protections. A University of Florida gathering organized by Richard Spencer supporting racial hierarchy can lay claim to the same First Amendment freedom of assembly protections as a University of Missouri gathering by #ConcernedStudents1950 demonstrators in opposition to racial hierarchy.**20 This doctrine seems impartial in theory. In practice, speakers who have opposed racial hierarchy have faced harsher treatment from authorities than those who have supported it. I argue therefore that the First Amendment is a racial project21: it results in predictable racialized outcomes that redistribute resources along racial lines. I do not base this claim on cynicism or disillusionment; the conclusion follows logically from a cold analysis of the history and the jurisprudence.**

**For example, antiracist protesters from Selma to Ferguson to Mizzou have generally faced harsh sanctions through the use of tear gas, tanks, physical threats, and economic threats.22 Meanwhile, from Skokie to Charlottesville to the university campuses that have recently hosted events featuring speakers such as Richard Spencer and Milo Yiannopoulos, we see authorities providing expensive accommodation to white supremacists, eagerly or reluctantly—even if they come heavily armed with guns and other weapons and espouse violence in the city square, even if security costs balloon into the hundreds of thousands of dollars.23 No law has limited how much universities and cities spend to accommodate hate speech, or what precise level of danger outweighs their perceived need to accommodate hate speech. In fact, the state and university decisions to provide heightened protection for racist speech and not for antiracist speech sends a message in and of itself.24 My concern is that the First Amendment as applied today will do worse than bankrupt the wallets of our cities and universities—it stands to bankrupt our souls.**

## First Amendment is being twisted and weaponized

**Mystal 22**, Elie Mystal, The Nation's Justice Correspondent J.D. Harvard Law School, Allow Me To Retort:A Black Guy's Guide to the Constitution, The New Press, 2022

Unfortunately, we live in an instance of the multiverse where Captain America has been captured and manipulated by the neo-Nazi group HYDRA and turned into a weapon against u**s. We live in a constitutional environment where the First Amendment has been infected by the religious right, who don't use it as a shield to protect their beliefs but instead use it as a sword to enforce dogmas and to humiliate members of the LGTBQ community. The First Amendment is being weaponized.** It's being turned into a thing that bullies schoolchildren in homerooms and bathrooms. It's being used t strike at women who want heath care, but won't protect condemned men on death row who want a spiritual advisor. It's being corrupted into a constitutional justification for bigotry and injustice.

## The 1A Has Been Used As A Tool Of Privilege That Disproportionally Harms Women And Minorities

**Franks 19**, Mary Anne Franks, Professor of Law at the University of Miami School of Law, The Cult of the Constitution: our deadly devotion to guns and free speech, Stanford University Press, 2019 (106-107)

Both **First Amendment** and Second **Amendment fundamentalists make use of constitutional propaganda that inverts power dynamics, portraying privileged individuals as vulnerable and vulnerable individuals as privi-leged. Ever-expanding definitions of what counts as "free speech" give constitutional cover to practices that disproportionately harm women and minorities, while attempts to ensure women and minorities' equal exercise of freedom of expression is labeled "censorship." Threats, harassment, and stalking that endanger the physical safety, psychological health, employ-ment opportunities, educational experiences, and intimate relationships of women and minorities are left unregulated in the name of protecting "everyone's" right to free speech, while meaningful attempts to limit the impact of these forms of abuse are denounced as attacks on constitutionally protected expression. Fundamentalists transform the right to free speech,** like the right to bear arms, **into a sword as well as a shield to be wielded against women and minorities.**

While conservative First Amendment fundamentalists are often gleeful about the potential to use the Constitution to limit the rights of women and minorities, liberal First Amendment fundamentalists often express regret that their high-minded free speech principles result in harsh con-sequences. Regardless of how its adherents feel about the outcomes**, free speech fundamentalism has devastating effects on historically subordi-nated groups**.

Today, conservative and liberal positions on political correctness, cor-porate speech, censorship, and academic freedom are often indistinguish-ble. **The left-right First Amendment alliance, fueled in large part by the increasing corporate libertarianism of the ACLU and the Supreme Court, as helped transform free speech doctrine into a tool of the most privileged and powerful members of society.**

## Sometimes defending Nazis is simply defending Nazis -- We Must Limit Our Conception Of The First Amendment to Create A Fairer, More Equal and Less Hateful Country

Noah **Berlatsky**, 12/23/**17**, NBC News, Is the First Amendment too broad? The case for regulating hate speech in America, https://www.nbcnews.com/think/opinion/first-amendment-too-broad-case-regulating-hate-speech-america-ncna832246

Richard **Delgado and** Jean **Stefancic** of the University of Alabama School of Law reject this conventional wisdom. The two professors have collaborated on numerous volumes about racism and the law, including "Critical Race Theory: An Introduction" (2012).

**In their new book "Must We Defend Nazis?: Why the First Amendment Should Not Protect Hate Speech and White Supremacy,"** they **argue that in fact regulating hate speech would make the United States a fairer, more equal and less hateful place.**

**"The best way to preserve lizards is not to preserve hawks,"** they insist in the book. **"Our answer to the question, does defending Nazis really strengthen the system of free speech is, then, generally, no. Sometimes defending Nazis is simply defending Nazis."**

The ACLU and its many supporters see this as sacrilege. But Delgado and Stefancic make a compelling case. They point out, in the first place, that **hate speech causes real harm. Free speech advocates will sometimes insist that words don't cause damage. They disregard — or even mock — the concerns of students on college campus who protest speeches by controversial figures like Milo Yiannopolous, who has used his speaking engagements to harass trans students, among other marginalized groups. They argue that victims should toughen up and ignore hateful words, or accept them as the price of freedom.**

**Delgado and Stefanic, though, argue the price for freedom in this case may be higher than we think. For example, a John Hopkins study published in 2013 concluded that being exposed to racism can lead to high blood pressure and stress among African Americans. Similarly, according to research by Claude Steele at Cornell, negative stereotypes affect African-American self-perception, and can lead to lower test scores.** More, the rash of recent stories about sexual harassment in the workplace provide stark examples of how hostile words or technically non-violent actions — like men exposing themselves —can create an intolerable environment, forcing women out of industries and leading to long-term stress and trauma.

**Free speech advocates also overstate the benefits of free speech, Delgado and Stefanic argue. The ACLU and its adherents claim that marginalized people who ask for restrictions on hate speech don't understand the importance of free speech to civil rights movements. But that argument is paternalistic, and also incorrect.**

**In reality, free speech rights have rarely protected black people in this country — especially activists of color. "The First Amendment co-existed quite comfortably with slavery for nearly 100 years and was never thought to cover abolitionist speech or speech deemed adverse to American interests," Delgado told me** in an email.

## Curbing First Amendment Rights By Limiting Hate Speech On College Campuses Is Important For The Safety Of Every Non-White Person In The Country

Elie **Mystal**, Sep 5, 20**17**, Executive Editor, Above the Law, White Supremacists Sue To Invade Another College Campus, https://abovethelaw.com/2017/09/white-supremacists-sue-to-invade-another-college-campus/

Here's how Nazis want it to work in America right now:

White supremacists try to go to colleges to teach people how to hate their neighbors.
Colleges and universities say, "Dude, you're a Nazi, you can't speak here."
White supremacists, whose people control all three branches of government mind you, scream "FREE SPEECH, FREE SPEECH," and sue.
A white court rules "Golly, there's nothing we can do about white supremacists encouraging people to destroy non-whites. Good thing I'm white or else this would be very disturbing."
Richard Spencer shows up and gets punched in the face.
The media talks about Antifa for a week, because making a distinction between oppressors and liberators is too complicated to do on TV, according to whoever keeps giving Megyn Kelly money.
White supremacists actually kill someone. These white supremacists disavow those white supremacists, like I freaking give a s**t about which version of genocide and ethnic separatism you happen to support this week.
The cycle repeats.
Now that Charlottesville has died down, another cycle has started. Richard Spencer's group, the National Policy Institute, were denied a room to spread hate from by Michigan State University. So, now they're suing. Michigan State says that they denied the speaking permit because of campus safety concerns, but the Nazis say they wouldn't hurt a fly (well, not a white fly at least), it's the dangerous left that causes the safety problems. From the Detroit Free Press:

But there's no threat from the NPI, the lawsuit claims, instead pinning the blame on the left for well-publicized violence around their appearances.

"Radical leftists affiliated with the Antifa (anti-facist) political movement have previously violently attacked Spencer and Spencer's supporters at venues which Spencer and Spencer's supporters peacefully assembled..." says the lawsuit, filed by Michigan attorney Kyle Bristow on behalf of Cameron Padgett, the organizer of Spencer's speeches.

Yeah, as I'm sure lots of Nazis have already forgotten, it was their side who killed a woman in Charlottesville. Yes, I've seen the video of the Nazi catching a beatdown from Antifa, but — I'll say it again because I know that sometimes white people have difficulty hearing things from a minority — THE NAZIS KILLED A WOMAN. WITH A CAR. IN BROAD DAYLIGHT. So can we COOL IT with the false equivalencies for one entire second?

**Having white supremacists on campus is a safety concern because white supremacists are a threat to the safety of EVERY NON-WHITE PERSON IN THE COUNTRY:**
*** You, black "libertarian" who thinks your economic conservatism and white girlfriend makes you post-racial… they'll kill you.**
*** You, Asian-American who thinks that "hard work" is better than "handouts," and believes that we should hash things out in the "marketplace of ideas"… they'll kill you.**
*** You, Cuban-American who still thinks we need to be tough on Castro and thinks the wall is a good idea because you are obsessed with the idea that somebody cut ahead of the line… they'll kill you.**
*** You, Jewish person… they'll kill you… though unlike the rest of these fools, you already know that.**

**I have no intention of waiting around for them to try to kill me before I demand protection from their "free speech." If you're a white male, you can afford to wait till I'm on a train to the camps before contemplating a more robust distinction between protected and unprotected speech. You have that luxury. You have that privilege.**

**Me, I can't afford to play the appeasement game. It'll be too late for me and my family. These Nazis and white supremacists are coming. They want it to be one way, but we need to make it the other way.**

**Of course Michigan State can deny these dangerous people a room on-campus. The First Amendment does not require that every obscene and violent expression imaginable must be protected. And if you can't square STOPPING NAZIS with your conception of free speech, then we need new standards and new conceptions of the right.**

## Allowing Dangerous Hate Speech To Have Access To Public Spaces Costs State And Local Governments Millions Trading Off With Housing, Infrastructure and Crime Prevention

Susan **Berfield**, January 25, 20**18**, Bloomberg Businessweek, The High Cost of Free Speech, From Charlottesville to the Women's March, https://www.bloomberg.com/news/features/2018-01-25/the-high-cost-of-free-speech-from-charlottesville-to-the-women-s-march

Amid the commotion and disruption, **the price of free speech has gone up**. The Constitution guarantees freedom of speech in public spaces: It's a civic right with civic costs. **The Supreme Court ruled in 1992 that the government can't impose fees on speakers based on the expected cost of security. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob," Justice Harry Blackmun wrote** in a decision prohibiting Forsyth County, Ga., from charging the Nationalist Movement a fee to demonstrate against Martin Luther King Jr. Day.

The result, says David Pozen, a visiting scholar at Columbia's Knight First Amendment Institute, has been **that the public now effectively subsidizes the speech** not only of peaceful protests like the 200 or so Women's Marches that took place across the U.S. this January, but also that **of the most controversial, inflammatory figures, even when they're just looking for a fight. It's the provocateurs' privilege. "The more provocative a speaker, the more costly it is to manage that event and the more ordinary people are going to have to bear those costs,"** Pozen says.

When a group called the New Confederate States of America planned a rally on Monument Avenue in Richmond, Va., in mid-September, the city spent $570,000 to provide security. The bill included $84,280.85 for body cameras, $14,982 for a chain-link fence around the nearby Arthur Ashe Jr. Athletic Center, and $822.50 for 250 Chick-fil-A sandwiches for police officers. Half a dozen people showed up to march near a statue of Robert E. Lee; many times that number came out to protest. A League of the South rally in Murfreesboro, Tenn., in October didn't amount to much either, except in costs to the city and county, about $350,000 in all.

**Berkeley, Calif., has borne a particular burden. "We represent progressive forward thinking, and the white supremacists and hate groups come here to challenge us, provoke us, thumb their nose at us," says Mayor Jesse Arreguin. His office estimates that it spent an additional $1 million for police and fire officers over the past year. "That had a significant impact on our city budget—it's money not available for affordable housing, infrastructure, and crime prevention," Arreguin says. The University of California at Berkeley paid an even higher price for its commitment to free speech in 2017: Five planned rallies and talks—including a Free Speech Week organized by the self-described right-wing troll Milo Yiannopoulos, which was ultimately canceled but still led to violence among those gathered—came to $4.84 million. The university, already tackling a $110 million deficit, spent more than $200,000 on barricades alone.**

## 1A Prohibition Against Hate Speech Law Is An Outdated Philosophy That Has Been Disproven Over Time and Make The U.S. an Outlier

Richard **Stengel**, October 29, 20**19**, Why America needs a hate speech law, https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/

It's a fair question. **Yes, the First Amendment protects the "thought that we hate," but it should not protect hateful speech that can cause violence by one group against another. In an age when everyone has a megaphone, that seems like a design flaw.**

**It is important to remember that our First Amendment doesn't just protect the good guys; our foremost liberty also protects any bad actors who hide behind it to weaken our society. In the weeks leading up to the 2016 election, Russia's Internet Research Agency planted false stories hoping they would go viral. They did. Russian agents assumed fake identities, promulgated false narratives and spread lies on Twitter and Facebook, all protected by the First Amendment.**

**The Russians understood that our free press and its reflex toward balance and fairness would enable Moscow to slip its destructive ideas into our media ecosystem. When Putin said back in 2014 that there were no Russian troops in Crimea — an outright lie — he knew our media would report it, and we did.**

**That's partly because the intellectual underpinning of the First Amendment was engineered for a simpler era.** The amendment rests on the notion that the truth will win out in what Supreme Court Justice William O. Douglas called "the marketplace of ideas." This "marketplace" model has a long history going back to 17th-century English intellectual John Milton, but in all that time, no one ever quite explained how good ideas drive out bad ones, how truth triumphs over falsehood.

