Resources on First Amendment Rights and Responsibilities on Campus
Compiled by Jeremy Fiel
August 2020

These are some notes and resources I have put together to better understand our First Amendment rights, not only generally but also on public university campuses and in Arizona. We need to know what kinds of expression are protected, not only to defend our own rights, but so that we do not inappropriately limit the expression of others.

If you have serious concerns about a First Amendment issue, talk to an attorney. I am not qualified to give legal advice.

I think these three broad principles are useful.

1. In people's private speech that is not directly related to their work responsibilities and does not use university resources, we have wide latitude in our speech. This is especially true when the speech addresses matters of public concern or politics. And as government agents, it is unconstitutional to limit or punish others' private speech that is not otherwise exempt from First Amendment protection. So, respect other people's right to freedom of expression, which includes their right not to express themselves.

2. In speech that directly entails (non-academic) work duties and resources, there are more limits on our speech. The clearest limits are when using university resources or our classes to advocate for specific election or legislative outcomes. There are also stricter limits on "institutions" than there are on "individuals." For example, Arizona state law and UA policy hold that individuals should not imply that they represent UA as an institution when taking stances on political or policy controversies.

3. As a regulator, when in doubt, err on the side of freedom of expression. Don't ask what you can restrict or punish. Ask how you can encourage free dialogue in productive ways. Respect people's right to speak and to listen. Counter bad speech with good speech.

Much of the material below comes from these three sources, which I am not citing throughout.

First Things First: A Modern Coursebook on Free Speech Fundamentals (2019)
Ronald K.L. Collins, Will Creeley, David L. Hudson, Jr., with Jackie Farmer

Free Speech on Campus (2017)
Erwin Chemerinsky and Howard Gillman

First Amendment Law in a Nutshell, 5th Edition (2018)
Jerome A. Barron and C. Thomas Dienes

Table of Contents

FEDERAL AND STATE LAWS

The Constitution of the United States
https://constitution.congress.gov/constitution/

Amendment 1. *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Amendment 14, Section 1*. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In, "Congress shall make no law…," the courts have construed "Congress" to mean the government as a whole, and have construed "make no law" to mean any governmental effort to regulate or punish expression. Hence, this is not just about U.S. Congress passing laws, but governmental actors at all levels doing things to infringe on the right to freedom of expression.

The U.S. Constitution is among the most protective of free expression in the world, although there are exceptions for some types of speech. It also does not protect speech from the actions of private individuals, private businesses, or private schools.

Also note that the U.S. Supreme Court has ruled that under the Fourteenth Amendment, a state cannot take away rights protected by the First Amendment of the U.S. Constitution, including freedom of expression; *Gitlow v. New York* (1925). This has been key to extending free speech rights, particularly when states infringe on them.

FIRST AMENDMENT PRINCIPLES & HISTORY

The United States is unique in the strength of its commitment to the ideal of freedom of expression. But it would be wrong to romanticize this. Many of the same people who helped write and ratify the Bill of Rights passed the Sedition Act in 1798, which made it a crime to criticize the government. John Adams's administration used it to prosecute journalists.

It was not until past 100 years that strong freedom of expression protections emerged as a reality. To the extent that there was ever a "golden age" of free speech, we are arguably living in it.

The commitment to freedom of expression is grounded in idea that it is essential to freedom of thought, knowledge, self-expression, and peaceful democratic self-government. Various claims along these lines include:

- More debate will produce better judgments

- More knowledge will make for more self-realized persons
- More associations and beliefs will make us more open-minded
- More press freedom will hold those with power accountable
- More robust expression of all sorts will make us a freer people
- More freedom of speech/press betters our chances to check government abuses, to discover truth, beauty, freedom
- Free expression allows a diverse political community to work through different views and air grievances peacefully
- Censorship has been on the side of authoritarianism, conformity, ignorance, and the status quo. Free speech advocates have been on the side of making societies more democratic, diverse, tolerant, educated, and open to progress
- Governmental protection of free speech is essential to protecting the flow of information, which as a public good tends to be undervalued in the marketplace and political system
- Chapter Two of John Stuart Mill's *On Liberty* is one of the most famous defenses of free speech and thought.

Many founders originally resisted a Bill of Rights, because they thought it would imply that rights were granted by the government. They believed that the danger was in government taking away "inalienable" rights, but they were ultimately convinced that a Bill of Rights was necessary to prevent this.

It is important that they chose the First Amendment to protect freedom of speech and expression. Its wording is also important: "*Congress shall make no law… abridging the freedom of speech…*" This implies that freedom of expression is an inherent right of individuals, and that the government should be prevented from taking it away.

FREE SPEECH EXCEPTIONS UNDER U.S. LAW

Not all speech is protected from government action, however, and virtually all of the legal action is around these exceptions. Speech/expression can cause harm, so the government claims a legitimate interest in regulating it. But it has to reconcile this with the protections promised by the First Amendment. The courts have two common ways evaluating speech to determine whether it is protected: categorization and balancing.

Unprotected Speech Categories

Categorization is a systematic effort to delineate specific *categories of speech* that are either unprotected or receive limited protection. This is where we have the most guidance, because precedent matters and things are more predictable. Courts have emphasized the low value of speech in unprotected categories, in combination with the potential harms of such speech.

The U.S. Supreme Court has established several categories of unprotected speech, and they have clearly and explicitly resisted efforts to create any new unprotected categories.

Unprotected categories:

1. Incitement: the incitement to illegal conduct
    a. Although courts have historically often deferred to the government when regulating incitement, they have done so less over time.
    b. In early cases *Schenck v. United States* (1919) and *Whitney v. California* (1927), the Court upheld convictions using the "clear and present danger" test: whether speech created "a clear and present danger that… will bring about the substantive evils that Congress has a right to prevent." This test was used less over time.
    c. *Brandenburg v. Ohio* (1969): Court overturned conviction of KKK leader Brandenburg after speech in which he was alleged to advocate crime.
        i. Court overturned conviction and held the OH criminal syndicalism law overly broad and unconstitutional under the First Amendment.
        ii. *Brandenburg* test: the state cannot forbid the advocacy of illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."
    d. The *probability* and the *imminence* of the danger arising from speech both matter.
2. True threats: clear statement indicating unequivocal intent to cause serious bodily harm to another.
    a. *Virginia v. Black* (2003): Court upheld VA's ability to ban cross-burning, but ruled unconstitutional a provision claiming that any act of cross-burning was prima facie evidence of intent to intimidate. The state must prove intent to intimidate.
    b. O'Connor in *Virginia v. Black*: "True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur."
3. Fighting words: profane, face-to-face personal insults likely to cause physical violence.
    a. *Chaplinsky v. New Hampshire* (1942): Walter Chaplinsky was distributing religious literature on a public sidewalk. He got in an argument and called the town marshal "a God-damned racketeer" and "a damned Fascist." He was arrested and convicted under a state law that prohibited intentionally offensive, derisive, or annoying speech to any person who is lawfully in a street or public area.
        i. Court upheld the conviction unanimously
        ii. Court defined fighting words as "words which by their very utterance inflict injury or cause an immediate breach of the peace."
    b. The Supreme Court has never overturned *Chaplinsky*, but it has never again upheld a fighting words conviction.
    c. *Cohen v. California* (1971): Court narrowed the scope of the fighting words doctrine by ruling that it applies only to speech directed at another person that is likely to produce a violent response.
        i. Court overturned a CA conviction of Cohen for wearing "FUCK THE DRAFT" jacket.
        ii. This expression did not qualify as incitement, fighting words, or obscenity.
    d. Court has often found laws prohibiting fighting words to be unconstitutionally vague or overbroad.

e. *R.A.V. v. City of St. Paul* (1992): Court ruled that gov't cannot regulate hate speech when it makes content-based distinctions.
    i. Teens burnt a cross on a black family's lawn, were charged under a local ordinance banning the display of a symbol that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."
    ii. Court unanimously found the law overly broad because it "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."
f. Court has created Catch-22 when it comes to regulation of fighting words
    i. Law punishing fighting words in general will be too broad and vague
    ii. Narrower law focusing on certain kinds of fighting words will be struck down for content-based distinctions.

