

MODULE 1

Free Speech Values; What Is Speech?

First Amendment Law · Fall 2026 · FlexTime, Manhattan

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Three sentences

The course sits between them.

“The unexamined life is not to be lived.”

Socrates

“I only know that I know nothing.”

Socrates, by way of Plato

“War is the continuation of politics by other means.”

Carl von Clausewitz

The first two set the register. The third is doctrine — keep it for the fighting-words material.

Two constitutions

Before any doctrine — what this course is going to claim.

“*...to teach you, in a certain way, **two different constitutions.***”

CONSTITUTION ONE

**The one we have been living on
for 100-plus years.**

CONSTITUTION TWO

**What the last ten years
have made of it.**

Notice that I haven't said 250.

Why protect speech at all?

Three reasons the Court has actually adopted. Which one you privilege decides cases.

1

Truth

“Free trade in ideas” — Holmes, dissenting in Abrams

It protects the liar. The falsehood is an input.

2

Self-government

Meiklejohn — the citizen is the sovereign

Includes Blasi’s checking value: speech that exposes official abuse.

3

Autonomy

Self-realization; freedom of thought

The only one that also generates a right in the audience.

Not three ways of saying the same thing. They decide cases differently — and the next slide is where the doctrine runs out.

Two attempts to go further

The three above are the Court's. These two are attempts to explain or expand them — and one of them is mine.

THE CASEBOOK — TOLERANCE

Free speech trains a society to put up with what it hates.

"I am not a fan of the word tolerance. It feels like you're tolerating someone — you're not actually engaging with the person."

MINE — COMMUNICATION

"If your speech destroys the channels of communication, or puts an end to a conversation and leads to violence, then that's not really speech."

Fighting words is the instance the Court adopted — and the live test case is a slap at the Oscars.

The marketplace has a birthday

Holmes is importing an economic idea, from a particular moment, into the law of speech.

1

Industrialization

An economy that had just learned to believe competition optimizes.

2

Darwin

Selection without a designer. The same shape of argument.

3

The transfer

“Let’s apply the free market idea ... to the idea world.”

He wrote “free trade in ideas” and “competition of the market.” He did not write “marketplace of ideas.” Quote the passage, not the slogan.

What broke it

Not culture. Infrastructure.

NETWORK EFFECTS

“Power starts to consolidate, and you begin to see infrastructure dominating who gets to speak.”

AND THE STATE-ACTION GAP

A platform banning a word is lawful. The same rule imposed on the Times would be “a gross violation.”

Brandeis’s answer is more speech — and sunlight. Both assume you can see the algorithm.

So the clause protects you from the actor that is no longer doing most of the excluding.

Two models of democracy

The Court runs the second one. That choice is why corporations speak.

PARTICIPATORY

Speech is protected because the speaker takes part in governing herself.

The right belongs to the speaker.

INFORMATIONAL

Speech is protected because the audience needs the information.

The right belongs to the listener.

“Obviously it’s not that Ford Motor Company feels happy when it participates.”

And the clause reaches what speech depends on: censor the films, or license the projectors — same thing.

The whole map, in one glance

The board, digitized. Everything this course does after today is a branch of it — and this slide comes back.

MODULE 1

First Amendment Values

Truth · democracy · autonomy · tolerance

MODULE 1

Speech vs. Conduct

Pure speech · expressive conduct · government speech

MODULE 2

Content-Based vs. Content-Neutral

Strict against intermediate — and the exceptions

MODULES 4-6

Disfavored Categories

Incitement · solicitation of crime · threats · fighting words · defamation · commercial · sexual speech

MODULE 7

Place of Speech

Public forum doctrine. Where it happens does the work.

MODULE 3

Four Facial Failures

Prior restraint · vagueness · overbreadth · compelled speech

THROUGHOUT

Related Protections

Press · assembly → association · petition — and the religion clauses

It looks like a decision tree. It does not behave like one, and I will say so all semester.

Coverage is a language question

Not “is it valuable?” but “is there an audience who could read it?”

“What you’re asking is whether there is a language that people might understand.”

Source code

Addressed to a machine — and to programmers.

Smoke signals

Nobody hesitates. So the test is not the medium.

A Facebook “like”

The judge did not say it was not communicative.

It does not have to be something everyone understands. It just has to be something there is an audience for.

Spence: the threshold screen

Both halves are required, in the opinion's order — intent, then likelihood.

1 Intent to convey a particularized message

+

2 Great likelihood the audience would understand it

Restated in Rumsfeld v. FAIR (2006): is the conduct inherently expressive?

Hurley, 1995

The Court quotes “particularized” and holds it is NOT a condition of protection.

Otherwise it would not reach Pollock, Schoenberg, or the Jabberwocky.

Footnote 8 decides the case: an interest in what the flag MEANS is “directly related to expression,” so O’Brien does not apply.

O'Brien: the four prongs

Learn the test cold, then find the hinge.

1

Within the constitutional power of the Government

2

Furthers an important or substantial governmental interest

3

That interest is **UNRELATED** to the suppression of expression

← the hinge

4

Incidental restriction no greater than is essential

Prong three does not decide the case. It sorts the case into a tier — and Module 2 asks whether the tiers are different.

Johnson: the fork

You should be able to draw this from memory.

Is the conduct expressive under Spence?

Is the State's interest related to the suppression of expression?

NO — UNRELATED

O'Brien.
Intermediate scrutiny.

Texas's breach-of-peace interest.
Not implicated on these facts.

YES — RELATED

Strict scrutiny.
Texas loses.

Preserving the flag as a symbol
of nationhood and national unity.

Same question as O'Brien prong three — asked at the front of the analysis instead of the middle.

The clause protects minds

My own proposal — and the most contestable thing I will say today.

Speech

Association

Religion

↓ all three point at thought ↓

STANLEY v. GEORGIA

Obscenity is unprotected — and Georgia still could not punish mere possession.

“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”

Dreams partly reconstructed from electrodes. Music reconstructed from brainwaves. “When that happens, we have to be ready.”

Stanley v. Georgia, 394 U.S. 557, 565 (1969) · West Virginia v. Barnette, 319 U.S. 624 (1943) · Neurotechnology framing: First Amendment, Spring 2026, Day 1 (20 January 2026) — not delivered in the Fall 2026 opening.

A hypothetical for your files

Run the screen. Then argue the other side.

Rosa flies a bare United States flag upside down from her porch.

No tape. No peace symbol. No sign. No crowd. She is cited under a general ordinance on displays.

1

Does she satisfy Spence?

2

Does Hurley make prong two irrelevant?

3

Change one fact. When does coverage arrive?

Nobody has asked yet whether the ordinance survives review. That is Module 2.

Compare Spence, 418 U.S. 405 (1974); Texas v. Johnson, 491 U.S. 397 (1989)

What we have not settled

Carry these. They come back.

- 1 Does the marketplace still have a justification — or only momentum?
- 2 Is there speech with no audience? A diary. A language of one.
- 3 After Hurley, does the Spence screen exclude anything at all?
- 4 If the clause protects minds, does it already reach neural data?
- 5 Is there any doctrinal route to private infrastructure — or is that a legislature's problem?