Milton, an early opponent of censorship, said truth would prevail in a "free and open encounter." A century later, **the framers believed that this marketplace was necessary for people to make informed choices in a democracy. Somehow, magically, truth would emerge. The presumption has always been that the marketplace would offer a level playing field. But in the age of social media, that landscape is neither level nor fair.**

**On the Internet, truth is not optimized. On the Web, it's not enough to battle falsehood with truth; the truth doesn't always win. In the age of social media, the marketplace model doesn't work. A 2016 Stanford study showed that 82 percent of middle schoolers couldn't distinguish between an ad labeled "sponsored content" and an actual news story. Only a quarter of high school students could tell the difference between an actual verified news site and one from a deceptive account designed to look like a real one.**

**Since World War II, many nations have passed laws to curb the incitement of racial and religious hatred. These laws started out as protections against the kinds of anti-Semitic bigotry that gave rise to the Holocaust. We call them hate speech laws, but there's no agreed-upon definition of what hate speech actually is. In general, hate speech is speech that attacks and insults people on the basis of race, religion, ethnic origin and sexual orientation.**

## Hate Speech Creates A Climate Where Mass Shootings Are More Likely

Richard **Stengel**, October 29, 20**19**, Why America needs a hate speech law, https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law/

I think it's time to consider these statutes. **The modern standard of dangerous speech comes from Brandenburg v. Ohio (1969) and holds that speech that directly incites "imminent lawless action" or is likely to do so can be restricted. Domestic terrorists such as Dylann Roof and Omar Mateen and the El Paso shooter were consumers of hate speech. Speech doesn't pull the trigger, but does anyone seriously doubt that such hateful speech creates a climate where such acts are more likely?**

Let the debate begin. **Hate speech has a less violent, but nearly as damaging, impact in another way: It diminishes tolerance. It enables discrimination. Isn't that, by definition, speech that undermines the values that the First Amendment was designed to protect: fairness, due process, equality before the law? Why shouldn't the states experiment with their own version of hate speech statutes to penalize speech that deliberately insults people based on religion, race, ethnicity and sexual orientation?**

**All speech is not equal. And where truth cannot drive out lies, we must add new guardrails. I'm all for protecting "thought that we hate," but not speech that incites hate. It undermines the very values of a fair marketplace of ideas that the First Amendment is designed to protect.**

# Campaign Finance reform

**Campaign Finance Reform is a big stick affirmative. Citizens United v. Federal Election Committee, radically changed the relationship of corporations and their interests to campaign contributions. Reaction to the decision — almost immediately — was strong.**

**Citizens United Will Continue to play an outsized role in the 2022 Midterms, prioritizing corporate issues over life altering issues like reproductive justice, the environment, and recovery from the COVID-19 pandemic**

**League of Women Voters**, January 21, 20**22**, How Citizen's United Will Affect the 2022 Midterms https://www.lwv.org/blog/how-citizens-united-will-affect-2022-midterms

**The 2022 midterms are coming at a pivotal time in our democracy, with voting rights under major threat and redistricting shaping the next decade of political representation. Life-altering issues, like reproductive justice, the environment, and recovery from the COVID-19 pandemic, need immediate solutions.** Who we elect now will determine how – and even whether – we respond to these issues and the other needs of everyday Americans.

**Yet campaign finance laws continue to empower corporations and the super-rich, making it difficult for the rest of the country to make their voices heard. In addition to the impact of Citizens United, recent decisions like 2021's Americans For Prosperity Foundation v. Bonta have opened the door to further exploitation by wealthy special interests. In Bonta, the Supreme Court struck down a California rule requiring 501(c)(3-4)s to disclose large donors. These types of organizations have recently been used as shells for political action and dark money donations. The Supreme Court's decision further allows big donors to do their spending in secret and sacrifices the ideal of political transparency in favor of protecting major donors from accountability.**

**Overall, our election system is primed to prioritize the interests of wealthy special interests, which bodes poorly for most of the population. There are many well-intended corporations and financially privileged Americans who are concerned with the needs of our overall population – but they're not necessarily the best people to speak for the rest of the country.**

Should major corporations decide our commitment to environmental policies – especially when green policies often negatively affect their bottom lines? Are millionaires the best-equipped people to speak on affordable health care, job opportunities, and an accessible education system? What about racial justice (76 percent of American millionaires are white)?

**A true democracy is one where every person's vote counts equally. Yet our midterm votes will not count equally if we continue to empower wealthy special interests over the American people.**

## Citizens United Has had disastrous results for the US opening up the floodgates of corporate influence

Jake **Johnson**, January 21, 20**22**, 'Time for Citizens United to Go': US Oligarchs Poured $1.2 Billion Into 2020 Elections, https://www.commondreams.org/news/2022/01/21/time-citizens-united-go-us-oligarchs-poured-12-billion-2020-elections

**Marking the 12th anniversary of the Supreme Court's landmark Citizens United decision, the advocacy group Americans for Tax Fairness on Friday published a report showing that U.S. billionaires dumped a staggering $1.2 billion into the 2020 elections—a 39-fold increase compared to 2010.**

**Over the course of the 2020 election cycle, ATF found, America's 661 billionaires contributed nearly $1 out of every $10 spent attempting to influence the outcome and determine who sets policy for a nation of 330 million.**

Nearly a third of the billionaire campaign funding in 2020 came from the mega-rich couple Sheldon and Miriam Adelson—former President Donald Trump's top donors—and former New York City Mayor Michael Bloomberg, who doled out $152.5 million during the 2020 election cycle, not including the $1.1 billion he spent on his own short-lived White House bid.

Democratic businessman Tom Steyer, his wife Kathryn Taylor, and Republican hedge fund manager Ken Griffin also spent big in 2020, collectively donating over $400 million.

**Frank Clemente, ATF's executive director, said in a statement that the findings lay bare the "disastrous" consequences of the high court's 2010 ruling in Citizens United v. Federal Election Commission, which toppled longstanding campaign finance restrictions and opened the floodgates to unlimited election spending by corporations and rich individuals.**

**And the reason billionaires have so much cash to give to political campaigns, Clemente stressed, is that they've been able to accumulate vast fortunes without any real threat of higher taxes. ATF estimated in a separate report out earlier this week that the 10 richest U.S. billionaires have added $1 billion to their combined wealth every day of the pandemic.**

**"Weak taxation of the wealthy combined with anemic regulation of campaign fundraising have handed America's billionaires outsized political influence to go along with their huge economic clout," said Clemente.**

## Citizens United Has Opened Up The Floodgates of Russian Interference In US Elections

Allegra **Kirkland** | January 22, 20**18**, Talking Points Memo, Did Citizens United Help Russians Funnel Money To NRA?, https://talkingpointsmemo.com/muckraker/campaign-finance-russia-funneling-dark-money-trump-nra

**“Citizens United opened up the floodgates to any kind of corporate money,” Craig Holman, a campaign finance expert at good government group Public Citizen, told TPM. “It’s easy to launder foreign money through corporate entities or LLCs, and it goes entirely unreported as coming from foreign sources.”**

McClatchy reported that Maria Butina teamed up with Paul Erickson, a Republican operative and NRA member, to set up an LLC, named Bridges, in February 2016. Butina is a top aide to the Russian banker, Alexander Torshin, who is a long-time ally of the NRA. Erickson told McClatchy last year that the company was created in case Butina

needed financial help for her graduate studies in the U.S. McClatchy described that as "an unusual way to use an LLC."

TPM has laid out the web of ties between Torshin, Butina, and top NRA figures.

**Foreigners are barred from contributing to U.S. political campaigns. But the Supreme Court's 2010 Citizens United ruling, which allowed corporations to spend unlimited amounts on political activities, fueled a spike in the number of 501(c)(4) "social welfare" non-profits, which are permitted to spend big on political campaigns without disclosing the source of their funds. That makes it hard for government watchdogs or federal agencies to know with certainty if foreign money is being funneled to these so-called "dark money" groups.**

## —Citizens United Opened Up The NRA's Influence

Allegra **Kirkland** | January 22, 20**18**, Talking Points Memo, Did Citizens United Help Russians Funnel Money To NRA?, https://talkingpointsmemo.com/muckraker/campaign-finance-russia-funneling-dark-money-trump-nra

But Larry Noble of the Campaign Legal Center told TPM that **the law is now easy to get around. 501(c)(4)s are required to file reports including the donor's name if money comes in that is expressly earmarked for an ad boosting a particular candidate. But as long as the non-profit doesn't divulge the specific content of an ad to the donor, no disclosure is necessary.**

**Anonymity, of course, would be appealing to those like Torshin, the Russian banker whose activities are reportedly under investigation by the FBI.**

Neither the NRA nor Butina, the Torshin aide, responded to TPM's request for comment.

**Noble said any case against Torshin or the NRA would be complex. The FBI will have to look through "bank records, the money coming in, where it went," Noble said. "And try to trace it through to what it was spent on. Beyond that, you want to know who was involved with it, what they discussed with foreign nationals, who approached who, what were their understandings."**

**No dark-money group spent more on the 2016 election than the NRA's dark-money arm. In all, the NRA spent a $55 million on the campaign, including $30 million to support Trump. And because non-profits don't need to reveal how much they spend on Internet ads or get-out-the-vote efforts, a more realistic estimate of the NRA's total spending could creep as high as $70 million, according to McClatchy.**

**The $30 million spent in support of Trump is twice what the group spent to back Mitt Romney in 2012, despite its well-publicized loathing for President Barack Obama.**

**If Russians did use the NRA as a conduit to financially support Trump, a whole new set of questions opens up.**

**"This NRA spending, if it turns out to be true, is it unique?" asked Ciara Torres-Spelliscy, a campaign finance expert at Stetson University. "Did they try to push it through other opaque non-profits?"**

After all the months searching for incontrovertible evidence of pro-Trump Russian intervention in the 2016 election, the answers to those questions, Torres-Spelliscy said, could be "the holy grail."

## —Current Laws are Insufficient To Stop Russian Interference in American Elections

RICHARD L. **HASEN**, FEB 17, 20**18**, Prof @ Irvine Law School, Slate, The Campaign Finance Loophole That Could Make the Next Russian Attack Perfectly Legal, https://slate.com/news-and-politics/2018/02/the-campaign-finance-loophole-that-could-make-the-next-russian-attack-perfectly-legal.html

**The Mueller indictment of 13 Russian nationals for interfering with the 2016 U.S. presidential election offers a remarkably detailed account of a complex plot to sow discord and influence the presidential contest in favor of Donald Trump. The indictment critically points to something else, though: It provides a roadmap for the Russians to do it all again, without violating any current campaign finance laws the next time.**

Paragraph 50 of the complaint demonstrates the kinds of social media ads Russian government agents paid for during the last election season. Here are two relevant examples: "Hillary is a Satan, and her crimes and lies had proved how evil she is," and "Vote Republican, Vote Trump, and Support the Second Amendment!"

**If the Russians interfere in the next presidential election, expect to see more of "the Democrat is Satan" sponsored Tweets and fewer "Vote Trump" messages. Under current campaign finance law, as the Supreme Court and lower courts currently construe it, it may have been perfectly legal for the Russians to run those Satan ads without disclosing their identity.**

As I explained in Politico back in September, **while the federal courts have upheld laws banning foreign nationals from spending money to try to influence our elections, the laws have been interpreted to bar only "express advocacy"—ads that might say "Vote Trump" or otherwise expressly advocate for the support or defeat of a particular candidate—and not ads which avoid those magic words**. The exception to this, thanks to the McCain-Feingold campaign finance law of 2002, is for certain ads (called "electioneering communications") broadcast close to the election on TV or radio which feature a candidate's name or likeness. So foreign nationals could not call Hillary Clinton "Satan!" in a radio ad broadcast close to the election (and Americans paying for such ads have to disclose their identity).

The rub, however, is that **it was likely perfectly fine for the Russians to put such ads on the Internet and social media.** As I explain in a forthcoming paper in the First Amendment Law Review, **soon after the Supreme Court decided the 2010 Citizens United case, freeing corporate money in U.S. elections, a three-judge district court in a case called Bluman v. FEC upheld the federal law barring foreign spending in U.S. elections. Crucially, however, the court read the spending ban to apply to express advocacy and not to "issue ads" like "Hillary is a Satan." The court did so because a broader interpretation may have run into First Amendment problems that the conservative Supreme Court had flagged in the past. The Supreme Court summarily affirmed Bluman, meaning it agreed without issuing an opinion that the three-judge court decision was right (though not necessarily all of its reasoning). The upshot is that there is potentially a huge loophole for foreign and undisclosed issue ads on federal elections.**

## —The primary beneficiaries of unfettered 1A speech are corporations , protecting corporate speech right has traded off with the rights of marginalize individuals

**Franks 19,** Mary Anne Franks, Professor of Law at the University of Miami School of Law, The Cult of the Constitution: our deadly devotion to guns and free speech, Stanford University Press, 2019 (121-122)

**While the myth of the marketplace is poorly suited to protect the general welfare or truth, it is remarkably well suited to serve corporate interests. The rise of marketplace mythology may help explain the astonishing shift in free speech claims from the marginalized to the powerful. As Morrison Torrey writes,**

**Initially, free speech claims were brought by draft resisters, labor organiz-ers, civil rights activists, pacifists, communists, and similar progressive or left groups with less than their share of power and all too easily silenced by a hostile majority. Today, free speech claims are increasingly likely to be brought by rich, powerful, commercial entities (including tobacco companies and pornographers), by racist speakers, or to challenge pro-gressive campaign reform legislation.40**

**Lincoln Caplan similarly observed in 2015 that "the most fervent champions" of free speech today** "are not standing up for mistrusted outliers... or for the dispossessed and powerless." Instead, they **"do the bidding of insiders-the super-rich and the ultra-powerful, the airline, drug, petroleum, and tobacco industries, all the winners in America's winner-take-all society."41 John Coates concludes that "corporations have increasingly displaced individuals as direct beneficiaries of First Amend-ment rights,"** finding that almost "half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals. "42

The worship of corporations by antigovernment libertarians is confound-ing as an initial matter, given that corporations are not the product of natural forces or unfettered competition but are literally created of government.