4. Obscenity: erotic speech with no redeeming social value
    a. *Roth v. United States* (1957): Court established obscenity as an unprotected category, but limited it to the "prurient interest" in sex.
    b. *Miller v. California* (1973): Court reaffirmed obscenity as unprotected but modified the Roth test, restricting it to hard-core pornography. Established *Miller* test with three elements:
        i. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest
        ii. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
        iii. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
5. Defamation: false statement that harms the reputation of another
    a. When written, defamatory statements are known as libel; when spoken, they are known as slander. Defamation is a tort—a civil, rather than criminal, wrong.
    b. I discuss Arizona defamation law below
    c. A defamation plaintiff must establish all of the following six elements:
        i. 1. Identification: publication was "of and concerning" the plaintiff.
        ii. 2. Publication: statements were disseminated to a third party.
        iii. 3. Defamatory meaning: statements in question were defamatory.
        iv. 4. Falsity: the statements must be false. Truth is an absolute defense to a defamation claim. Generally, the plaintiff bears the burden of proof of establishing falsity.
        v. 5. Statements of fact: statements in question must be objectively verifiable as false statements of fact. This means the statements were presented as true facts, but are demonstrably false.
        vi. 6. Damages: the false and defamatory statements must cause actual injury or special damages.
    d. *New York Times Company v. Sullivan* (1964) set high bar for defamation claims by public figures and public officials
        i. Montgomery Public Safety Commissioner, Sullivan, sued *NYT* for running an ad criticizing his office for cracking down on civil rights protests on the grounds that it had inaccuracies and stained their reputations.
        ii. AL state courts ruled in favor of Sullivan. US Supreme Court overturned that decision unanimously.

iii. "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."
iv. "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."
v. "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'"

e. In *Sullivan*, the Court fashioned new constitutional privilege in defamation claims by public officials and public figures and established the *actual malice* standard.
i. Public official suing libel must prove by clear and convincing evidence, "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or [not]."
ii. Actual malice refers to the subjective awareness that his statement is false or that there is a high probability that it is false.
iii. Reckless disregard requires that the defendant have "serious doubts as to the truth of the publication."

f. *Gertz v. Robert Welch, Inc.* (1974): Supreme Court allowed states to set lower standards of liability with respect to defamation against private individuals.
i. Gertz was an attorney hired by a family to sue a police officer who had killed their son. The John Birch Society accused Gertz of being a "Leninist" and a "Communist-fronter."
ii. Supreme Court reversed a lower decision against Gertz, holding (5-4) that Gertz's rights had been violated and ordering a new trial.
iii. "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater."
    - This shows that Courts expect public officials to first use their resources to defend themselves and fight bad speech with good speech.
iv. Public figures and public officials must accept closer public scrutiny, including comments on attributes related to their fitness.
v. Not so for private individuals, who have greater rights to privacy and more need for the protection of their reputation.
vi. But where libel involves speech of public concern, even a private plaintiff must prove "actual injury" related to impairment of reputation, personal humiliation, and mental anguish and suffering.
vii. Reaffirmed that falsity alone is not grounds for libel: "we protect falsity in order to safeguard truth." "[E]rroneous statement is inevitable in free debate, and must

be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"

Unprotected Conduct and Protected Speech

Conduct is not protected by the First Amendment, but sometimes the line between conduct and speech is blurry. Some forms of expressive or symbolic speech, carried out by conduct, are given First Amendment consideration. Conversely, there are some forms conduct that can be carried out by otherwise protected speech, but where the conduct is what matters.

1. Expressive Conduct: the court has two imports tests for expressive conduct.
   a. *Spence v. Washington* (1974): Supreme Court overturned Spence's conviction for affixing peace symbol to American flag and displaying in his window.
      ii. *Spence* test: Court defined symbolic speech with 2-part inquiry
         - 1. Was there an intent to communicate a specific message?
         - 2. Given the circumstances, was it probable that the message would be so understood by its audience.
      iii. Spence test is a guide for identifying symbolic speech or expressive conduct, but Supreme Court has vacillated in using it.
      iv. Even if conduct is determined to be expressive, there is still the question of whether it merits First Amendment Protection
   b. *United States v. O'Brien* (1968): O'Brien burnt draft card; Court upheld conviction.
      i. When speech and non-speech elements are combined, "a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedom."
      ii. *O'Brien* test: "a government regulation is sufficiently justified…
         - 1. If it is within the constitutional power of the Government;
         - 2. If it furthers and important or substantial governmental interest;
         - 3. If the governmental interest is unrelated to free expression;
         - 4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."
      iii. This test seems protective of expressive conduct, but it has not been in practice, and Court has been deferential to gov't.
   c. *O'Brien* test applies only if the regulation is content-neutral. If the regulation is not content-neutral, then strict scrutiny standard applies.
   d. The most famous expressive speech case is *Texas v. Johnson* (1989)
      i. Court voted 5-4 to overturn TX conviction of Johnson for burning a flag in protest at 1984 GOP Convention.
      ii. Court used Spence test, found it to be expressive conduct, found gov't had no interests in restricting speech unrelated to the suppression of expression, found there was no actual or threatened public disturbance, and the conduct did not constitute fighting words.
      iii. Law had to meet strict scrutiny b/c the conviction was content-based
      iv. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

e. Often, though, the Court has been unwilling to view various types of actions as symbolic speech meriting First Amendment protection.

2. Harassment: some forms of harassment are illegal conduct under anti-discrimination law, but harassing language in and of itself is not an unprotected category.
   a. It is the conduct, not the speech itself, that can be punished.
   b. Under the U.S. Supreme Court, *Davis v. Monroe County Board of Education* (1999), and under Arizona law (ARS §15-1866), harassment in the educational context is unwelcome, discriminatory conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."
   c. A single instance of offensive speech or expression is unlikely to qualify.
   d. Extreme, repetitive behavior that prevents one from doing one's job or receiving their education is usually required.
   e. If you are subject to such incidents, it may be helpful to document them, tell others, and contact officials in case a pattern emerges.
3. Heckler's Veto: refers to someone threatening or inciting a breach of the peace or disruption of public order to prevent someone else from speaking.
   a. This is conduct that infringes on another person's First Amendment rights.
   b. Often involves conduct that attempts to force the government to prevent another person's speech by causing upheaval.
   c. *Terminiello v. City of Chicago* (1949): Supreme Court set precedent that the danger of disorder arising from hostile crowd reaction does not justify suppressing the speaker.
   d. The government cannot suppress someone's protected speech just because it may rile up a hostile crowd. It is the government's job to police the crowd.

Not Unprotected Categories

Some controversial types of speech are protected under the First Amendment:

1. Hate speech: hate speech cannot be restricted or punished by the government unless it falls into another unprotected category.
   a. Critics argue that we have unnecessarily elevated the liberty interests of the First Amendment over its equality interests.
   b. Problem with hate speech is that it is hard if not impossible to define, and the government gets to define it. The process of defining hate speech easily leads to the suppression of ideas.
   c. Sometimes hate speech will fall in an unprotected category, in which case it is unprotected.
   d. When accompanying criminal conduct, hate speech can also be used as evidence of a hate crime.
2. Indecent/offensive speech: unless speech is deemed obscene under the *Miller* test, it is not unprotected just because it is profane, vulgar, tasteless, or offensive.
   a. *Cohen v. California* (1971): Supreme Court also declared it impermissible to restrict speech because it was offensive or might evoke negative emotional responses.
      i. "One man's vulgarity is another's lyric."
      ii. The state's concern with offensive language is "inherently boundless."

iii. "…governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views."

b. *Hustler Magazine v. Falwell* (1988): Supreme Court established that public officials and public figures must meet the high standards of defamation in cases where they allege emotional distress.
   i. *Hustler* parodied a liquor ad to mock Jerry Falwell by describing a drunken episode with his mother in an outhouse.
   ii. Supreme Court unanimously sided with *Hustler*, reversed lower ruling that had sided with Falwell for emotional distress.
   iii. "Public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without meeting standards for defamation."
   iv. "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."

Balancing Speech and Government Interests

Balancing is more ad hoc than categorization. It is done on a case by case basis based on the competing interests implicated in a given case. The factors balanced include the perceived social value of the speech, the perceived harm of the speech, the types of speakers involved, the nature of the forum, and the neutrality of the regulations on speech. This is harder to predict, because there are no general rules to use in future cases, although there are some themes.

1. Public concerns: the more "public" the targets of the speech and the matters addressed, the more likely the speech is protected under the First Amendment.
   b. *Public officials*: defined to include "those among the hierarchy of government employees who have, or appear to have, substantial responsibility for or control over the conduct of public affairs" *Rosenblatt v. Baer* (1966).
      i. In *Gertz*, the Court discussed some bases for classification
   c. *Public figures*: tend to have access to media to engage in self-help and have voluntarily assumed the risk of adverse publicity.
      i. Total public figure: individual achieves such pervasive fame or notoriety that they become a public figure for all purposes and in all contexts.
      ii. Limited ("vortex") public figure: individual voluntarily injects self or is drawn into a particular public controversy and becomes a public figure for a limited range of issues.
   d. *Public matters*: speech of the sort that addresses civilians' concerns with matters of public importance, especially politics and government, get a comparably high level of First Amendment protection.
   e. Courts in several states, including in Arizona, have classified university professors as public officials or public figures. This means, among other things, a high bar for professors' defamation claims.

2. Neutrality of regulation: the less neutral a regulation is regarding the nature of speech, the less courts defer to the gov't and the more likely the regulation is unconstitutional.
    a. *Content-based* regulations (content discrimination) involve regulation of expression based on what is being discussed (content of the message), but not the viewpoint taken (viewpoint-neutral).
        i. These are presumptively unconstitutional.
        ii. Government restrictions must meet *strict scrutiny*, the most rigorous form of judicial review
            - (1) it has a compelling interest (something necessary or crucial)
            - (2) the law is narrowly tailored to achieving this compelling purpose
            - (3) that the law limits speech in the least restrictive way possible (*least restrictive means* test).
    b. *Viewpoint-based* regulations regulate expression based on the specific stance taken.
        i. These are also presumptively unconstitutional, courts use strict scrutiny
        ii. This is the type of regulation most likely to run afoul of the First Amendment.
    c. *Content-neutral* regulation involves restrictions without regard to the message
        i. Regulations usually focus on time, place, and manner of speech
        ii. Perceived as imposing lesser burden on First Amendment values
        iii. Courts use less stringent *intermediate scrutiny* standard of review, based on severity of restriction on speech
            - (1) Restriction is within the constitutional power of government
            - (2) Restriction furthers important or substantial governmental interest
            - (3) Gov't interest is unrelated to the suppression of free expression
            - (4) Restriction is narrowly tailored (no greater than necessary)
            - (5) Restriction leaves open ample opportunities of communication.
    d. Exceptions to principles against content and viewpoint discrimination
        i. Secondary effects doctrine: courts sometimes allow restrictions on speech because of harms it causes (ex. pornography near schools to protect children)
        ii. Government speech doctrine: gov't has its own right to engage in speech, so it can take positions on issues when promoting a public interest

3. Nature of forum: the more the setting resembles a traditional public space, the stronger the First Amendment protections.
    a. Over time, the Court increasingly rejected government's prerogative to allocate access to public property for some speakers or messages and deny it for others.
    b. *Traditional public forum*: place that historically has been open for free expression
        i. Public park, public sidewalk, etc.
        ii. Government has least ability to restrict speech here, must meet *strict scrutiny*
    c. *Designated public forum*: has not historically been open for expressive activities, but the government has, by policy or practice, opened up for expression
        i. Public auditorium, outdoor spaces on campus
        ii. Reasonable time, place, manner restrictions allowed, but must be viewpoint neutral. Must meet *strict scrutiny* if they are not content neutral, *intermediate scrutiny* if they are content neutral.
    d. *Limited public forum*: government has opened up public property and limited its use to specified groups or dedicated public property "to the discussion of certain subjects"

i. Meeting room in gov't building, public library
ii. Gov't is not required to create such forums, can restrict the people who use it and the purposes it is used for
iii. Reasonable time, place, manner restrictions allowed, but must be viewpoint neutral. Must meet *strict scrutiny* if they are not content neutral, *intermediate scrutiny* if they are content neutral.

e. *Nonpublic forum*: not generally open for expression by the public.
   i. Jailhouse grounds, public university classroom
   ii. Gov't has more leeway, can discriminate between speakers and content
   iii. Courts have been deferential, as long as the government has not shown any intention to have the area used for public speech
   iv. Courts uses *rational basis* standard of review: viewpoint neutrality and meeting the rationality standard of review are sufficient
f. *Government-sponsored environments*: courts are more deferential to government when it regulates speech in nonpublic forums where the speech is construed as government speech. Here speech need not even be viewpoint-neutral.
   i. Military bases, government workers, etc.
   ii. Justification on restrictions:
      - Apply to a sector with a special relationship to the gov't,
      - Laws relate to the operation of that relationship,
      - Sanctions usually are limited to ending the relationship,
      - Those regulated have often voluntarily entered into it.
g. The government has more leeway when restricting speech on/around private property

Problematic Laws and Regulations

Irrespective of the nature of the expression or the context around any particular case, laws (and policies, regulations, etc.) are often found unconstitutional under the First Amendment because the way they are written or enforced can infringe on protected speech. There are three common challenges to laws on First Amendment grounds.

1. Facial challenges are when laws violate the First Amendment on its face. That is, the law forbids or punishes expression that is clearly protected under the First Amendment.
2. Overbreadth doctrine protects speech against laws that are overbroad. An overbroad law affects protected speech, even if it does so unintentionally in an effort to restrict unprotected speech. Overbreadth challenges can be made even if the law was constitutionally applied in a particular case, or even if the expression would have violated a narrower constitutional law.
   a. People have right to be judged according to constitutionally valid laws
   b. This is a special case in which litigants engaged in unprotected activity are allowed to challenge laws to protect a third party
   c. Judicial concern of chilling effect: overbroad laws sanctioned by courts may prevent citizens from engaging in expression that should be protected
   d. Courts are concerned about danger of selective enforcement

3. Vagueness can also lead courts to rule a law in violation of the First Amendment. A law is vague if persons of "common intelligence must necessarily guess as at its meaning and differ as to its application." *Connally v. General Construction Co.* (1926).
    a. Courts have established a due process prohibition on vague laws
    b. Law must be sufficiently precise so that those bound by it can understand the conduct which will subject them to toe sanctions imposed by the law.
    c. Vagueness challenges cannot be made if the law was constitutionally applied in a particular case (you can't get out of punishment for unprotected speech if it was clearly in violation of the law, even if it might have been vague in other cases).

Unnecessary Censorship and Countering Bad Speech

When presented or targeted with "bad speech" (insults, hateful speech, offensive material), attempts to censor, punish, or retaliate often fail.

First, it is unconstitutional for government actors to prohibit or punish speech unless it falls in one of the unprotected categories or meets some other exception. Public officials and institutions can be held liable for any damages caused by these efforts, and if they file a frivolous lawsuit, they can face financial penalties (see Arizona's Anti-SLAPP law).

Second, censorship efforts often backfire and make the speech even more widely disseminated and more impactful than it would have otherwise been, especially in the age of the internet.

The "Streisand effect" is when efforts to suppress speech or hide information inadvertently cause that speech or information to spread more widely. It is named for Barbara Streisand, who in 2003 sued a photographer for taking pictures of her mansion and putting them online. The lawsuit sparked interest and led to hundreds of thousands of people seeing the pictures.

The "Carreon Effect" is the tendency of censorship efforts to result in ridicule or shame for the person attempting to censor the speech. It is named after lawyer Charles Carreon, who got into legal dispute with internet comic site The Oatmeal. After being widely mocked, Carreon dropped his lawsuit.

If the effort entails or sparks a lawsuit, this can also bring to light embarrassing information and evidence in the discovery phase.

So how do you fight "bad speech"? The Supreme Court often cites the "counterspeech doctrine," which entails fighting the bad with the good. That is, use speech that corrects falsehoods or repairs your reputation. It is even better if it defuses conflicts, does not arouse undesirable outside interest, and does not make you look like an authoritarian or a fool. Sometimes ignoring bad speech is effective too, especially if it is meant to provoke a reaction.