**The establishment and protection of corporate rights requires extensive government regulation. As Batchis notes, "This is the paradox of decrying government suppression of what we now call corporate speech: There can be no such thing as corporate speech without government."43**

**What is more, corporations fundamentally disrupt the nature of human interaction and competition. The ability of any individual human being to engage in risky or harmful behavior is, in theory, limited by the potential of personal liability for negative outcomes. An entirely artificial entity, however, is able to sever risks from responsibilities. The structure of corporations creates a classic moral hazard: "[T]he nature of corporate action, where bureaucracy dictates that most of the actors are far removed from the actual harm that might occur as a result of their decisions, increases the likelihood of egregious conduct."44 Being allowed to reap nearly limit- less benefits from risky behavior without facing the costs of that behavior means that corporate liberty will always outstrip individual liberty. As Joel Bakan describes in The Corporation: The Pathological Pursuit of Profit and Power, "The corporation's legally defined mandate is to pursue, relentlessly and without exception, its own self-interest, regardless of the often harmful consequences it might cause to others."45**

# National Security

**The balance between national security and the First Amendment is written into the very fabric of 1A jurisprudence from the start of the Republic. Depending on the wording of the resolution an aff could limit either speech or press rights in order to advance national security interests.**

## The First Amendment Prevents Fighting Disinformation By Foreign Powers

**Goldenziel,** Jill I. and Cheema, Manal, The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare (February 26, 20**19**). 22 U. Pa. J. Const. L. 81 (2019), Available at SSRN: https://ssrn.com/abstract=3286847. or http://dx.doi.org/10.2139/ssrn.3286847

**The United States prides itself on freedom of speech and information. However, Russia and other foreign actors have weaponized these freedoms against the United States.** Most famously, before the 2016 presidential election, Russia used online sources disguised as news outlets to produce and distribute fake news, targeting voters in swing states.1 **Russia** then interfered in the 2018 midterm elections and is attempting to influence the 2020 Presidential election.2 **Iran, North Korea, and China are also engaging in coordinated campaigns aimed at spreading disinformation3 to alter political discourse.4 The Islamic State, too, has successfully used social media to shape public opinion and the narrative of its conflict with the United States.5 According to the U.S. Department of Justice ("DOJ"), foreign influenced operations like Russia's include covert actions intended to "sow division in our society, undermine confidence in [ ] democratic institutions, and otherwise affect political sentiment and public discourse to achieve strategic geopolitical objectives."6 Indeed, Russia's disinformation campaigns spurred a national argument over the legitimacy of the U.S. electoral system and how the United States should respond.7 The 2017 U.S. National Security Strategy repeatedly notes that the threat of information warfare by Russia and China is likely to continue and that the United States' response has been "tepid and fragmented."8 One reason for this weak response is that U.S. laws and jurisprudence protecting free speech and privacy were not designed for the technological realities of today. Much First Amendment doctrine is premised on an idealized public square containing a marketplace of ideas. The Supreme Court has even called the Internet "the modern public square."9 However, this metaphor is inapt for today's social media environment, where private entities control the conditions in which speech is made and heard. Moreover, many laws that prevent the U.S. Government from collecting data on U.S. persons' First Amendment activities far predate the Internet.10 Many of these laws were developed in the 1970s, in the context of fears of U.S. Government overreach during the Cold War. They were intended to legally and morally distinguish U.S. Government actions from the Soviets', who surveilled and propagandized their own people. 11 These laws remain critical to protect civil liberties and curtail abuses of government power. However, the drafters of those laws could not foresee that, years later, Russia would surveil Americans' Internet data and weaponize it against the United States, while the U.S. Government would be barred from accessing its own people's data to fight back.** An example from 2016 acutely illustrates how U.S. laws constrain the country's ability to combat information warfare. **In 2016, the State Department ("DOS") proposed to identify social media influencers who were spreading Kremlin messages and target them with counterarguments.12 However, the Privacy Act of 1974 restricts data collection related to the ways Americans exercise their First Amendment rights. The proposed program could not guarantee that it would not inadvertently collect American citizens' data, and the DOS**

**program did not fall under the Act's law-enforcement exceptions. State Department lawyers quashed the program, reasoning that tweets, retweets, and comments implicate the collection of data related to the ways Americans exercise their First Amendment rights. The State Department lawyers thus reasoned that the First Amendment prohibited a program that would have encouraged the First Amendment right to free political debate by adding political speech to the marketplace of ideas.13 In this and other ways, the United States' own laws tie its hands in its fight against information warfare. For this reason, developing, updating, and deconflicting the laws regulating information operations is a high government priority.14 This Article argues that the United States must reform laws, doctrine, and policies to protect national security and the democratic process. First Amendment jurisprudence and the Privacy Act, in particular, pose substantial obstacles to a whole-of-government approach in fighting the Russian disinformation campaign and information warfare more broadly.**

## In order to avoid Americans being Radicalized There Should Be Prohibitions On Access websites that glorify, express support for, or provide encouragement for radical groups

Eric **Posner**, December 15, 20**15**, professor at the University of Chicago Law School, Slate, ISIS Gives Us No Choice but to Consider Limits on Speech, http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.single.html

But there is something we can do to protect people like Amin from being infected by the ISIS virus by propagandists, many of whom are anonymous and most of whom live in foreign countries. **Consider a law that makes it a crime to access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS; to distribute links to those websites or videos, images, or text taken from those websites; or to encourage people to access such websites by supplying them with links or instructions. Such a law would be directed at people like Amin: naïve people, rather than sophisticated terrorists, who are initially driven by curiosity to research ISIS on the Web.**

**The law would provide graduated penalties. After the first violation, a person would receive a warning letter from the government; subsequent violations would result in fines or prison sentences. The idea would be to get out the word that looking at ISIS-related websites, like looking at websites that display child pornography, is strictly forbidden. As word spread, people like Amin would be discouraged from searching for ISIS-related websites and perhaps be spared radicalization and draconian punishment for more serious terrorism-related crimes.**

**The law would not deter sophisticated terrorists who send one another encrypted messages. That's not its point. ISIS seeks to recruit Americans on American soil; in order to recruit from the public, it obviously cannot act secretly. It must instead broadcast widely and rely on surrogates to broadcast widely, in order to reach an audience of nonradicalized Muslims. This is a vulnerability. When people discover ISIS websites and circulate them by Twitter, Facebook, and other public websites, those people often disclose their identities. Many are too naïve to use pseudonyms; others reveal their identities to their ISPs, which can be forced to cough them up to police. Teenagers who are curious about ISIS but not yet committed to it are unlikely to use complicated encryption technologies to mask their identities from ISPs. Laws directed at this behavior would make a dent in recruitment, and hence in homegrown radicalism, even if they do not solve other problems.**

One worry about such a law is that it would discourage legitimate ISIS-related research by journalists, academics, private security agencies, and the like. But the law could contain broad exemptions for people who can show that they have a legitimate interest in viewing ISIS websites. Press credentials, a track record of legitimate public commentary on blogs and elsewhere, academic affiliations, employment in a security agency, and the like would serve as adequate proof.

**The obvious problem with this law is that the courts could strike it down under the First Amendment. Under current doctrine, such an anti-propaganda law is unconstitutional because it would interfere with the right of people to receive or read political information—as would proposed laws that would require Internet companies such as Facebook and Twitter to remove ISIS-related propaganda from their websites. The Supreme Court has held that the government can ban political speech only when it poses an immediate threat to public safety, as when an orator encourages a crowd to go on a rampage. Speech that blasts the American constitutional system and praises America's enemies has been held constitutionally protected time and again.**

**However, these rules go back only to the 1960s. Before then, in the United States, people could be punished for engaging in dangerous speech. The U.S. government prosecuted Nazi sympathizers during World War II, draft protesters during World War I, and Southern sympathizers in the Union during the Civil War. It's common sense that when a country is embroiled in a war, it should counter propaganda that could populate a fifth column with recruits.* The pattern in American history—and, in the other democracies as well, even today—is that during times of national emergency, certain limits on speech will be tolerated.**

We do not currently face a national emergency comparable to a world war, but **anti-propaganda laws may nonetheless be warranted because of the unique challenge posed by ISIS's sophisticated exploitation of modern technology. In the old days, radicals handed out crudely mimeographed leaflets at street corners. Today, the Internet makes possible the constant circulation of captivating videos, vivid images, and extremist text, creating a "radicalization echo chamber." It is the change in technology, more than the change in the nature of foreign threats, that has given rise to a historic and unprecedented danger from foreign radicalization and recruitment.**

## The First Amendment Ideals Are Not Universal, And Cause Violence Abroad and Damage America's Reputation

Eric **Posner**, SEPT. 25 20**12**, Prof @ Chicago Law, The World Doesn't Love the First Amendment http://www.slate.com/articles/news_and_politics/jurisprudence/2012/09/the_vile_anti_muslim_video_and_the_first_amendment_does_the_u_s_overvalue_free_speech_.html

But there is another possible response. This is that **Americans need to learn that the rest of the world**—and not just Muslims—**see no sense in the First Amendment. Even other Western nations take a more circumspect position on freedom of expression than we do, realizing that often free speech must yield to other values and the need for order. Our own history suggests that they might have a point.**

Despite its 18th-century constitutional provenance, the First Amendment did not play a significant role in U.S. law until the second half of the 20th century. The First Amendment did not protect anarchists, socialists, Communists, pacifists, and various other dissenters when the U.S. government cracked down on them, as it regularly did during times of war and stress.

**The First Amendment earned its sacred status only in the 1960s, and then only among liberals and the left, who cheered when the courts ruled that government could not suppress the speech of dissenters, critics, scandalous artistic types, and even pornographers. Conservatives objected that these rulings helped America's enemies while undermining public order and morality at home, but their complaints fell on deaf ears.**

**A totem that is sacred to one religion can become an object of devotion in another, even as the two theologies vest it with different meanings. That is what happened with the First Amendment.** In the last few decades, conservatives have discovered in its uncompromising text— "Congress shall make no law … abridging the freedom of speech"—support for their own causes. These include unregulated campaign speech, unregulated commercial speech, and limited government. Most of all, conservatives have invoked the First Amendment to oppose efforts to make everyone, in universities and elsewhere, speak "civilly" about women and minorities. I'm talking of course about the "political correctness" movement beginning in the 1980s, which often merged into attempts to enforce a leftist position on race relations and gender politics. Meanwhile, some liberals began to have second thoughts. They supported enactment of hate-crime laws that raised criminal penalties for people who commit crimes against minorities because of racist or other invidious motives. They agreed that hate speech directed at women in the workplace could be the basis of sexual harassment claims against employers as well. However, **the old First Amendment victories in the Supreme Court continued to play an important role in progressive mythology. For the left, the amendment today is like a dear old uncle who enacted heroic deeds in his youth but on occasion says embarrassing things about taboo subjects in his decline.**

**We have to remember that our First Amendment values are not universal; they emerged contingently from our own political history, a set of cobbled-together compromises among political and ideological factions responding to localized events. As often happens, what starts out as a grudging political settlement has become, when challenged from abroad, a dogmatic principle to be imposed universally. Suddenly, the disparagement of other people and their beliefs is not an unfortunate fact but a positive good. It contributes to the "marketplace of ideas," as though we would seriously admit that Nazis or terrorist fanatics might turn out to be right after all. Salman Rushdie recently claimed that bad ideas, "like vampires … die in the sunlight" rather than persist in a glamorized underground existence. But bad ideas never die: They are zombies, not vampires. Bad ideas like fascism, Communism, and white supremacy have roamed the countryside of many an open society.**
**So symbolic attachment to uneasy, historically contingent compromises, and a half-century of judicial decisions addressing domestic political dissent and countercultural pressures, prevent the U.S. government from restricting the distribution of a video that causes violence abroad and damages America's reputation.** And this is a video that, by the admission of all sides, has no value whatsoever.

## 1A is in conflict with national security interests

Jameel **Jaffer** April 5, 20**22**, Reclaim the First Amendment — Harvard Law Review Address https://www.justsecurity.org/80974/reclaim-the-first-amendment-harvard-law-review-address/

I said the **First Amendment failed us, but what I really mean, of course, is that the courts failed us**. The courts failed to enforce First Amendment rights that had already been recognized, and failed to consider the possibility that changing conditions required core First Amendment rights to be given life in new ways.