Here is some useful advice about writing effective requests for people to take down online information that may be defamatory or violative copyright laws. If speech violates the provider's (e.g., Twitter, Facebook) rules, you can also notify them to request the content be taken down.

SPEECH AT WORK AND SCHOOL

Academic Freedom

The Supreme Court has never established any clear First Amendment privilege with respect to academic freedom, but a few important rulings relate to the rights of professors doing academic work at public institutions.

1. *Sweezy v. New Hampshire* (1957): landmark case where the Court first recognized a constitutional privilege for academic freedom
    a. Sweezy, a professor at the University of New Hampshire, was interrogated by the New Hampshire Attorney General about suspected affiliations with communism. Sweezy refused to answer a number of questions about his lectures and writings. State AG sought to force him to answer, lower courts agreed, but Supreme Court reversed.
    b. U.S. Supreme Court stated that academic freedom is protected by the Constitution.
        i. "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression -- areas in which government should be extremely reticent to tread."
        ii. "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die."
    c. Justice Frankfurter concurred, outlined "four essential freedoms" of a university:
        i. to determine for itself on academic grounds who may teach,
        ii. what may be taught,
        iii. how it shall be taught,
        iv. and who may be admitted to study.
2. *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.* (1967): extended protections for professors at public universities under academic freedom.
    a. Faculty at SUNY-Buffalo were forced to sign statements that they were not members of the Communist Party. Several refused and were fired.
    b. Supreme Court ruled that the requirements were overly broad and unconstitutional. The state must prove the individuals intended to overthrow the U.S. government.
        i. "Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy?"
    c. By imposing a loyalty oath and prohibiting membership in "subversive groups," the law unconstitutionally infringed on academic freedom and freedom of association.
        i. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That

freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

3. *Perry v. Sindermann* (1972): Supreme Court showed it would consider unwritten custom about academic freedom, just as it would consider common law in various industries.
   a. Sindermann was an untenured professor at a junior college whose year-to-year contract had not been renewed after he criticized the Board of Regents.
   b. The Court ruled he was entitled to a trial and a hearing with the Board of Regents.
   c. Even without a formal tenure system, the Court recognized the possibility of a college having an "unwritten 'common law'" "in practice" with something resembling tenure.
4. Courts often use the American Association of University Professors *1940 Statement of Principles on Academic Freedom and Tenure* when analyzing claims of academic freedom and interpreting contracts. Here is some of what it says.
   a. "Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights."
   b. "1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties…
      2. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject…
      3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."
5. US Courts of Appeals have generally held that speech by professors in the classroom and curricular decisions are protected under the First Amendment and academic freedom.
   a. This is especially true if the speech/content is relevant to the subject matter of the course and the decisions have pedagogical justification.
   b. Sometimes this is balanced against unnecessarily creating a hostile or disruptive learning environment.
6. When speaking on administrative or institutional matters, courts have tended to use balancing tests comparable to those of other public employees, discussed next.

Government employees

The government has greater power and control over its employees' speech than it does over other citizens' speech. A series of influential cases show the evolution of government employees' free speech rights over time.

1. *McAuliffe v. Town of New Bedford* (1892): Massachusetts Supreme Court upheld the firing of a police officer fired for engaging in political canvassing.
    a. Reflected widespread view that public employees relinquished free speech rights when they accepted public employment.
    b. Future US Supreme Court Justice Holmes: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."
2. *Pickering v. Board of Education* (1968): U.S. Supreme Court overturned the firing of teacher Marvin Pickering for writing a letter to the editor that criticized the school board for spending too much on athletics and not enough on academics.
    a. "In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."
    b. *Pickering* test: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."
        i. (1) Did the public employee speak on a matter of public concern or importance, or was the speech was more of a private grievance?
        ii. (2) The court uses the "balancing prong" to balance the employee's right to free speech against the employer's efficiency interests.
            - Ex. Does speech disrupt professional relationships or operations in ways that undermine the functioning of the workplace?
3. *Connick v. Myers* (1983): US Supreme Court (5-4) upheld decision by New Orleans DA Harry Connick Sr. to fire Asst. DA Sheila Myers for distributing a questionnaire about office climate and seeking comment about the DA's practices after she was transferred.
    a. Court majority emphasized that government offices need to be able to function free from disruption and interference.
    b. Court reaffirmed protections for speech on matters of "public concern."
        i. The Court defined speech on a matter of public concern as that "relating to any matter of political, social, or other concern to the community."
        ii. Myers ostensibly lost because this was purely a work dispute that harmed important work relationships, it was all done at work during work hours with work resources, and it was not of public concern.
4. *Rankin v. McPherson* (1987): U.S. Supreme Court (5-4) overturned a TX county constable's decision to fire a clerical employee (McPherson) for saying offensive things about President Reagan in a private conversation at work.
    a. Court noted that this was clearly speech on a matter of public concern, and was not a true threat, so it warranted the *Pickering* balancing test.
        i. State failed to prove the statement interfered with effective office functioning
        ii. Statement was not made to the public, and the clerical job had no impact on the law enforcement activities of the constable's office.
5. *Garcetti v. Ceballos* (2006): U.S. Supreme Court (5-4) upheld D.A. Garcetti punishing Asst. D.A. Richard Ceballos for refusing to alter a memo in which he recommended the office dismiss criminal charges in a case because a search warrant contained perjured law enforcement testimony.

a. This decision fundamentally changed public employee free speech jurisprudence.
b. When speaking on matters of public concern, the Court created a new layer of analysis: whether the employee spoke as an employee or as a citizen.
    i. One has less First Amendment protection when speaking as an employee with respect to official work duties (even if the matter is a public concern).
    ii. If the employee spoke more as a citizen (not in course of official work duties), then the court would still apply the rest of the Pickering analysis.
    iii. "*Citizen analogue*" test: if the speech in question has a similar analogue for a citizen (could a citizen do it?), then the employee has a better chance of claiming they are speaking as a citizen. If not, then the employee is likely speaking only as an employee, not as a citizen.
c. "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."
d. "…as long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."
e. "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline... Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."
f. In a dissent, Justice Souter rose concerns about jobs like university professors
    i. "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"
g. Kennedy's majority opinion responded by explicitly reserving this question
    i. "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

6. *Lane v. Franks* (2014): The Court held unanimously that a public employee's speech that may concern their job, but is not ordinarily within the scope of their duties, is subject to First Amendment protection.
    a. Edward Lane was fired in retaliation for testifying, under a subpoena, against a fellow state employee accused of committing mail fraud and theft.
    b. Court clarified the key feature of *Garcetti*: whether speech "is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."
        i. Testimony in judicial proceeding is a "quintessential example" of citizen speech
        ii. Just because speech may concern their job does not automatically transform citizen speech into employee speech.
    c. Using *Pickering* and *Connick* tests…
        i. Speech about corruption of a public program is matter of public concern

ii. Employer could not demonstrate any interest in limiting this speech to promote the efficiency of the public services it performs or "that Lane unnecessarily disclosed sensitive, confidential, or privileged information."

7. *Government-sponsored* or *government-subsidized speech* rights are less clear.
   a. 2 lines of analysis to analyze gov't sponsored speech.
      i. First Amendment approach: gov't may not have obligation to provide funds, but it must operate in a content-neutral and non-discriminatory manner. Gov't cannot do indirectly (via conditions on funding) what it may not do directly (suppress people's free speech rights).
      ii. Government-as-participant approach: government is simply creating various environments through granting subsidies or providing tax exemptions, and it is making allocational decisions that are in the public interest. People can choose whether or not to accept gov't grants and any conditions attached to them. It is fine for gov't to fund some views and not others.
   b. The same balancing principles discussed above often come into play.
      i. First Amendment protections are stronger in contexts/forums that are traditionally open to public expression.
      ii. Restrictions are more permissible if viewpoint-neutral and content-neutral.
      iii. Restrictions are more permissible when they are tailored closely to the purpose of the funds/resources, and are less permissible if they regulate speech outside of that specific purpose.
   c. Courts have indicated a distinction between the gov't as regulator and participant.
      i. When gov't acts as participant speaker in the marketplace, communicating a particular message directly or through others, it need not fund ideas or viewpoints it dislikes.
      ii. If gov't acts as patron, funding the speech of others, it is a regulator and may not selectively fund only certain views or ideas.
   d. Court has also indicated distinction between government's public and private roles
      i. When gov't acts in private role as proprietor, employer, educator, or participant, First Amendment restraints on its activities are often subordinated.
      ii. When gov't acts in public role as regulator, the First Amendment applies with all its force.

Academic Work

There are some conflicts between respect for academic freedom and emerging ability of public employers to regulate work-related speech. The U.S. Supreme Court has not addressed the extent to which their analysis in *Garcetti* does or doesn't alter the First Amendment protections for academic teaching and writing at public universities. But several subsequent cases at federal courts of appeals have made important rulings. (Arizona is in the 9th Circuit Court of Appeals.)

1. *Renken v. Gregory* (2008): 7th Circuit Court of Appeals held that administrative aspects of professors' work are subject to *Garcetti*.
   a. University of Wisconsin-Milwaukee Professor (Renken) got into a dispute with Dean (Gregory) over the execution of a grant, which led to the University terminating the

grant. Renken sued for retaliation and claimed his complaints about grant funding were protected under the First Amendment.
   b. District Court sided with the University, ruling the speech was of private interest and Renken spoke as an employee in regards to his official duties, not as a citizen.
   c. Appeals Court affirmed, noting that the proper administration of the grant was clearly part of Renken's official job duties.
2. *Savage v. Gee* (2012): 6th Circuit Court of Appeals held that *Garcetti* may apply to university work that is not related to academic scholarship or teaching.
   a. Savage, a librarian at Ohio State University, recommended assigning to incoming freshmen a book that discussed homosexuality as aberrant behavior. After a series of lawsuits between faculty and Savage were dismissed, he resigned and sued the university, claimed that he was harassed.
   b. The court ruled against Savage: "Savage's speech as a committee member commenting on a book recommendation was not related to classroom instruction and was only loosely, if at all, related to academic scholarship. Thus, even assuming *Garcetti* may apply differently, or not at all, in some academic settings, we find that Savage's speech does not fall within the realm of speech that might fall outside of *Garcetti's* reach."
3. *Adams v. Trustees of the University of North Carolina Wilmington* (2011): 4th Circuit Court of Appeals rejected *Garcetti* in the context of academic work at public universities.
   a. Associate Professor (Adams) filed a complaint claiming he was denied promotion because of religious discrimination, due to his outspokenness on political and social issues, including in his writing.
   b. The court found no proof of discrimination, but also ruled that *Garcetti* had been applied incorrectly by the lower court:
      i. "…the district court applied *Garcetti* without acknowledging, let alone addressing, the clear language in that opinion that casts doubt on whether the *Garcetti* analysis applies in the academic context of a public university."
      ii. "We are also persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case. Our conclusion is based on the clear reservation of the issue in *Garcetti*, Fourth Circuit precedent, and the aspect of scholarship and teaching reflected by Adams' speech."
4. *Demers v. Austin* (2013): 9th Circuit Court of Appeals rejected *Garcetti* in context of public university professors because of academic freedom concerns.
   a. Demers, associate professor at Washington State University, sued administrators for retaliating against him (including unfavorable performance reviews and service assignments) over a book in progress titled *The Ivory Tower of Babel*, which was critical of academia broadly as well as events at WSU's journalism school.
   b. Appeals Court offered a mixed ruling and sent the suit back to district court, but established an exception to *Garcetti* for academic teaching and writing.
      i. "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor."
      ii. Hence, although the Court found that Demers' writing was part of his official duties, it applied *Pickering* and *Connick* and found that Demers's speech was protected and he could not be punished for it.

        - The speech was a matter of public concern
        - It did not seriously threaten the functioning of university operations
    iii. However, they also ruled that Demers did not prove the supposed retaliation was a response to his book, and he was awarded no damages.
c. Attorney Ken White on *Demers*: "It means that, for public university professors, their rights revert to what they were before *Garcetti* — to the *Pickering-Connick* test, rather than a blanket loss of rights to speak on job-related issues. This is hugely important: had then Ninth Circuit ruled the other way, then the state could fire professors at will if it didn't like, for instance, the stance that a history professor took about a historical event, or a political science professor took about a political dispute, or any professor took about an issue of academic governance on a committee."

5. Overall, there seems to be a sentiment across different circuit courts that the academic aspects of work as professors at public institutions are exempt from *Garcetti* and warrant strong First Amendment protections, but that other aspects of work related to the day-to-day functioning of the workplace may still be reviewed in light of *Garcetti*. The Supreme Court may eventually have to resolve the ambiguity.

Student Speech on Campus

Primary/Secondary Education. Courts have established that students in public schools do have First Amendment rights. Those rights are more likely to be curtailed in primary and secondary schools, with the justification that schools are inculcating community values in young children. But cases involving K-12 education still establish important free speech protections.

1. *West Virginia State Board of Education v. Barnette* (1943): Supreme Court overturned expulsions of two Jehova's Witness students who refused to recite the pledge of allegiance on religious grounds.
    a. First time the Court established that public school students have First Amendment rights, and that gov't officials can violate the First Amendment by compelling people to engage in certain expression.
    b. Also ruled that deference to national symbols such as the flag do not outweigh constitutional protections.
2. *Tinker v. Des Moines Independent Community School District* (1969): Supreme Court overturned suspension of junior high school student Mary Beth Tinker, who was punished for wearing black armbands to protest the Vietnam war.
    a. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
    b. "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."
    c. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."

d. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school, are 'persons' under our Constitution."
e. *Tinker* test (*substantial disruption*): a student "may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others…But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."
f. Another important aspect of *Tinker* is that government officials cannot engage in viewpoint discrimination. Here, school officials banned a symbol representing a specific viewpoint, while at the same time allowing students to wear other symbols, such as Iron Crosses and political campaign buttons.

3. *Hazelwood School District v. Kuhlmeier* (1988): Supreme Court ruled in favor of a high school principal who ordered that two articles not be printed in the student newspaper.
   a. "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."
4. Schools started cracking down on student speech by claiming a variety of things were school-sponsored.
   a. Several states enacted anti-*Hazelwood* statutes, giving students greater free speech protections under state law than US constitution
5. A troubling trend recently is primary and secondary schools punishing students for their social media posts, even when written outside of school time off campus.
   a. Many courts have applied the *Tinker* test (substantial disruption) in these cases, and findings have been mixed. The Supreme Court will eventually have to resolve this.
6. *B.L. v. Mahanoy Area School District, No. 19-1842* (2020): 3rd Circuit Court of Appeals overruled a high school student's suspension from the school junior varsity cheerleading team for a Snapchat post that said "fuck cheer."
   a. Court noted precedent that Students' online speech is not rendered "on campus" simply because it involves the school, mentions teachers or administrators, is shared with or accessible to students, or reaches the school environment.
   b. Court ruled that *Tinker* does not apply to off-campus speech: speech that is outside school-owned, -operated, or -supervised channels and is not reasonably interpreted as bearing the school's imprimatur is not subject to *Tinker* substantial disruption test.
   c. Ruled that…
      i. B.L. did not waive her speech rights by agreeing to the team's rules
      ii. Her suspension from the team implicated the First Amendment even though extracurricular participation is merely a privilege.
      iii. B.L.'s snap was off-campus speech and had not caused any actual or foreseeable substantial disruption of the school environment.

Higher education. Student free speech rights reach their apex for students on public college and university campuses, who are expected to be engaging with a variety of ideas and establishing themselves as independent thinkers.