**The courts' failure in this respect transcends the national security context. In recent decades, the courts have allowed the First Amendment freedoms most vital to self-government to become hollowed out. Even as they've extended new First Amendment protection to campaign donors, data-miners, and commercial advertisers, they've allowed the rights of protesters, journalists, and whistleblowers to wither. The First Amendment is increasingly serving private interests rather than democratic ones. It's becoming alienated from the values it was meant to serve—including truth-seeking, official accountability, and, most of all, self-government.**

**And yet the rights neglected or abandoned by the courts are both more necessary and more vulnerable than they've ever been. Authoritarianism is ascendant all over the world. Repressive regimes are becoming more repressive. Democracies are becoming less democratic. Autocrats have become bolder and no longer hesitate to reach across borders. Using German spyware, the Ethiopian government monitored a political opponent living in Maryland. The Russian president ordered the poisoning of dissidents in London. The Saudi Crown Prince had a Washington Post journalist murdered in an embassy in Istanbul.**

**The ascendancy of authoritarianism abroad would pose a real threat to our freedoms even if authoritarianism had no constituency here at home. But it does have a constituency here, as we've seen. Our last president adopted many of the tactics of authoritarians the world over, and in many quarters he was celebrated for it.**

Now Trump is gone, but authoritarian and demagogic impulses aren't. Around the country, state legislatures have enacted bills intended to control public discourse, shrink the space available for dissent, and centralize narrative power in the hands of government officials. There are bills that restrict how public-school teachers can talk about race, gender, and sexuality; bills that prohibit boycotts of Israel, or of fossil fuel companies. Over the past five years, almost 40 states have enacted new legislation restricting protest rights, imposing extreme penalties for protest-related offenses, or reducing penalties for violence directed at protesters.

New communications technologies pose other risks to First Amendment values. A case we're litigating at the Knight Institute involves a Trump-era rule that requires millions of foreign citizens who apply for US visas to register their social media handles with the State Department. The registration requirement facilitates the government's ongoing surveillance of visa holders after they enter the United States. What should the First Amendment have to say about surveillance of this kind—surveillance many of us might ordinarily associate with repressive regimes, rather than open societies?

**And what should the First Amendment have to say about the far-reaching influence that a small number of technology companies now have over public discourse online? "The very purpose of the First Amendment," Justice Robert Jackson wrote, "is to foreclose the government from assuming a guardianship of the public mind." But should the First Amendment be indifferent to the accumulation of narrative power in the hands of private actors? And, perhaps more pressing, should the First Amendment be hostile to government efforts to limit this power?**

**Earlier I said the First Amendment is becoming alienated from the values it was meant to serve. Even if you agree with me, you might wonder what exactly it would require, at a doctrinal level, to reverse this trend. I mean, it's all well and good to say that the First Amendment should serve self-government, but self-government is an abstract concept; it's not going to decide specific cases. Still, reminding ourselves of the values the First Amendment was meant to serve might at least help us approach conversations about the First Amendment in a different way.**

**In everyday conversation, we tend to talk about the First Amendment as if it were something fixed, something we've inherited. First Amendment advocates often say they're "defending" the First Amendment, or "protecting" the First Amendment—phrases that suggest, again, that the First Amendment is something stable—something that's already been won and that now needs only to be preserved. But if we want the First Amendment to serve democratic interests rather than private ones—if we want it be a check on power, rather than a tool of it—then**

**First Amendment doctrine has to be attentive to new forms of power, and new ways in which power is being exercised. It needs to be attentive to evolving technology, new business models, and changing social practices.**

I asked you, earlier, what comes to mind for all of you when I invoke "the First Amendment." Let me leave you with one modest suggestion: At this moment, when our democracy seems fragile, and the First Amendment isn't doing the work we need it to do, it would be better for all of us to think of the First Amendment not just as something to be defended but as something to be built, not just as something to be protected but as something to be reclaimed, or even reimagined.

# Pornography

## Obscenity Laws

**The feminist case against pornography is most famously laid out in literature surrounding the MacKinnon/Dworkin anti-pornography statute in the 80s. Authors since then have continued that work, explaining the pornography's role in perpetuating gender hierarchies and violence against women.**

## Pornography increases violence against women and rape

**Ezioni 20** [Limor, Dean of Law, The Academic Center of Law and Science, Israel, Southwestern Law Review, PORNOGRAPHY AS A TOOL FOR PERPETUATION OF GENDER HIERARCHY: THE UNITED STATES AS A CASE STUDY]

**A radical and critical theory regarding the manner in which non-violent pornography could have an impact upon violence toward women was proposed by Russell** in 1992.58 Her article reviews the conclusions of various *228 studies on the topic and compares them. Russell, **in essence, divides the occurrence of an incident of rape into a timeline** consisting of four stages: **creation of desire to rape, overcoming internal restraints not to commit rape** (morals and conscience against rape), **overcoming social restraints not to rape** (fear of criminal penalties or social exclusion), **and finally belief in the ability to physically overcome the victim**.59 She claimed that most of the **studies which examine the existence of a causal relationship between non-violent pornography and violence toward women make the mistake of only examining the first stage**--the connection between pornography consumption and creation of the desire to rape--**while the main impact of pornography is not in the creation of the desire to rape but in the weakening and degeneration of the internal and external restraints among men who already have the desire to commit rape**.60

## In order to Institute An Effective Regulatory System Of Pornography The First Amendment Needs To Be Curtailed

Morgan **Bennett**, October 10th, 20**13**, The Witherspoon Institute For Public Discourse, http://www.thepublicdiscourse.com/2013/10/10998/

In yesterday's article, I gave an overview of new brain research that has exposed internet pornography as a powerfully addictive narcotic. I also mentioned that, from a legal and constitutional standpoint, **the First Amendment is the ultimate hurdle to clear in order to regulate or prosecute internet pornography**.

But why should the government get involved at all? Isn't consuming internet pornography a private decision that doesn't hurt anyone?

**The claim that internet pornography "doesn't hurt anyone" is patently disproved by years of multidisciplinary studies in the hard sciences and the social sciences. These studies have exposed internet pornography as a massive, paradigm-shifting social harm that undermines the family unit and causes abuse, life-long addictions, infidelity, and unhealthy perceptions and expectations among men, women, and children.**

**Likewise, the "no harm" argument also fails to consider the production of internet pornography, which is produced by way of real human beings who are almost always engaged in illegal and dehumanizing acts such as prostitution, rape, sex trafficking, assault, and even murder.**

Though sexuality is considered "private" in our society, the social effects of collective sexual behaviors and norms, including the effects of internet pornography, cannot be kept "private." Because pornography is sexual, it is inherently relational and thus inherently social. How people relate to each other in society is important, but how people relate sexually is crucial to the sustenance of a society because it either incentivizes or de-incentivizes the very foundation of society: the family unit.

## Anti-pornography laws to address the subjugation of woman would require expanding the scope of First Amendment exceptions

**Arthur 19** [Thomas, Professor, Emory Law School, Emory Law Journal, THE PROBLEMS WITH PORNOGRAPHY REGULATION: LESSONS FROM HISTORY]

**In theory, however, even "protected expression"** not included in the Miller definition **could be restricted if the restriction passes "strict scrutiny." To do so, it would have to be narrowly tailored to serve a compelling state interest. It is hard to see how a new anti-pornography statute could pass this test, assuming that the Court would actually apply it at all.** The lower courts assume that in the areas carefully defined as exceptions to the protections of the First Amendment--such as libel, fighting words, true threats, and obscenity--"operate within their own framework, and do fine without any sort of strict scrutiny."232

**What is new in the current anti-pornography arguments is the claim that pornography alters users' attitudes.** Conservatives are no longer content merely to claim it corrupts morals; they now argue that it alters the entire moral tone of society. Put bluntly, the harm they cite is that they must live in a society that they do not like. **Anti-pornography feminists claim it alters attitudes about the proper status of women, insidiously persuading men--and probably women too--that women should be subject to men and their desires.233 They argue that *899 its ultimate message is that women exist to serve and please men.234 Professor MacKinnon goes further: "Pornography is not imagery in some relation to a reality already constructed. It is not a distortion, reflection, projection, fantasy, representation or symbol either. It is a sexual reality."235**

**The MacKinnon/Dworkin ordinance thus defined pornography as the "graphic sexually explicit subordination of women, whether in pictures or in words,"** provided that it included at least one of six features.236 While some were quite specific, others were not. The last feature was especially vague: the presentation of women as "sexual objects" for "exploitation, possession or use," or in "postures or positions of servility or submission."237 The ordinance did not require that a work be viewed as a whole. Specific sections were enough.238 Nor did it matter if the work had social value. **As Professor MacKinnon wrote, "if a woman is subjected, why should it matter that the work has other value?"239**

# Revenge Porn

In past iterations of this paper, folks have expressed concerns that the "revenge porn case would be unbeatable." As the law has developed since then, the viability of a nonconsensual pornography or cyber sexual abuse Aff has declined.

Early attempts to restrict revenge porn revolved around criminal and civil penalties for dissemination under the same logic as obscenity regulation. See Koppelman 16. These efforts were opposed by free speech advocates like the ACLU as inappropriately broad and violative of the First Amendment, a position state courts occasionally adopted in striking down these laws.

But since then, legislatures have changed their approach and, instead of penalizing the dissemination of revenge porn, framed penalties around the invasion of privacy involved. Privacy violations take this outside of the First Amendment sphere because violations of a reasonable expectation of privacy are content neutral and ALREADY clear the requisite level of scrutiny to overcome a First Amendment challenge. Courts have affirmed this view. See Foley, Killion.

It's… like a real-life Counterplan!

Congress created a federal civil claim relating to the disclosure of intimate images as part of the Consolidated Appropriations Act of 2022, creating a civil tort for victims of revenge porn, expressing confidence that these state supreme court opinions put the law on solid ground. This federal law goes into effect on October 1, 2022. See Killion.

Could an Aff claim that we should restrict free speech by federally criminalizing revenge porn? Perhaps. Though the federal government already has a law against it that likely deters and the strength of "frame it as privacy to avoid restricting the speech beyond the squo" CP would be so strong that this doesn't seem a likely problem for the topic now.

# Cards

## Despite the Harms Of Revenge Porn, The Speech Is Protected By The First Amendment

Andrew **Koppelman**, 65 Emory L.J. 661 (20**16**), Emory Law Journal, Revenge Pornography and First Amendment Exceptions, http://law.emory.edu/elj/content/volume-65/issue-3/articles/revenge-pornography-first-amendment-exceptions.html

A recent illustration is the new phenomenon of **"revenge pornography"—the online posting of sexually explicit photographs without the subject's consent, usually by rejected ex-boyfriends.** The photos are often accompanied by the victim's name, address, phone number, Facebook page, and other personal information. They are sometimes shared with other websites, viewed by thousands of people, and become the first several pages of hits that a search engine produces for the victim's name. The photos are emailed to the victim's family, friends, employers, fellow students, or coworkers. They are seen on the Internet by prospective employers and customers. **Victims have been subjected to harassment, stalking, and threats of sexual assault. Some have been fired from their jobs. Others have been forced to change schools. The pictures sometimes follow them to new jobs and schools. The pictures' availability can make it difficult to find new employment. Most victims are female.** 1

**Twenty-six states have passed laws prohibiting this practice, and others are considering them.** 2 (Civil remedies are often available but have not been much of a deterrent: victims often cannot afford to sue, and perpetrators often have few assets to collect. 3 ) The constitutionality of such laws is uncertain, however.

**These laws restrict speech on the basis of its content. Content-based restrictions (unless they fall within one of the categories of unprotected speech) are invalid unless necessary to a compelling state interest. 4 The state's interest in prohibiting revenge pornography, so far from being compelling, may not even be one that the state is permitted to pursue. The central harm that such a prohibition aims to prevent is the acceptance, by the audience of the speech, of the message that this person is degraded and appropriately humiliated because she once displayed her naked body to a camera. The harm, in other words, consists in the acceptance of a viewpoint. Viewpoint-based restrictions on speech are absolutely forbidden.** 5

There are exceptions to the ban on content-based restrictions: t**he Court has held that the First Amendment does not protect incitement, threats, obscenity, child pornography, defamation of private figures, criminal conspiracies, and criminal solicitation, for example. 6 None of those exceptions is applicable here.**

The pathologies of revenge pornography I have just described are the product of entirely new technologies: digital photography and the Internet. Because it is so new, however, it is not a category of speech that has traditionally been denied First Amendment protection. The Court has recently announced that unless speech falls into such a category, it is fully protected. There can be no new categories of unprotected speech.

**Laws prohibiting revenge pornography thus violate the First Amendment as the Court now understands it. The crux of the problem is the Court's announced unwillingness to create new categories of non-protection.**

## Privacy-based revenge porn laws do not implicate the First Amendment

**Foley 21** [Katherine, Boston College Law Review, https://lawdigitalcommons.bc.edu/bclr/vol62/iss4/7/]

Free speech protection under the First Amendment to the U.S. Constitution is arguably one of the most essential rights that U.S. citizens hold. Since the founding of this country, a tension has existed between the government's protection of free speech and an individual's right to privacy. The Internet exacerbated this tension by providing an accessible avenue for the dissemination of private images for all to see. Nonconsensual pornography and "revenge porn" are at the epicenter of this issue. Today, one in twelve adults in the United States will become a victim of nonconsensual pornography during their lifetime. **Despite the pervasive role of nonconsensual pornography in modern society, most existing state criminal laws are narrowly drawn and, as a result, fail to protect most victims from these devastating attacks**. **State efforts to pass statutes that provide more comprehensive protections to victims' privacy are routinely frustrated by constitutional challenges under the First Amendment**. This Note discusses the two most prominent types of criminal nonconsensual pornography laws—harassment-based statutes and privacy-based statutes— and explores the intersection between these laws and the First Amendment. This Note argues that, **to sufficiently protect all victims of nonconsensual pornography, states must adopt privacy-based laws with no intent-to-harm provisions**. Finally, this Note argues that **these privacy-based statutes do not violate the Constitution, because they make permissible content-neutral restrictions on speech that should survive intermediate scrutiny when challenged under the First Amendment**.