1. *Healy v. James* (1972): Supreme Court established especially strong First Amendment Protections for students in higher education.
    a. Court ruled president of Central Connecticut State College violated students' rights when he denied recognition to their chapter of Students for a Democratic Society.
    b. "The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary… The college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas,' and we break new no constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."
2. Subsequent cases clarified that public universities are granted less leeway in regulating student speech than elementary schools or high schools.
3. *Papish v. Board of Curators of the University of Missouri* (1973): Supreme Court overturned the expulsion of graduate student for distributing a campus newspaper with offensive content.
    a. Court set aside university's concerns about decency, clarified that public institutions of higher education cannot discipline student speech due to disapproved content.
        i. "…the mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of 'conventions of decency.'"
    b. Public universities, as government actors, violate the First Amendment when they regulate student speech on account of viewpoint.
4. *Doe v. University of Michigan* (1989): U.S. District Court ruled that UM speech codes forbidding hate speech violated the First Amendment.
    a. Ruled that UM was within its power to prohibit fighting words, incitement, obscenity, child pornography, libel, slander, and other speech beyond the First Amendment's protection, or to enact reasonable, content- and viewpoint-neutral time, place, and manner restrictions.
    b. But it could not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed."
5. *College Republicans at San Francisco State University v. Reed* (2007): U.S. District Court in Northern CA blocked SFSU's punishment of students who stomped on Hamas and Hezbollah flags during an anti-terrorism rally on campus.
    a. SFSU accused them of violating the Standards for Student Conduct, specifically a provision that said "students are expected to be… civil to one another and to others in the campus community."
    b. Court ruled this unconstitutional, struck down the speech codes of the CSU system.
    c. "The First Amendment difficulty with this kind of mandate should be obvious: the requirement 'to be civil to one another' and the directive to eschew behaviors that are not consistent with 'good citizenship' reasonably can be understood as prohibiting the kind of communication that it is necessary to use to convey the full emotional power

with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause. Similarly, mandating civility could deprive speakers of the tools they most need to connect emotionally with their audience, to move their audience to share their passion."

   d. "Because the University so assertively communicates that its 'policies' include undefined and apparently elastic mandates to 'be good citizens,' to 'engage in responsible behaviors that reflect well upon their university,' and to 'be civil to one another,' we conclude that there is a considerable risk that the University's trumpeted intention to discipline organizations whose members offend any of these 'policies' will chill to a substantial extent the exercise of expressive rights that students enjoy under our Constitution."

6. Similar University Speech Codes have been struck down several times since.
7. *McCauley v. University of the Virgin Islands* (2010): 3rd Circuit Court of Appeals explained the difference between First Amendment protections for high school and college students.
   a. "We reach this conclusion in light of the differing pedagogical goals of each institution, the *in loco parentis* role of public elementary and high school administrators, the special needs of school discipline in public elementary and high schools, the maturity of the students, and, finally, the fact that many university students reside on campus and thus are subject to university rules at almost all times."
   b. "First, the pedagogical missions of public universities and public elementary and high schools are undeniably different. While both seek to impart knowledge, the former encourages inquiry and challenging a priori assumptions whereas the latter prioritizes the inculcation of societal values. Public universities encourage teachers and students to launch new inquiries into our understanding of the world. The university atmosphere of speculation, experiment, and creation is essential to the quality of higher education. Our public universities require great latitude in expression and inquiry to flourish."
   c. "Second, 'public elementary and high school administrators,' unlike their counterparts at public universities, 'have the unique responsibility to act *in loco parentis*.'… Public university administrators, officials, and professors do not hold the same power over students."
   d. "Closely related to the *in loco parentis* issue is the third observation, that public elementary and high schools must be empowered to address the "special needs of school discipline" unique to those environs… public universities operate in a manner that gives students great latitude: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes. In short, public university students are given opportunities to acquit themselves as adults."
   e. "Fourth, public elementary and high school administrators 'must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.'… Considerations of maturity are not

nearly as important for university students, most of whom are already over the age of 18 and entrusted with a panoply of rights and responsibilities as legal adults."

f. "Finally, university students, unlike public elementary and high school students, often reside in dormitories on campus, so they remain subject to university rules at almost all hours of the day… were we to grant public university administrators the speech-prohibiting power afforded to public elementary and high school administrators. Those students would constantly be subject to a circumscription of their free speech rights due to university rules."

Graduate Students

Graduate students at public universities fall in a gray area between students and public employees. I asked how we differentiate the two roles in an email to Steve Voeller at UA's office of Government and Community Relations. His Vice President Sabrina Vazquez, replied:

"Students are considered university employees when they are on the clock and getting paid by the university."

In other words, apart from their official work duties and work time, graduate students are to be treated as students. Note that courts give less First Amendment protection to employees in their official job duties, but give extremely broad First Amendment protection to students.

Internet and Social Media

The First Amendment applies no differently to speech on the internet or social media. This means the government cannot prohibit or punish any speech on social media that would be protected in print or in person.

However, media platforms run by private companies or individuals can establish their own rules about content. They can remove content or ban users that violate their policies, their policies do not have to be content or viewpoint neutral, and they can ban speech that might be protected under the First Amendment. The First Amendment does not come into play.

U.S. law (Section 230 of the Communications Decency Act) discusses addresses these issues and protects providers and users from liability related to the content of third parties (you cannot be punished for something bad someone else says on your website). See the Digital Media Law Project for more info.

Thoughts from *Free Speech On Campus* by Chemerinsky and Gillman

Constitutional scholars Erwin Chemerinsky (Dean of UC Berkeley Law School) and Howard Gillman (Chancellor of UC Irvine) have a short book that lays out their cultural and legal argument for free speech on campus. Here is an outline of some of their most important points. Where they say "can" or "cannot," they are referring to things that they consider clear based on First Amendment Law. Where they say "should" or "should not," they are making arguments that are either based on norms or are not as clear in the law.

Summary

- We should think of campuses as having two different zones of free expression
    - *Professional zone*: protects expression of ideas but imposes an obligation of responsible discourse and responsible conduct in formal educational and scholarly settings.
    - *Free speech zone (larger)*: exists outside scholarly and administrative settings; only restrictions are those of society at large. Members of campus community may say things in the free speech zones that they would not be allowed to say in the core educational and research environment.
- Colleges and universities can almost never punish faculty members or students who express controversial views outside the professional, educational context, where there are no enforceable scholarly standards and no disruption of the educational context other than that certain persons may take offense.
    - Faculty should not fear retaliation or harmful effects because of views they express outside their official duties (e.g., non-work statements on social media)
    - Students cannot be officially penalized for controversial offensive statements made on their own time, outside of class (unless they are unprotected speech)
    - People are not immune from criticism by others who also exercise their free speech rights.
- Hate speech causes great harm, and colleges and universities must act to protect students from harm. But courts have repeatedly ruled that the First Amendment prohibits public colleges and universities from using hate speech codes to achieve this goal, and giving the government the power to punish speakers they don't like creates even more harm.
    - Such codes are usually impermissibly vague and overbroad, and risk punishing people based on political viewpoint or worldview.
    - They are also inherently politically charged. Lots of debate about what should be considered demeaning or insulting, risk of discriminatory enforcement.
    - Speech codes are often used to punish the speech of people who were not their intended targets.
- The First Amendment does not preclude campus evaluation of professional quality of teaching or scholarship, nor do they preclude campus from requiring that faculty members be fair-minded when presenting materials in educational settings.
    - Neither free speech principles nor academic freedom gives a faculty member the right to use the classroom as their personal platform for the expression of political opinions without regard to professional norms, or to prevent students from having their fair opportunity to express views without fear of being punished.

What Campuses Can and Can't Do

- Can never punish the expression of ideas
    - Campus cannot censor or punish speech merely because a person or group considers it offensive or hateful.
    - Campus can censor or punish speech that meets the legal criteria for harassment, true threats, or other speech acts unprotected by the First Amendment.
- Can and should prevent the disruption of classes
    - People have no right to disrupt classes or campus activities

    - Any restrictions must remain content-neutral and viewpoint-neutral
- Can and should prevent the disruption of campus activities and operations
    - No right to occupy campus buildings, block access to them, or interfere with normal university functions.
    - This doesn't mean such disruptions should always be punished. Might be wiser to allow students to temporary disrupt an event in hope of avoiding the ill will engendered by a show of force.
- Cannot prevent protestors from having a meaningful opportunity to get their views across in an effective way
    - Cannot confine/separate expression to marginal areas
    - Can impose time, place, and manner restrictions on protests to prevent protestors from disrupting the normal work of the campus
    - Such restrictions must be reasonable, justified without reference to the content of regulated speech, serve significant governmental interest, and leave open ample alternative channels for communication of the information.
- Can create general content-neutral regulations governing on-campus expression
    - Cannot censor or punish some speakers, but not others, for putting up handbills, writing messages in chalk, or engaging in similar acts of expression.
    - Cannot engage in content-based discrimination against faculty, students, or other speakers or writers who seek to express themselves outside the professional educational context.
- Can engage in content-based evaluation of faculty and students who are operating within the professional educational context, as long as it is based on professional standards or peer assessments of the quality of scholarship or teaching.
- Should allow but cannot mandate that faculty provide *trigger warnings* before presenting or assigning material that might be offensive or upsetting to students
    - Professors need to decide how to best education their students, and some might reasonably decide that being exposed to material without a warning makes for more effective instruction.
- Can create *safe spaces* in educational settings that ensure that individuals feel free to express the widest array of viewpoints, but cannot use them to censor the expression of ideas considered offensive.
    - Safe space can refer to place where one feels safe to express an opinion without punishment, harassing judgment, or bullying condemnation.
- Can prohibit speech that falls into unprotected categories, but otherwise cannot prohibit students or faculty from using words that some consider to be *microaggressions*.
    - Can sensitize students and faculty to the impact that certain words may have, as part of an effort to create a respectful work and learning environment.
- Can advocate norms of civility in expression, but cannot enforce these norms by censorship or punishment.
- Internet and social media: there is no reason for campuses to treat speech differently based on whether it is transmitted through old means or new.
    - Social media and internet make it possible for harmful speech to reach a large audience quickly, but principles of free speech do not change.
    - Can prohibit/punish speech over the internet and social media that otherwise is not protected, such as true threats or harassment.

    - Can discipline a student's online speech if it relates directly to their academic program (breaking class rules), as long as those rules are narrowly tailored and directly related to established professional conduct standards.
    - Cannot punish speech over the internet on the ground that it is offensive.
- Campus should expect university administrators to speak out against especially egregious speech acts and, most important, encourage the university community to make its own decisions about what speech acts deserve praise or condemnation.
    - Speaking out on behalf of university's core values, and condemning speech inimical to them, is important component of how campuses should deal with offensive expression.
    - Rather than be tempted toward censorship, campus leaders should focus on strategies premised on more speech.
- Campus should not expect university administrators to comment on or condemn every campus speech act that some person considers offensive.

ARIZONA LAWS AND POLICIES

Arizona has recently passed legislation that expands free speech protections at public colleges and universities. These are incorporated in Title 15 of the Arizona Revised Statutes. Students' rights are addressed in Title 15, Chapter 14, Article 6. Laws regarding political activities are addressed in Title 15, Chapter 13, Article 2.

AZ Campus Speech Laws

Arizona Revised Statutes (ARS) §15-1861
https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/15/01861.htm

This defines public forum and describes the law against infringing on others' expressive activity or preventing official business operations.

Arizona Revised Statutes (ARS) §15-1864
https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/15/01864.htm

This is the most important and detailed part of state law dealing with free speech protections on campus. I encourage you to read this. Here are some details.

A. Public universities and colleges cannot restrict students' speech in a public forum; they can only impose reasonable time, place, and manner restrictions.
    a. This prohibits higher education institutions from using misleadingly labeled "free speech zones" to "quarantine" student speech to peripheral areas.
B. These restrictions must satisfy the standard of strict scrutiny, meaning they…
    a. Are reasonable
    b. Are justified without reference to the content of the regulated speech
    c. Are necessary to achieve a compelling governmental interest
    d. Are the least restrictive means to further that compelling governmental interest
    e. Leave open ample alternative channels for communication of the information
    f. Allow spontaneous assembly and distribution of the literature.

    *This is important because laws/policies very often fail to meet all of these requirements. When they don't any restrictions on speech are unconstitutional and any punishment for the speech can be overturned.
C. Any person lawfully present on campus may protest or demonstrate, and individuals cannot infringe on the rights of others to engage in or listen to expressive activity.
    a. This "does not prohibit faculty members from maintaining order in the classroom."
D. Public areas of university and community college campuses are public forums are open on the same terms to any speaker.
E. Campuses are open to any speaker whom a student, student group, or faculty member has invited.
F. Colleges/universities must make reasonable efforts to protect speakers and other persons in attendance; cannot charge security fees based on content of speech.

G. "An individual student or a faculty or staff member of a university or community college may take a position on the public policy controversies of the day, but the institution is encouraged to attempt to remain neutral, as an institution, on the public policy controversies of the day unless the administrative decisions on such issues are essential to the day-to-day functioning of the university or community college."
H. "The university or community college may not take action, as an institution, on the public policy controversies of the day in a way that requires students or faculty members to publicly express or endorse a particular view of a public policy controversy."
I. Allows the Arizona Attorney General or an aggrieved individual to bring action in court to "enjoin any violation of this article by any university, community college, faculty member or administrator or to recover reasonable court costs and reasonable attorney fees."
J. If the court finds that a violation occurred, it "shall award the aggrieved person injunctive relief for the violation and shall award reasonable court costs and reasonable attorney fees. The court shall also award damages of one thousand dollars or actual damages, whichever is greater."
K. Imposes one-year limitation period on bringing such action.

Arizona Revised Statutes (ARS) §15-1866
https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/15/01866.htm

This clarifies state requirements on the free speech policies for public colleges and universities. It rejects any institutional efforts to shield people from speech that is protected by the First Amendment, including "ideas and opinions that may be unwelcome, disagreeable or deeply offensive." It also clarifies students' rights in disciplinary hearings, the definition of harassment, and categories of speech not protected under the First Amendment (federal crimes, defamation, harassment, true threats, privacy violations, and unlawful disruptions of campus operations).

This is consistent with University of Chicago's Free Speech Policy Statement.

"'Harassment' means only that expression that is so severe, pervasive and subjectively and objectively offensive that it unreasonably interferes with an individual's access to educational opportunities or benefits provided by the university or community college." This definition of harassment is consistent with the U.S. Supreme Court's definition in *Davis v. Monroe County Board of Education* (1999).

Arizona Revised Statutes (ARS) §15-1633
https://www.azleg.gov/viewdocument/?docName=https://www.azleg.gov/ars/15/01633.htm

This section lays out laws regarding political activities involving college and university resources. This is very important in our capacities as university employees.

1. "A. A person acting on behalf of a university or a person who aids another person acting on behalf of a university shall not spend or use university resources, including the use or expenditure of monies, accounts, credit, facilities, vehicles, postage, telecommunications, computer hardware and software, web pages, personnel, equipment, materials, buildings

or any other thing of value of the university for the purpose of influencing the outcomes of elections or to advocate support for or opposition to pending or proposed legislation."

a. Note that this is specific to election outcomes and legislation.
b. This also lists exceptions, including…

"3. An employee of a university using personal time and resources from influencing the outcomes of elections or from advocating support for or opposition to pending or proposed legislation if the employee does not use university personnel, equipment, materials, buildings or other resources for these purposes."

"4. Any university employee from providing classroom instruction on matters relating to politics, elections, laws, ballot measures, candidates for public office and pending or proposed legislation."

2. E. Universities may not provide publicly funded programs, scholarships, or courses that advocate for specific public policies.
3. F. There are exceptions to (E) above. This policy does not apply to…

"2. Any university employee who expresses a personal opinion on a political or policy issue, regardless of whether that opinion is expressed inside or outside the classroom.

3. Print or electronic media produced by students who are enrolled at a university.

4. A recognized student government, club or organization of students who are enrolled at a university.

5. Any university employee who is appointed to a government board, commission or advisory panel who provides expert testimony or guidance on public policy.

6. The publication of reports or the hosting of seminars or guest speakers by the university that recommends public policy.

7. Researching, teaching and service activities of university employees that involve the study, discussion, intellectual exercise, debate or presentation of information that recommends public policy."

4. Section K.2. "'Influencing the outcomes of elections' means supporting or opposing a candidate for nomination or election to public office or the recall of a public officer or supporting or opposing a ballot measure, question or proposition, including any bond, budget or override election and supporting or opposing the circulation of a petition for the recall of a public officer or a petition for a ballot measure, question or proposition in any manner that is not impartial or neutral."