## Congress passed statute against revenge porn

Killion 4/1/2022 [Victoria L., Legislative Attorney, Congressional Research Service, Federal Civil Action for Disclosure of Intimate Images: Free Speech Considerations, https://crsreports.congress.gov/product/pdf/LSB/LSB10723]

**On March 15, 2022, Congress authorized a federal civil claim relating to the disclosure of intimate images as part of the Consolidated Appropriations Act, 2022. The new cause of action, which takes effect on October 1, 2022, marks the first federal law targeting the unauthorized dissemination of private, intimate images of both adults and children—images commonly referred to as "nonconsensual pornography" or "revenge porn."**

# US Congress does not see risk of revenge porn law being struck down based in part on privacy framing

**Killion 4/1/2022** [Victoria L., Legislative Attorney, Congressional Research Service, Federal Civil Action for Disclosure of Intimate Images: Free Speech Considerations, https://crsreports.congress.gov/product/pdf/LSB/LSB10723]

**As of the date of this Sidebar, CRS has not identified any pre-enforcement legal challenges to the constitutionality of Section 1309**. Litigation over similar laws continues to unfold at the state level, however. The highest state courts in **five states**—Illinois, Indiana, Minnesota, Texas, and Vermont—**have adjudicated free speech challenges to their states' nonconsensual pornography laws. All five of these courts ultimately rejected the First Amendment arguments in those cases**, though the Texas Court of Criminal Appeals did so in a nonprecedential opinion that is not controlling in the state's lower courts. The reviewing courts concluded that the statutes prohibited "more than obscenity," reaching protected speech in the form of non-obscene, sexually explicit images depicting adults. With one exception (IL), the courts also determined that the laws regulated or potentially regulated speech on the basis of its content (i.e., depictions of sexual conduct or nudity) and applied strict scrutiny, the most stringent First Amendment test. The laws passed strict scrutiny in these four jurisdictions (IN, MN, TX, and VT). In particular, the courts determined that the laws served compelling governmental interests in protecting privacy and preventing the psychological and reputational harms associated with public disclosure of intimate images. The courts also concluded that the laws were narrowly tailored and the least restrictive means of serving those interests.

**Although the state statutes differed in their particulars, at least three features of the laws were important to the courts' strict scrutiny analysis**. **First**, **the laws expressly imposed or were construed to impose a mens rea requirement with respect to the depicted person's consent to disclosure—negligence** (IN, MN), **recklessness** (TX), **or actual knowledge** (VT). **Second, several of the statutes exempted disclosures made for law enforcement purposes** (IN, MN) **or regarding matters of public concern** (VT). **Third, several of the statutes were limited to circumstances where a depicted person would have a reasonable expectation of privacy** (MN, TX, VT).

# Deep Fakes & Other Tech Issues

That said, revenge porn via deepfake opens a new window for regulation. This arguably wouldn't involve a violation of someone's expectation of privacy, allowing it to escape existing revenge porn laws.

"Virtual child pornography" is currently protected by the First Amendment. This involves digitally altering adult pornography to look like children.

"Morphed child pornography" – digitally imposing REAL children's faces on adult actors engaged in sex acts presents one tricky argument because it's almost universally not covered by the First Amendment except in the Eighth Circuit. There's not a lot of literature immediately available suggesting that the Eighth Circuit is right.

## Cards

### Courts must adopt a new right to defend personality to overcome First Amendment protection of deepfakes

**Reid 21** [Shannon, Penn Law School graduate focusing on privacy and government investigations, Penn Journal of Constitutional Law, THE DEEPFAKE DILEMMA: RECONCILING PRIVACY AND FIRST AMENDMENT PROTECTIONS, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1754&context=jcl]

There is an increasing need to protect public and private parties who are victimized in nonconsensual deepfakes. **The First Amendment**, however, **poses a significant challenge to the U.S. government's ability to regulate nonconsensual deepfakes and individuals' ability to obtain redress for their harms**. **To remedy this issue, federal courts should infer a constitutional right to defend one's personality and reputation from the 14th Amendment right of autonomy. This interpretation would fortify plaintiffs against deepfake creators and compel courts to define clear rules for balancing competing constitutional interests**. Ultimately, it would create space for lawmakers to develop more precise and innovative methods for discouraging outrageous attacks on human dignity while upholding core constitutional ideals.

### Virtual child pornography protected by the First Amendment

**Comerford 21** [Taylor, Boston College Law Review, NO CHILD WAS HARMED IN THE MAKING OF THIS VIDEO: MORPHED CHILD PORNOGRAPHY AND THE FIRST AMENDMENT]

**The 1996 Child Pornography Prevention Act** (CPPA) **added morphed and virtual child pornography to the list of prohibited pornography** depictions to account for the advent of photo and video manipulation technology.36 In 2002, in Ashcroft v. Free Speech Coalition, **the Supreme Court struck down the CPPA, holding that it was too broad and it criminalized behaviors that the First Amendment protects**.37 **The Court held, therefore, that virtual child pornography is protected speech, noting that virtual pornography has value to the arts or literature.**38 Further, **the Court emphasized that virtual pornography is not intrinsically linked to sexual abuse, as there is no child involved or harmed in the creation of such pornography**.39 Notably, the Court acknowledged that morphed child *II.-331 pornography fell closer to real child pornography because it harms the interests of a real child, but it did not rule on its relation to the First Amendment.40

## Federal courts split on First Amendment protections for morphed child pornography

**Comerford 21** [Taylor, Boston College Law Review, NO CHILD WAS HARMED IN THE MAKING OF THIS VIDEO: MORPHED CHILD PORNOGRAPHY AND THE FIRST AMENDMENT]

**Perhaps the most contentious development in child pornography is morphed child pornography**, in which the faces of real children are superimposed upon adult actors engaged in sex acts.4 **Initially state and federal legislators took a strong stance by categorically banning all pornography featuring the likeness of real children**.5 In response, **the Eighth Circuit ruled that laws banning morphed child pornography may violate the First Amendment right to free speech**.6 The Eighth Circuit emphasizes **that if there is no underlying crime, namely the sexual abuse of a child, the pornography is protected speech** *II.-325 **under the First Amendment**.7 **Other courts have upheld laws prohibiting morphed child pornography because the children featured face trauma and reputational harm like in real child pornography**.8

# Other AFF Areas

**Although not fully fleshed out, there are other potential areas that the TC might take up that would be consistent with the direction of the paper.**

# Animal Cruelty

**U.S. v. Stevens, 08-769**, (April 20, 2010)

**The Court in an 8-1 decision held that portrayals of animal cruelty should not be added to the list of prohibited speech that is unprotected by the First Amendment thereby striking down a federal law that criminalized the production and sale of videos and other depictions of animal cruelty. In arguing in favor of the law the government had advocated the area of animal cruelty deserved no protection under the First Amendment, in a similar to how child pornography received no free speech protections. Justice Roberts, writing for the majority found the law to be overbroad because the law punished "any depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" without the requirement that such a depiction be cruel. The Court did point out however, this was not a ban on the ability of the federal government to animal cruelty but was specific to speech acts. Additionally, the Court left open the possibility that congress may have the authority to ban "crush videos,"**

**Lyle Denniston Apr 20, 2010, First Amendment Left Intact, https://www.scotusblog.com/2010/04/first-amendment-left-intact/**

**While the Court conceded that Congress had passed the law to try to stop interstate trafficking in so-called "Crush videos" showing the actual killing of cats, dogs and other small animals by stomping or other intensely cruel methods, it said the resulting law itself reached far more than that kind of portrayal. Limiting the law's reach to those depictions, the opinion said, would require the Court to give "an unrealistically broad reading" to the exceptions Congress wrote into the law.**

# Compelled speech

**Though religious freedom is outside the scope of this paper (in favor of more unified neg ground) there is still a speech element to the Masterpiece Cake decision that may be a good Aff. As the majority says, "To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs."**

**Additionally, Federal Courts (6th Circuit) and a likely upcoming SCOTUS case have expanded the First Amendment Protections against compelled speech as a cover for discrimination**

Evan **Gerstmann**, March 27, 20**22**, Senior Contributor, Forbes, Supreme Court Will Be Making A Major Ruling On Free Speech And The Rights Of Sexual Minorities https://www.forbes.com/sites/evangerstmann/2022/03/27/supreme-court-will-be-making-a-major-ruling-on-free-speech-and-the-rights-of-sexual-minorities/?sh=2a506b531be1

Therefore, the fact that **the Supreme Cour**t has decided to hear only the free speech issues, and not the religious freedom issues, is a sign that Court **is considering a more sweeping ruling in the 303 Creative Designs v. Elenis case that would protect the right of people to express disagreement with progressive views on gender and sexuality. 303 Creative Designs is a graphic design company owned by Lorie Smith, a devout Christian who believes that she has been called by God to design websites to celebrate traditional marriage but not same-sex marriage. Like the religious baker, she does not perceive herself as discriminating against same-sex couples. She argues that she happily serves same-sex couples who want to celebrate birthdays, retirements, and so forth. The federal courts, however, have rejected that argument and have held that her behavior is discriminatory and therefore violates Colorado's anti-discrimination law. That's probably right. After all, if someone refused to provide services to interracial weddings, it's pretty clear that it would be race discrimination.**

**So, this case is going to come down to the designer's argument that the state is compelling her to celebrate same-sex marriage against her will in violation of her first amendment rights. This line of argument means that this case has more in common with a case called Meriwether v. Hartop. That case involved a public university professor who was disciplined for refusing to call a student by the student's preferred pronouns. The Sixth Circuit Court of Appeals (the federal court just below the Supreme Court in the state where the university is located) ruled that the university violated the professor's right against compelled speech.**

# Neg Ground

**There are ample generic off case positions (on both the policy and K sides of the community) with a lot of good, generic evidence espousing the benefits of a robust 1A and the risks of limiting those rights -- a slippery slope DA that would link to all topical Affs**

**Even in the face of awful harms and the worst case scenario we need to cling to our values of free speech. Regulating speech in the era of Trump can only lead to the destruction of our ideals**

Ken **White**, AUGUST 14, **2017**, lawyer with Brown, White & Newhouse, America At The End of All Hypotheticals, https://www.popehat.com/2017/08/14/america-at-the-end-of-all-hypotheticals/
Discussions of free speech in America are usually dominated by hypotheticals — or by slippery slope arguments, if you prefer.

**The First Amendment unquestionably and broadly protects what we call "hate speech." If you point that out, you get hypotheticals in return. "Really? So, the day that Nazis march the streets, armed, carrying the swastika flag, sieg-heiling, calling out abuse of Jews and blacks, some of their number assaulting and even killing people, you'll still defend their right to speak?" That literal parade of horribles is invoked when free speech defenders talk about anything from bigot college kids acting out to Alt-Right racism online.**

**We free speech defenders are just as quick with hypotheticals; it's built into our worldview. "Really? So you'd give the state the power to choose what speech is acceptable and what speech isn't, and use its vast power to punish the difference? You're comfortable giving it that power, even though some day that state might be controlled by an implacable enemy of everything you believe in, a tyrant who overtly relishes the power to punish people who think like you do, encouraged by supporters who hate you?" The unprincipled-tyrant-that-could-be is a staple of First Amendment rhetoric.**

Hypotheticals — called slippery slopes when you're dismissing them — are supposed to require some imagination, are supposed to involve some projection about how current events could deteriorate to an ugly future scenario. How will it change our thinking when that ugly future is now?

This weekend **the hypotheticals about how far the Alt-Right might go collapsed into a grim reality. Literal Nazis marched the streets of an American city, calling out Jews and blacks and gays, wielding everything from torches to clubs and shields to rifles, offering Nazi slogans and Nazi salutes. Some of their number attacked counter-protesters, and one of them murdered a counter-protester and attempted to murder many others. This is the "what if" and "how far" that critics of vigorous free speech policies pose to us as a society.**

**So, too, has the malevolent government we fear come to pass. We have a President elected on a platform of denouncing the press, "investigating" protest movements, and "opening up" libel laws (however little he can actually do so). We have an administration and its powerful, megaphone-equipped sycophants who define entire diverse protest groups — Black Lives Matter, as one example — by the violent actions or rhetoric of a tiny fraction of their**

**members, and suggest that the state should treat the whole based on that part. (This, ironically, is exactly what the Nazis are now complaining that people are doing.) Rhetoric from officials and their media supporters about protest groups is full of accusations of incitement of crime and group criminality and conspiracy. Across the country, conservative legislators rush to craft statutes to protect people who run over protesters with cars. The NRA, one of the most powerful lobbying groups in the country, is putting out chillingly totalitarian propaganda videos to gun owners portraying protest against the regime as uniformly violent and criticism of the President as "inciting" that violence, and exhorting them to defend themselves and the regime from the violent protesters and their inciters. And we have a President who seems to respect no American norms.**

**What do we do when we near the bottom of the slippery slope?**

**These are hard times. Our values should be our beacons to lead us through them. Those values include** due process, the rule of law and equality of all people before it, and **freedom of speech** and worship.

**The Nazis, whether armed with rifles or clownishly clad in khakis, stand against our values — they stand for the proposition that some of us are less American than others by birth, and that America must be "preserved" to the tastes of a particular narrow ethnic prejudice. Nazis attacking and threatening our fellow Americans threaten not just their immediate targets but the foundations of everything we've built. Decent Americans should speak, organize, and lead against them. This is the end of another classic hypothetical — what would you do if America's most shameful ancient wrongs were resurgent? What would you do if the Nazis started marching again?**

**But you cannot destroy a value in order to save it. Nazis — like terrorists — hope that we will abandon principles and fundamentally change who we are out of fear.** Assault is assault, threats are threats, murder is murder, and all of them should be vigorously investigated and prosecuted. The allowance for self-defense by those threatened by Nazis should reasonably be generous. **But despicable speech is protected by the First Amendment, and should remain so. Our present circumstances show why it is sheer terrified madness to entrust a broad power to prevent or punish speech upon a fickle state. We've flirted with that madness of abandoning rights in pursuit of safety for our nation's whole life. The flirtation has turned sordid and degrading during the War on Crime and frankly self-destructive after 9/11. It would be philosophical suicide to hasten it now by giving a government — a visibly terrible and amoral government — the power to regulate speech. This is the final hypothetical come to pass: if the state asked you to give up freedoms in exchange for a dubious promise it would make you safer, would you do it? Would you convince yourself that the state would only use the power against Them, and not you?**

We're a long way from perfect. But we are better than this place we find ourselves. We can climb out of it.

## Foes Of the First Amendment Will Use Half Truths And Lies To Force Acceptance Of Limitations On Free speech

Ken **White**, DECEMBER 19, **2015**, Popehat, Challenged About the First Amendment, Eric Posner Lies About It, https://www.popehat.com/2015/12/19/challenged-about-the-first-amendment-eric-posner-lies-about-it/

Posner's **argument — that there are "countless" exceptions to the First Amendment and it's perfectly natural to make more — is exactly the government's we-should-have-power-to-censor argument that the Supreme Court flatly reject**ed in United States v. Stevens in 2010. In Stevens — which I've written about before — the Supreme Court rejected the federal government's attempt to create the first of many new "balancing" based ad-hoc exceptions to the First Amendment. **Faced with loathsome speech** — so-called "crush videos" depicting animals being killed for pleasure — **the court unequivocally reaffirmed that the set of First Amendment exceptions is historically based and finite and cannot be expanded based on the of-the-moment application of "balancing tests":**

> "From 1791 to the present," however, the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." Id., at 382–383. These "historic and traditional categories long familiar to the bar," Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd., 502 U. S. 105, 127 (1991) (Kennedy, J., concurring in judgment)—including obscenity, Roth v. United States, 354 U. S. 476, 483 (1957), defamation, Beauharnais v. Illinois, 343 U. S. 250, 254–255 (1952), fraud, Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748, 771 (1976), incitement, Brandenburg v. Ohio, 395 U. S. 444, 447–449 (1969) (per curiam), and speech integral to criminal conduct, Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 498 (1949)—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Chaplinsky v. New Hampshire, 315 U. S. 568, 571–572 (1942).
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> The Government contends that "historical evidence" about the reach of the First Amendment is not "a necessary prerequisite for regulation today," Reply Brief 12, n. 8, and that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress's " 'legislative judgment that … depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection,' " Brief for United States 23 (quoting 533 F. 3d, at 243 (Cowen, J., dissenting)), and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Brief for United States 8; see also id., at 12.

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. **The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."** Marbury v. Madison, 1 Cranch 137, 178 (1803).

**Saying that courts have created "countless" exceptions to the First Amendment is not true. The opposite is true: courts have made those exceptions expressly limited and enumerated.** They have done so in the course of rejecting Posner's exact argument.

**There are foes of the First Amendment. And they lie. Watch them. Call them out. Fight them.**

## The First Amendment Is A Hero That Protects Us From The Worst Of Tyranny

Ken **White**, December 16, **2015**, Popehat, Eric Posner: The First Amendment's Nemesis, https://www.popehat.com/2015/12/16/eric-posner-the-first-amendments-nemesis/

Every hero needs a villain.

Not only that, ever hero needs a suitable villain, a villain that somehow complements the hero's attributes. If your hero is a very large collection of Dalmatians, you need a villain who craves a Dalmatian-skin suit. If your hero is Aquaman, you need either a seafood-themed villain or perhaps a desert-themed villain, depending on your mood. If your hero is The Flash, you need a gigantic gorilla, because — well, okay. There are exceptions.

The First Amendment is not an exception. **The First Amendment is a hero, of a sort: a tireless defender of expression from angry mobs and fickle tastes, a sentinel against the sort of annoy-me-and-I-kill-you rule that has prevailed for most of humanity's history. So of course it has a villain, a foe, cackling and scheming and plotting to tie it up and lower it into a bubbling vat of stinking, unprincipled lit-crit twaddle.**

**That villain is Eric Posner, professor at the University of Chicago. I would not go as far as to call him super-, but he is certainly the First Amendment's archvillain.**

## Even In The Face Of Harms We Must Protect The First Amendment

Marc **Randazza**, December 5, **2017**, national president of the First Amendment Lawyers Association, Popehat, Randazza: The Neo-Nazi and The First Amendment, https://www.popehat.com/2017/12/05/randazza-the-neo-nazi-and-the-first-amendment/

Andrew Anglin, a neo-Nazi whom many online publications refer to as a vicious online troll, is being sued by a Jewish citizen of Whitefish, Montana. Tanya Gersh accuses him of invading her family's privacy, urging his supporters to attack her family with hateful and death-threatening messages, and unleashing an online anti-Semitic trolling campaign against her, her relatives, her 12-year-old son, and other Jewish citizens of the local community.

I represent Anglin in this suit. I realize that **Anglin's story is full of controversy, hate, and nationalistic views, which he reportedly spread among his followers. However, the court may be on the verge of creating a dangerous precedent when deciding this lawsuit. Anglin has every right to ask people to share their views, even if those views are absolutely abhorrent.**

**The First Amendment protects unpopular speech and I firmly believe that everyone deserves their constitutional rights to be defended. Even though it appears that the neo-Nazi movement is gaining momentum in the US and evoking public disturbances, this fact should not be used as an excuse to forget that Anglin's right to freedom of speech is granted by the First Amendment. Restricting it in court will impose severe damage on free speech in America.**

**In Anglin's case, it is the shitty price we have to pay for freedom**. The lawsuit is supposed to enter the pre-trial stage in December, so we will have to see how this case unfolds.

## Current 1A freedoms are also currently popular, forming a link scenario for Ptix

## —First Amendment overwhelmingly popular – only 23 percent believe in any reforms

**Policinski 21** [Gene, Freedom Forum senior fellow for the First Amendment, SURVEY SAYS WE LIKE OUR FIRST AMENDMENT RIGHTS – WHATEVER THEY ARE https://www.freedomforum.org/2021/09/22/survey-says-we-like-our-first-amendment-rights-whatever-they-are/]

"The First Amendment: Where America Stands" is a survey commissioned by the nonpartisan Freedom Forum. The survey sampled a representative group of more than 3,000 **Americans on their attitudes and values about the freedoms of religion, speech, press, assembly and petition.**

For those who see these five freedoms as essential to democracy, there are welcome results in the survey: **94% of respondents see the First Amendment as vital** and 63% would keep the 45 words of the amendment as adopted in 1791.

But — no surprise in our polarized society — 23% of all those polled would make some changes. A smaller group, 15% of respondents, said our core freedoms go too far.

## Despite some disagreement over applications, Americans support First Amendment protections as they exist now

**Alexander 22** [Evette, director of learning and impact at Knight Foundation, The Free Speech Center from MTSU, New survey of 4,000 Americans: We agree that free speech is important, but disagree on what's acceptable post-2020 https://www.mtsu.edu/first-amendment/post/2540/new-survey-of-4-000-americans-we-agree-that-free-speech-is-important-but-disagree-on-what-s-acceptable-post-2020]

Under the First Amendment, private social media companies have the right to moderate content that violates their rules. But the social giants' decisions to suspend the former president remain deeply controversial among many Americans. Knight Foundation, in partnership with the polling firm Ipsos, released a study today — on the first anniversary of the insurrection — that illuminates both common ground and divisions when it comes to how Americans view speech rights.

This new Knight-Ipsos survey of more than 4,000 American adults expands on our nearly two decades of student public opinion polling on free speech and First Amendment issues. Free Expression in America Post-2020, part of the Knight Free Expression (KFX) Research Series, represents the most comprehensive public opinion research on free expression available. It also reveals a complex landscape when it comes to speech attitudes in a post-2020 environment.

At a high level, our findings show that **most Americans — regardless of race, party or age — overwhelmingly support free speech and expression, recognizing its importance to a healthy**

**democracy. Large majorities also express confidence that the First Amendment protects people like them to a fair degree.**

## And, as mentioned above, the body of academic literature is somewhat limited and affords authors the opportunity to respond to one another in-depth. This means that there's lots of specific neg ground.

## Only 24 percent of Americans want hate speech legislation

**First Amendment Watch 21** [A project of Arthur L. Carter Journalism Institute at NYU, New Survey Reveals Most Americans Value the First Amendment But are Divided on Key Issues https://firstamendmentwatch.org/new-survey-reveals-most-americans-value-the-first-amendment-but-are-divided-on-key-issues/]

Hate speech is a divisive concept among the respondents. Fifty-four percent say that they know the First Amendment protects hate speech, but they are split over whether it should be protected. Thirty-nine percent of respondents said that people should say whatever they want, while **24% percent say that hate speech should be outlawed.**

## --Defining hate speech is impossible, meaning laws that ban hate speech get politicized

James **Kirchick**, November 7, **2019**, No, America doesn't need a hate speech law, https://www.washingtonpost.com/opinions/2019/11/07/no-america-doesnt-need-hate-speech-law/

Yet that's essentially what Stengel advised in a Post op-ed last week entitled "Why America needs a hate speech law." Stengel never adequately defines what constitutes **"hate speech,"** because he can't. The concept **is inherently subjective. What you determine to be hate speech another may consider a legitimate argument worthy of debate.**

**Investing government bureaucrats with the power to determine what constitutes legally proscribed "hate speech" presents many problems, foremost among them the lack of a neutral arbiter. Would Stengel entrust the current administration, led by a thin-skinned narcissist who calls critics "human scum" and inveighs against the "lying media," with enforcing his recommended "hate speech" law?**

Stengel says he was persuaded to reconsider his lifelong support for the First Amendment when "the most sophisticated Arab diplomats" expressed bafflement to him at how the United States could allow people to burn the Koran. In other words, he concluded that the United States should prohibit blasphemy because flunkies for regimes that outlaw dissent told him so. Jamal Khashoggi, enemy of a regime boasting many "sophisticated Arab diplomats," was not available for comment.

## --The right way to combat hate speech and misinformation is media literacy and more speech, not engaging in viewpoint discrimination

James **Kirchick**, November 7, **2019**, No, America doesn't need a hate speech law, https://www.washingtonpost.com/opinions/2019/11/07/no-america-doesnt-need-hate-speech-law/

**It is deceptive to write, as Stengel does, that because Russian government agents assuming fake identities to promulgate lies are "protected by the First Amendment" we therefore need to abandon it. First, Stengel conflates foreign, state-sponsored propaganda with speech by American citizens. Second, he neglects to mention that there are non-censorious ways of combating disinformation**, such as the Trump Justice Department requiring Kremlin propaganda channel RT to register under the Foreign Agents Registration Act.

As this measure suggests, **the best strategy to mitigate the corrosive effects of disinformation and hateful speech is with a better-educated citizenry. And that requires more speech, not less. Stengel laments studies indicating that middle and high school students cannot tell the difference between genuine news stories and sponsored content online. Yet surely the more effective way to reverse such a troubling societal deficiency is not by banning "fake news" (a hopeless task) but investing in media literacy and civics education.**

**Stengel asserts that "our First Amendment standard is an outlier," as if that were a bad thing. The only country to have been founded upon the idea of liberty, the United States is indeed an "outlier." It's what makes us exceptional. And central to that exceptionalism is freedom of speech. While plenty of bigots exercise that freedom, so, too, have those at the forefront of every positive social change, from abolitionists to the suffragists to the leaders of movements for African American civil rights and gay equality. There is no way to secure the free speech rights of the latter without also guaranteeing those of the former.**

## Banning hate speech chips away at American democracy

**FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION**,March 28, **2019**, https://www.thefire.org/issues/hate-speech/

There is no "hate speech" exception to the First Amendment. So, many Americans wonder, "is hate speech legal?"

Contrary to a common misconception, **most expression one might identify as "hate speech" is protected by the First Amendment and cannot lawfully be censored, punished, or unduly burdened by the government — including public colleges and universities.**

**The Supreme Court of the United States has repeatedly rejected government attempts to prohibit or punish "hate speech." Instead, the Court has come to identify within the First Amendment a broad guarantee of "freedom for the thought that we hate,"** as Justice Oliver Wendell Holmes described the concept in a 1929 dissent. In a 2011 ruling, Chief Justice **John Roberts described our national commitment to protecting "hate speech" in order to preserve a robust democratic dialogue:**

**Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.**

In other words, **the First Amendment recognizes that the government cannot regulate "hate speech" without inevitably silencing the dissent and dialogue that democracy requires. Instead, we as citizens possess the power to most effectively answer hateful speech—whether through debate, protest, questioning, laughter, silence, or simply walking away.**

## Banning hate speech will backfire

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There is no "hate speech" exception to the First Amendment. So, many Americans wonder, "is hate speech legal?"

As Justice Louis Brandeis put it, the framers of the Bill of Rights "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."

**Justice Brandeis argued** that our nation's founders believed that **prohibiting** "evil counsels"—what today we might call "**hate speech"—would backfire:**

**They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form.** Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

**Banning "hate speech" without restricting political speech is prohibitively difficult because of the target's inherent subjectivity. Each American all but certainly has a different understanding of exactly what expression should lose First Amendment protection as "hate speech." One citizen's hateful screed is another's religious text; one citizen's slur is another's term of endearment; or, as the Court put it, "one man's vulgarity is another's lyric." As a result, crafting a generally applicable definition of "hate speech" is all but impossible without silencing someone's "legitimate" speech.**

**"Hate speech" is also a moving target, making a workable definition still more elusive. Conceptions of what constitutes "hate" do not remain stable over time. As ideas gain or lose acceptance, political movements advance or recede, and social commitments strengthen or erode, notions of what is unacceptably "hateful" change, too. Today's majority viewpoint should not be allowed to foreclose that of tomorrow**. For example, thirty years ago, the Board of Regents of Texas A & M University sought to deny recognition to a gay student organization because it believed that "[s]o-called 'gay' activities run diabolically counter to the traditions and standards of Texas A & M." At the time, the Board may have voiced the majority view, which found the gay students' speech to be beyond the pale. Today, the opposite characterization might be true.