Arizona Defamation law

Arizona labor laws cover defamation of employers (ARS §23-1325):

"A. A person commits defamation of an employer by doing all of the following:

1. Maliciously making a false statement about the employer to a third party without privilege.
2. Knowingly, recklessly or negligently disregarding the falsity of the statement.
3. Causing damage to the employer by the false statement."

You can find much more detailed information about how AZ courts treat defamation claims at the Digital Media Law Project. Here are a few important details.

To be defamatory, a statement must be false and bring the defamed person into disrepute, contempt, or ridicule, or impeach her honesty, integrity, virtue, or reputation. See *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341 (Ariz. 1989).

Here are the required elements of defamation established by Arizona courts; see *Morris v. Warner*, 160 Ariz. 55, 62 (Ariz. Ct. App. 1988). The burden of proof is on the plaintiff.

1. a false statement concerning the plaintiff;
2. the statement was defamatory;
3. the statement was published to a third party;
4. the requisite fault on the part of the defendant; and
5. the plaintiff was damaged as a result of the statement.

Arizona Courts also recognize several privileges and defenses in defamation claims. Here are a few most relevant to us.

1. Truth is an absolute defense against defamation
2. Substantial truth doctrine: minor factual inaccuracies are ignored if they do not materially alter the substance or impact of what is being communicated.
3. Fair comment privilege: protects media and non-media defendants when the plaintiff is a public official and the claim involves "discussion of matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community."

This all sets a high bar on defamation claims. The bar is higher for public officials and public figures. Relevant to us, Arizona courts have held that many low-level government employees are public officials, including teachers and student government representatives.

Anti-SLAPP Law

Arizona has an Anti-SLAPP (Strategic Lawsuits Against Public Participation) law, which makes it easier to dismiss defamation and other lawsuits against people criticizing public officials, and imposes financial penalties on public officials who file such lawsuits if they are dismissed. These laws are designed to prevent public officials from pursuing costly frivolous lawsuits to suppress criticism.

ARS §12-751 and §12-752 are the relevant statutes. The former classifies protected speech including that meant to influence governmental action or decisions, and the latter is the Anti-SLAPP law.

When a defendant makes a motion to dismiss a lawsuit brought by a public official, the court must grant the motion unless the plaintiff (official) can prove that the speech in question "did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party." If the court grants the motion to dismiss, the plaintiff must pay the defendant's legal costs.

The Digital Media Law Project has more details no Arizona Anti-SLAPP cases.

Other Relevant Arizona Laws

Digital Media Law Project has lots of great information about Arizona law that is relevant to free expression, privacy, etc.

Arizona courts have been highly protective of anonymous speech in cases where one party attempted to unmask anonymous online speakers.

Arizona law regarding right of publicity (right to control and profit from commercial use of name, likeness, etc.) is unclear.

ABOR AND UA POLICIES

Arizona Board of Regents (ABOR) Policy 6-905

https://public.azregents.edu/Policy%20Manual/6-905-Political%20Activity.pdf

ABOR's policy for political activity on campuses introduces the phrase "political issue." This portion of the policy is vague. Otherwise this policy mostly restates some of the language from the state statutes above.

"A. Employees may participate in political activity outside their employment, but shall not allow their interest in a particular party candidate, or political issue to affect the objectivity of their teaching or the performance of their regular university duties."

UA Political Activity and Lobbying Policy

https://policy.arizona.edu/ethics-and-conduct/political-activity-and-lobbying-policy-interim

The UA policy goes a bit further with respect to not taking positions on public policy controversies. The policy is vague about what a "public policy controversy of the day" is. But note that the prohibition here is on "the University" taking such positions. So employees should be careful they do not give the impression they represent the University when taking policy or political positions.

"The University recognizes the right of every individual to engage in Political Activity. Under Arizona law and Arizona Board of Regents policy, University employees and Designated Campus Colleagues ("DCCs") who engage in Political Activity:

- must do so on their own personal time,
- must not use University Resources, and
- must act and speak as private citizens without implying that the University is attempting to influence the outcome of an election, endorsing any particular candidate, taking a position on any pending or proposed legislation, or taking a position on any ongoing public policy controversy."

I emailed Steve Voeller, Vice President of UA's office of Government and Community Relations, and got clarification on UA's position. Here is the key part of his response.

"There is no definition in the statute of a 'public policy controversy of the day.' However, it may be interpreted broadly, as neither the statute or the University's Political Activity Policy are intended to interfere in any way with free expression by any individual faculty or staff member on any issue. As stated clearly in the Policy, University employees or DCCs engaging in Political Activity, which includes expressing themselves on 'public controversies of the day' are free to do so but must do so as individuals, on their own time, without using University resources (including email, computers, phones, etc.). Further, any such statement or expression must not be made nor appear to be made on behalf of the University."

UA's Adoption of the Chicago Statement of Freedom of Expression

https://facultygovernance.arizona.edu/sites/default/files/ua_adoption_of_chicago_statement_of_freedom_of_expression.pdf

This statement endorses extremely broad protections for freedom of expression on campus. It states that the university may only restrict speech that is not protected under the First Amendment (defamation, true threats, harassment, etc.) or that directly impairs the functioning of the university. Here is an especially important excerpt.

"Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community."

UA FREE SPEECH RESOURCS

University of Arizona First Amendment Resources (Dean of Students Office)
https://deanofstudents.arizona.edu/student-rights-responsibilities/first-amendment

Information and resources related to exercising speech and campus use, as well as mechanisms for reporting concerns.

The Haury Conversation on Campus Free Speech
https://www.youtube.com/watch?v=vw5KKIrJ8DM&t=3s

In 2018 The UA College of Social and Behavioral Sciences had a panel to discuss free speech on campus.

University of Arizona Office of the General Counsel
https://ogc.arizona.edu

For legal advice on campus.

University of Arizona Ombuds Office
https://ombuds.arizona.edu

The Ombuds Office is helpful in offering confidential assistance, whether you need to have sensitive questions answered through a mediator, raise a concern anonymously, or get help with some sort of conflict management.

University of Arizona Human Resources
https://hr.arizona.edu/supervisors/workplace-climate

For workplace/employment-related issues.

ADDITIONAL RESOURCES

***Free Speech on Campus* by Erwin Chemerinsky and Howard Gillman**
Available online through UA library

A very positively reviewed book by two law professors.

Foundation for Individual Rights in Education (FIRE)
https://www.thefire.org/resources/free-speech-resources-for-faculty/

FIRE has a ton of resources on First Amendment rights in general, as well as resources targeted for faculty and students. Here is a short summary of forms of speech that are NOT protected under 1A. FIRE also provides a free e-book, *First Things First*, that is highly informative about free speech law and does so in a way that makes a strong case for the value of freedom of expression.

Digital Media Law Project
http://www.dmlp.org/state-guide/Arizona

DMLP has tons of resources and information about law regarding speech/media, including state-specific laws and analyses.

American Civil Liberties Union (ACLU)
https://www.aclu.org/other/speech-campus

A short Q&A about campus speech.

Freedom Forum Institute
https://www.freedomforuminstitute.org

Freedom Forum Institute provides accessible resources and information for the public regarding First Amendment rights.

Here is a useful article about government employees using social media.

Workplace Fairness
https://www.workplacefairness.org/retaliation-public-employees

Workplace Fairness has information and resources for employees, including this Q&A about public employees' First Amendment rights and retaliation in the workplace.

Popehat
www.popehat.com

Funny and irreverent attorney Ken White has a variety of useful resources that translate case law into normal language. His website has links to free speech resources, and several blog posts about cases directly related to 1A rights for government employees and faculty specifically.

One blog focuses on the U.S. Supreme Court case *Garcetti v. Ceballos* (2006), which considered what kinds of speech are protected for government employees. A subsequent U.S. Circuit Court case, *Demers v. Austin* (2014), dealt specifically with professors at public universities.

White also has an excellent free speech podcast, *Make No Law*. The third episode, "On the Job," discusses the *Garcetti* case and touches a bit on *Demers*.