## The costs of banning hate speech outweighs any benefit

Nadine **Strossen**, "Freedom of Speech and Equality: Do We Have to Choose?," Journal of Law and Policy, December 2,
**2016**. https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1521&context=jlp

**It is quite clear that the perceived benefits of censoring psychically harmful hate speech are far outweighed by the costs of such suppression. The plus side, from the perspective of those who seek speech suppression, is quite limited. That is because the new suppression would extend to only a subset of hate speech, since we already punish hate speech that causes specific tangible harms: threats, harassment, incitement, and hate crimes. Of that newly suppressible subset–psychically harmful hate speech–we would only punish yet another subset, consisting of the most blatant expression. In contrast, even advocates of restricting psychically harmful hate speech acknowledge that free speech principles would nonetheless protect more subtle expressions of racism, sexism, and other bias. Yet, it is likely that these more subtle expressions may well be the most damaging precisely because they cannot as easily be dismissed as biased. On the cost side, permitting the government to punish psychically harmful hate speech would undermine equality and exert an incalculable chilling effect on any speech that challenges the prevailing orthodoxy in any community.**

## It's impossible to define hate speech meaning any law cannot be properly enforced

Jonathan **Rauch**, "A new argument for hate-speech laws? Um … no," Washington Post, Feb. 4,
**2014**. https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/04/a-new-argument-for-hate-speech-laws-um-no/

Above all, **the idea that hate speech always harms minorities is false. To the contrary: painful though hate speech may be for individual members of minorities or other targeted groups, its toleration is to their great collective benefit, because in a climate of free intellectual exchange hateful and bigoted ideas are refuted and discredited, not merely suppressed. The genius of the open society is that it harnesses the whole range of public criticism, including offensive and hurtful speech, in a decentralized knowledge-making process that has no rival at the job minorities most care about: finding truth and debunking bigotry. That is how we gay folks achieved the stunning gains we've made in America: by arguing toward truth.**

Rosenbaum says, "Jurors are as capable of working through these uncertainties in the area of emotional harms as they are in the realm of physical injury." Really? The many college administrators overseeing speech codes, who are probably at least as bright and well intentioned as most jurors, seem to be having a lot of problems distinguishing between unpopular opinions and intolerable expression. Here are a few representative picks from the Foundation for Individual Rights for Education's listing of recent cases:

-a professor was summarily suspended for joking in his class, "Am I on a killing spree, or what?" when a student complained;

-a professor was put on leave for an anti-National Rifle Association tweet (on his own time and account);

-students were barred from distributing copies of the U.S. Constitution on Constitution Day.

**The big problem for proponents of hate-speech laws and codes is that they can never explain where to draw a stable and consistent line between hate speech and vigorous criticism, or who exactly can be trusted to draw it. The reason is that there is no such line.** Pace Rosenbaum, sharp public criticism of the kind that we rely on to advance social learning is very often hurtful, and surprisingly often intended to be hurtful. As the historian and philosopher of science David Hull observes, "Scientists acknowledge that among their motivations are natural curiosity, the love of truth, and the desire to help humanity, but other inducements exist as well, and one of them is to 'get that son of a bitch.'"

## Citizens United Did Not Open Up The Floodgates to Foreign Money, The decision has allowed smaller associations to have a voice in elections and increases independent political speech

Ilya **Shapiro**, January 20, **2015**, Former Vice President and Director, Robert A. Levy Center for Constitutional Studies, Cato Institute https://www.cato.org/commentary/citizens-united-misunderstood

First, Citizens United didn't reverse a century of law. The president was referring to the Tillman Act of 1907, which banned corporate donations to campaigns. Such donations are still banned. Instead, the decision overturned a 1990 precedent that upheld a ban on independent spending by corporations. That 1990 ruling was the only time the court allowed a restriction on political speech for a reason other than the need to prevent corruption.

Second, the "floodgates" point depends on how you define those terms. In modern times, **nearly every election cycle has seen an increase in political spending, but there's no indication that there's a significant change in corporate spending. And the rules affecting independent spending by wealthy individuals, who are spending more, haven't changed at all.**

**Indeed, much of the corporate influence peddling in Washington that has reformers concerned has nothing to with campaign spending. Most corporations spend far more on lobbying lawmakers already in Washington than they do in political spending to choose which politicians come to Washington.**

No foreign invasion

Third, **Citizens United said nothing about restrictions on foreign spending in our political campaigns. In 2012, the Supreme Court summarily upheld just such restrictions.**

Fourth, **while independent spending on elections now has few limits, candidates and parties aren't so lucky. Even last year's decision in McCutcheon v. FEC, which struck down aggregate — not per-candidate — contribution limits, only affected the relatively few bigwigs (about 600 in the 2012 cycle) who had hit the $123,200 cap. The amount that an individual can give to a single campaign remains untouched.**

**And so, if you're concerned about the money spent on elections — though Americans spend more on Halloween — the problem isn't with big corporate players. Exxon, Halliburton and all these "evil" companies (or even "good" ones) aren't suddenly dominating the conversation. They spend little on political ads because they don't want to alienate half of their customers.**

**On the other hand, smaller players now get to speak freely: groups such as the National Federation of Independent Business, Sierra Club, the American Civil Liberties Union and the National Rifle Association. Even if we accept "leveling the playing field" as a proper basis for regulation, the freeing of associational speech achieves that goal.**

**People don't lose rights when they get together, be it in unions, advocacy groups, private clubs, for-profit enterprises or any other way.**

**By removing limits on independent political speech — spending by people unconnected to candidates and parties — Citizens United weakened the government's control of who can speak, how much and on what subject. That's a good thing.**

## Key to negative ground if this controversy is selected will, of course, be an increase in free speech and supporters of the Citizens United decision make a strong case that the increase in speech is particularly important in the area of elections.

Bradley A. **Smith**, **2010**, Capital University Law School professor former chairman of the Federal Election Commission https://www.city-journal.org/html/citizens-united-fallout-10686.html

**Who could be afraid of more political free speech, one might ask. But it's clear that incumbent politicians, shocked by the apparent tectonic shift in politics of late, are keen to maintain a chokehold on such speech.** Democratic congressman Leonard Boswell of Iowa, for instance, introduced a resolution Thursday to begin the process of amending the First Amendment to ban corporations from engaging in free speech. The speech teetotalers also introduced several bills that would prevent corporations from actually spending money on independent speech: Democrat Alan Grayson of Florida even introduced legislation imposing a 500 percent excise tax on corporate political expenditures and prohibiting any company from trading on a stock exchange unless it abided by the pre–Citizens United provisions.

## The topic is also ripe for process Cps such as Congress or Amendment CP: a legislative reaction to the Citizens United case could overturn Citizens United. However, only a constitutional amendment would be able to fully reverse the decision,

Lawrence **Tribe**, **2010** https://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united/

Such an action in this setting – unlike the setting of the Violence Against Women Act, where the absence of a link to commerce proved constitutionally fatal a decade ago in United States v. Morrison – would be easy to defend as falling within Congress's power over commerce. It could overcome some of the weaknesses that have hindered state corporate law in the past. For example, it could provide a greater incentive for suit, by offering statutory damages or treble damages (i.e., reimbursement of three times the challenged expenditure, part of which reimbursement would go directly to the plaintiffs rather than into the corporation's coffers), as well as attorneys' fees, and it could provide better deterrence by imposing individual liability for the corporate officers authorizing the improper political expenditure. And the "business judgment" rule making such cases notoriously difficult to bring under state law could be replaced with a rule less deferential to management and more focused on the existence of a convincing justification for using general treasury funds as such rather than relying entirely on PAC funds contributed by people with politics in mind.

**Such a federal structure would not operate as a complete substitute for the provisions of McCain-Feingold that the Court struck down in Citizens United, but that is hardly an objection to this kind of legislation. On the contrary, the more completely a federal "fix" replicates what the Court held invalid under the First Amendment, the greater the danger that the Court would strike down the substitute as a thinly disguised end-run around its handiwork. So this is not a complete substitute, but it is an approach Congress should pursue**, in a manner as bipartisan as McCain-Feingold itself, without delay.

# K Ground

**K ground is available on both the Aff and Neg sides of this topic. Indeed, the conversation between Critical Race Theorists and Critical Legal Studies scholars is a vibrant one, which ensures access to critical ground regardless of the side of the debate.**

## The rhetoric of rights mystifies how the law really works

The Bridge, CriticalTheory, Critical Perspectives on Rights, https://cyber.harvard.edu/bridge/CriticalTheory/rights.htm

**The very language of a right, like the right to freedom of contract, appeals to people's genuine desires for personal autonomy and social solidarity, and yet masks the extent to which the social order makes both values elusive, write Peter Gabel and Jay Fineman**, in Contract Law as Ideology, in The Politics of Law 496,498 (David Kairys, ed., third edition, Basic Books: New York 1998). Contract law in fact works to conceal the coercive system of relationships with widespread unfairness in contemporary market-based societies. **The system of rights renders invisible the persistent functional roles such as landlord, tenant, employer, and individual consumer of products produced by multinational conglomerates, that themselves reflect widely disparate degrees of economic and political power**. Contract law is a significant feature in the massive denial of experiences of impotence and isolation and the apology for the system producing such experiences. Similar points can be made about other areas of law. Property rights, for example, imply promotion of individual freedom and security, and yet owners' property rights are precisely the justification afforded to the control of others and arbitrary discretion to wreak havoc over the lives of tenants, workers, and neighbors.

Contract law artificially constrains analysis by focusing n a discrete promise and a discrete act of reliance rather than complex and often diffuse communications and inevitable reliance by people on others than. **Courts and legislatures recognize to some extent the power of these real features of people's lives but the language of legal rules often leads decisionmakers to feel powerless to act on such recognition**. Workers at a U.S. Steel plant in Youngstown, Ohio and their lawyers tried to buy the plant after the company announced plans to close it. Federal trial and appellate judges acknowledged that the plant was the lifeblood of the community but nonetheless concluded that contract and property law provided no basis for preventing the company either from shutting down the plant or refusing to negotiate to sell it to the workers. Local 1330, United Steel Workers v. United States Steel Corp. 631 F.2d 1264 (6th Cir. 1980**). Gabel and Feinman conclude: "it was not the law that restrained the judges, but their own beliefs in the ideology of law. By recognizing the possibilities of social responsibility and solidarity that are immanent in the doctrine of reliance, they could have both provided the workers a remedy and helped to move contract law in a direction that would better align the legal ideals of freedom, equality, and community with the realization of these ideals in everyday life." Id.,at 509. But the ideology of law made the judges feel they could not do so**.[more reading: Staughton Lynd, the fight Against Shutdowns: Youngstown's Steel Mill Closings (Single Jack Books: San Pedro, CA 1982); Joseph William Singer, The Reliance Interest in Property, 40 Stanford Law Rev. 611 (1988)]

## Rights rhetoric leads to individualism and impedes democracy

The Bridge, CriticalTheory, Critical Perspectives on Rights, https://cyber.harvard.edu/bridge/CriticalTheory/rights.htm

**The individualism pervading American law calls for "the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested.** The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them." Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685(1976). **As implemented in law, individualism means that there are some areas within which actors (whether actual individuals or groups) have total arbitrary discretion to pursue their own ends without regard to the impact of their actions on others. A legal right evokes the idea of a domain protected by law within which the individual is free to do as he or she pleases, and the arrangements ensuring that freedom are fair, neutral, and equitable. Judges must facilitate private ordering and avoid regulating or imposing their own values on the aggregate of individual choices. The state thereby polices all boundary crossings by private individuals and contributes to the pretense that individual, private, self-interested values are all that matter.**

**Yet people need others as much as they need their own freedom. Altruism has roots as deep as individualism, and altruism urges sacrifice, sharing, cooperation, and attention to others. Rights help people deny the equal tug of individual freedom and social solidarity on people's hearts and assert that legal rules resolve the tension by assuring that people relate to one another through the recognition and respect for each others' separate, bounded spheres of self-interest. Yet this very mode of thinking renders it more difficult for individuals – and for the legal system – to act upon altruism, social cooperation, and relationships of generosity, reciprocity, and sacrifice. The legal structure of rules, and the abstracted roles (owner, employee etc.) upon which it depends makes it more likely that people feel helpless to counteract existing hierarchies of wealth and privilege or any perceived unfairness.**

**Robert Gordon explains: "This process of allowing the structures we ourselves have built to mediate relations among us so as to make us see ourselves as performing abstract roles in a play that is produced by no human agency is what is usually called (following Marx and such modern writers as Sartre and Lukacs) reification. It is a way people have of manufacturing necessity: they build structures, then act as if (and genuinely come to believe that) the structures they have built are determined by history, human nature, and economic law."** Robert Gordon, Some Critical Theories of law and Their Critics, in the Politics of Law 650 (David Kairys, ed., third edition, Basic Books: New York 1998).

## CRT reject the critique of rights

The Bridge, CriticalTheory, Critical Perspectives on Rights, https://cyber.harvard.edu/bridge/CriticalTheory/rights.htm

Although **critical race theorists** and many feminist legal theorists acknowledge their indebtedness to critical legal studies, they **reject in part or in whole the critique of rights. The existing system of legal rights, they concede, is unstable and often manipulated to advance the interests of the wealthy and powerful. But, as illustrated by Kimberle Crenshaw's discussion, rights can be defended and reconstructed; the critique of rights neglects the historical potential of rights in the real lives of people of color and women.**

**The argument offered by critical race theorists and feminists to defend and reconstruct rights has several elements. First, although the establishment of legal rights, even if much more enforced than at present, would not eliminate racism and sexism, arguments for and public recognition of rights for persons of color and women do help to combat group-based oppression. As Richard Delgado rights, "Rights do, at times, give pause to those who would otherwise oppress us; without the law's sanction, these individuals would be more likely to express racist sentiments on the job. It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment."**

Second, **the impact of rights discourses on social psychology is likely, on balance, to be beneficial to minorities and to women. The organization of human relationships in terms of rights may perpetuate alienation and reinforce artificial distance between people but it at least accords everyone a modicum of respect. And, as a rhetorical rallying cry, rights discourse can both mobilize those who have been oppressed and lend them a greater sense of self-respect and empowerment. Few members of historically disadvantaged groups are deluded by the language of rights into believing that the current distribution of wealth and power is legitimate. The vast majority are able to sustain a "dual consciousness" – recognizing and capitalizing on the revolutionary potential of legal rights while remaining skeptical of the overall social and political order in which rights are currently embedded.**

**Third, the content and language of rights are malleable, not fixed, and afford an medium through which even the disempowered can claim equal rights to participate in defining their content. Even if it is only the hypocrisy of the powerful to which they appeal, the disempowered can use the language of rights to demand recognition, and by so doing, contribute to reshaping rights themselves. Using rights talk can get some people in the game who have not even been recognized before as players.**

**Further, for both people of color and women, social solidarity and close connections with others may be less elusive than protection of personal space and boundaries. Asserting rights as a group can itself enhance solidarity while also assisting individuals in their own personal journey to recognize what they can and should demand for themselves.**

## CLS overlooks the lived experiences of Black people

Patricia **Williams**, **1987**, Alchemical Notes: Reconstructed Ideals From Deconstructed Rights, 22 Harv. Civil Rights-Civil Liberties L. Rev. 401 (1987)

**The CLS disutility argument is premised on the assumption that rights' rigid systematizing may keep one at a permanent distance from situations which could profit from closeness and informality: "It is not just that rights-talk does not do much good. In the contemporary United States it is positively harmful." Furthermore, any marginal utility to be derived from rights discourses is perceived as being gained at the expense of larger issues; rights are pitted against, rather than asserted on behalf of, the agencies of social reform. This reasoning underlies much of the rationale for CLS's abandonment of rights discourse, and for its preference for informality—for restyling, for example, arguments about rights to shelter for the homeless into arguments about the "needs" of the homeless."**

**However, such statements about the relative utility of "needs" over "rights" discourse overlook that blacks have been describing their needs for generations. They overlook a long history of legislation against the self-described needs of black people, the legacy of which remains powerful today. While it is no longer against the law to teach black people to read, for example, there is still within the national psyche a deeply, self-replicating strain of denial of the urgent need for a literate black population. ("They're not intellectual," "they can't…"). In housing, in employment, in public and in private life it is the same story: the undesired needs of black people transform them into undesirables or those-without desire ("They're lazy;" "they don't want to…").**

**For blacks, describing needs has been a dismal failure as political activity. It has succeeded only as a literary achievement. The history of our need is certainly moving enough to have been called poetry, oratory and epic entertainment—but it has never been treated by white institutions as a statement of political priority. Some of our greatest politicians have been forced to become ministers or blues singers…[F]rom blacks, stark statistical statements of need are heard as "strident," "discordant" and "unharmonious"; heard not as political but only against the backdrop of their estwhile musicality, they are again abstracted to mood and heard as angry sounds.**

For blacks, therefore, **the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather, the goal is to find a political mechanism that can confront the denial of need. The argument that rights are disutile, even harmful, trivializes this aspect of black experience specifically, as well as that of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement which rights provide.**

# Key Cases:

## Citizen United v. Federal Election Committee, No. 08–205 (January 21, 2010).

Background

Citizen United, a nonprofit organization, sought to run television commercials promoting its film Hillary: The Movie, a documentary critical of the then-Senator Hillary Clinton, and to show the movie on DirecTV. The Bipartisan Campaign Reform Act of 2002 (BCRA)(AKA McCain-Feingold), prohibited corporations and unions from using their general treasury funds to make an "electioneering communication" or for "independent expenditures," defined as speech that expressly advocates the election or defeat of a candidate and that is made independently of a candidate's campaign. In January 2008, the US district court for the District of Columbia ruled that the commercials violated provisions in the Bipartisan Campaign Reform Act of 2002 restricting "electioneering communications" 30 days before primaries. Though Citizens United argued that the film was fact-based and nonpartisan, the lower court found that the film had no purpose other than to discredit Clinton.

The Supreme Court found that the legislation's prohibition of all independent expenditures by corporations and unions were invalid and could not be applied to spending such as that in "Hillary: The Movie." Kennedy wrote: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." He also noted that since there was no way to distinguish between media and other corporations, these restrictions would allow Congress to suppress political speech in newspapers, books, television and blogs. The Court overruled Austin v. Michigan Chamber of Commerce, which had previously held that a Michigan campaign finance act that prohibited corporations from using treasury money to support or oppose candidates in elections did not violate the First and Fourteenth Amendments. The Court also overruled the part of McConnell v. Federal Election Commission that upheld BCRA §203's extension of §441b's restrictions on independent corporate expenditures.

## RA.V. v. City of St. Paul, 505 U.S. 377 (1992)

Teenagers allegedly burned a homemade cross inside the fenced yard of a black family that lived across the street from the defendant; the incident took place in the middle of the night. D was prosecuted under the St. Paul "Bias-Motivated Crime Ordinance," which provided that "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The Supreme Court (5-4) concluded that the law was impermissibly content-based, because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."

The Supreme Court has previously held in Chaplinsky and after that the First Amendment does not protect "fighting words." (Court held that the statute in question only impacted "fighting words"--- this prevented overturning the ordinance on overbreadth grounds) Nevertheless, even though the government is regulating a supposedly "unprotected" category (such as fighting words), it may not do so in a content-based manner.

Justice Scalia gave two examples of what he considered to be impermissibly content based regulations of "unprotected" categories: The government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government. Similarly, a city council may not enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government.

But there is a caveat to the above rule. Scalia acknowledged that there is an exception to the rule that even unprotected categories enjoy complete freedom from content-based regulation: when "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists," and the content discrimination is allowed. Thus the state could choose to prohibit only "the most lascivious displays" of sexual activity, rather than all constitutionally-obscene materials; or, the federal government can (as it does) criminalize only those threats of violence that are directed against the President becayse in each case, the proscribed speech represents the most extreme instance of the reason why the whole category is unprotected in the first place (i.e., it is the "most obscene," or it is the "most dangerously violent").

Analysis

This case raises the classic dilemma that free speech entails a freedom to hate and pits civil libertarians against the postmodern critical theorists. The case implicates not only racism, but hate crime legislation for sexism, heterosexism, and religious persecution. Additionally, objectivists take exception with that very concept of regulating some types of speech.

The debate on this decision is focused on the underlying value conflict because of its limited scope. While hate crime legislation is unconstitutional under *R.A.V.*, hateful motivations may be used to enhance penalties for other crimes (e.g. racially-inspired murder can be punished more harshly than other murders). This is problematic for those seeking a non-critical debate because from the perspective of most links we can think of there is little difference between hate crime legislation and hate crime enhancements. Ultimately, we think this case is essential to a courts topic, whether focused on the First Amendment or as part of a “social issues potpourri” due to the wealth of legal scholarship on the case and the centrality of the social issues it raises.

## *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff’d mem., 475 U.S. 1001 (1986)

Background

Indianapolis enacted an anti-pornography ordinance drafted by feminist scholars Andrea Dworkin and Catherine MacKinnon. The ordinance contained four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who had seen or read pornography had a right of action against the maker or seller.

"Pornography" under the ordinance is defined as "the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

The Seventh Circuit (Judge Easterbrook) invalidated the ordinance on the First Amendment ground that the ordinance is impermissibly aimed at viewpoint and the Supreme Court summarily affirmed.

The Seventh Circuit summed up the dilemma of free speech eloquently, stating: Depictions of pornography tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex, which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." Yet this simply demonstrates the power of pornography as speech.

Analysis

Another classic case within the scholarship. Not only does this case problematize the promise of freedom through free speech for those not within the majority, but unlike *R.A.V.* the holding is fully unique because there is no civil rights based anti-pornography act of any kind.

This case raises gender literature, heterosexism literature (gay porn was banned under this statute too), in addition to the legal literature.

# Additional Bibliography


Richard Delgado and Jean Stefancic, January 2018, Must We Defend Nazis? Why the First Amendment Should Not Protect Hate Speech and White Supremacy, NYU Press (2018)

From NYU Press: “In Must We Defend Nazis?, legal experts Richard Delgado and Jean Stefancic argue that it should not. Updated to consider the white supremacy demonstrations and counter-protests in Charlottesville and debates about hate speech on campus and on the internet, the book offers a concise argument against total, unchecked freedom of speech.

Delgado and Stefancic instead call for a system of free speech that takes into account the harms that hate speech can inflict upon disempowered, marginalized people. They examine the prevailing arguments against regulating speech, and show that they all have answers. They also show how limiting free speech would work in a legal framework and offer suggestions for activist lawyers and judges interested in approaching the hate speech controversy intelligently.”

Bell, Jeannie, "Oh Say, Can You See: Free Expression by the Light of Fiery Crosses," 39 Harvard Civil Rights-Civil Liberties Law Review 335 (2004)

Article argues cross burning should be treated as a hate crime, which may be prosecuted rather than as constitutionally protected hate speech. Argues 1A scholars do not put cross burning in the correct historical perspective and race theorists do not analyze the 1A issues correctly.

McMasters, Paul, “Must a civil society be a censored society?,” Human Rights, published by the American Bar Association, Fall 1999, Vol. 26, No. 4

Argues we should never take steps to censor speech and RAV is correctly decided. Also argues hate speech laws encourage appropriation of victims group’s identities.

Delgado and Stefancic, "The Boundaries of Free Speech: Understanding Words That Wound”, 2004

Revisits Delgado’s seminal work: Delgado, Richard, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. C.R.-C.L. L. Rev. 133 (1982). Describes the paternalistic approach taken by many advocates of regulating hate speech and the ‘tough love’ approach of conservative libertarians. Also discusses hate speech regulation in an international context

Demaske, Chris, "Modern Power & the First Amendment: Reassessing Hate Speech," 9 Communications Law & Policy J. 273 (Summer, 2004, #3)

Modern power dynamics indicate that free speech doctrine needs to be reconsidered— this requires the Court to think about the role of group identity and how speech can be resistant and oppressive. The article also advocates a different way to analyze 1A questions and reject the content neutral analysis traditionally used to assess these kinds of questions

Holdowsky, Jonathan, "Out of the Ashes of the Cross: The Legacy of R.A.V. v. St. Paul," 30 New England L. Rev. 1115 (1996)

Lower courts have applied RAV in ways that are arbitrary, incoherent and self-serving. Court needs to clarify (perhaps overturn) its holding.

Butler, Judith, “Constitutions and ‘Survivor Stories’: Burning Acts: Injurious Speech”, 3 U Chi L Sch Roundtable 199, 1996

A reading of the RAV decision that explores the power dynamics of the decision and the violence that precipitates hate speech.

Tsesis, Alexander, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (2002)

The dangers of hate speech are compounded when it is systematically developed over time. This becomes part of the culturally acceptable dialogue, which leads to the persecution of minorities.

Franks, Mary Anne, Professor of Law at the University of Miami School of Law, The Cult of the Constitution: our deadly devotion to guns and free speech, Stanford University Press, 2019

In this book Professor Franks outlines the ways that, wrapped in the belief of their own constitutional righteousness, First Amendment fundamentalists have led the doctrine into dangerous territory.

An Overview Of Past Pornography Rulings By The Supreme Court
[PBS] https://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/overview.html

Sunstein, "Pornography and the First Amendment," 1986 Duke L.J. 589 (1986).

Sunstein counters "content neutrality" in the context of antiporn legislation by positing that such legislation is "directed at the harm rather than at viewpoint." Invoking the footnote of Carolene Products, Sunstein contends that the economic advantages of the porn industry actually function to limit the marketplace of free speech and justify antiporn legislation.

MacKinnon, "Pornography, Civil Rights, and Speech," 20 Harv.C.R.-C.L.L.Rev. 1

(1985). Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," 8 Harv. Women's L.J. 1 (1985).

MacKinnon and Dworkin outline the premise of their statute and argue that pornography's societal harms extend beyond the individual viewing the work and therefore justify regulation. They also contend that pornography underlies violence against women.

Rosen, "SYMPOSIUM: DEMOCRACY IN ACTION: THE LAW & POLITICS OF LOCAL GOVERNANCE: Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances," 21 J. L. & Politics 223 (2005).

Tailoring antiporn ordinances to permit sub-state polities (but not states or the federal government) to enact content-based regulations may advance rather than impede foundational free speech values.

Allen, Pornography and Power, Journal of Social Philosophy, Winter 2001, 512-31 (2001)

"Insofar as pornography is empowering, it is a possible site for resistance, but insofar as the genre is structured to a large extent by relations of masculine dominance and feminine subordination, it is also a possible site of the application and articulation of oppression. Finally, what might allow pornography to go from being a possible to being an actual site for resistance is precisely the resources that are generated by the collective power of feminism as a social movement."

Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's

Rights (1995); Meyer, "Sex, Sin, and Women's Liberation: Against Porn-Suppression," 72 Tex.L.Rev. 1097 (1994).

Pornography can empower women as greater sexual citizens

Martha Minnow, Making All the Difference: Inclusion, Exclusion, and American Law 306-311 (Cornell U. Press: Ithaca 1990)

Patricia Williams, 1987, Alchemical Notes: Reconstructed Ideals From Deconstructed Rights, 22 Harv. Civil Rights-Civil Liberties L. Rev. 401 (1987)