

**Democratic Theory:
Freedom of Expression & Democracy**

Professor Pevnick (rp90@nyu.edu)

Office: 19 West 4th St., #326

Office Hours: Tuesday 2-4pm or by appointment

Course Description:

The First Amendment of the U.S. Constitution states that:

Congress shall make no law ... abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The strong wording of this amendment enshrines the place of freedom of expression in our system of democratic government. At the same time, it leaves open important questions about the justification for such a commitment, as well as its limits. This course is designed to explore the relationship between commitments to democratic governance and free expression. It does so in three main sections.

First, we will discuss the reasons for valuing freedom of expression and their relationship to democratic governance. Second, we will discuss the appropriate role of deliberation and expression in a system of democratic governance. In so doing, we will explore questions connected to public deliberation, campaign finance, and the limits properly imposed on free expression by concerns of security. Third, a commitment to democratic governance is not just a commitment to a shared decision-making process or a mechanism for aggregating preferences. It also includes a commitment to treating fellow citizens as equals. Although one of the reasons that we protect speech is to treat citizens with due regard, some speech arguably threatens the equal standing of citizens. The last several weeks of the course are dedicated to thinking through how we ought to handle hate speech and other instances in which protecting speech may be thought to be at odds with the democratic commitment to maintaining a society of equals.

Requirements and Grading:

Grades will be determined as follows:

1. Midterm Exam (25%)
2. Final Exam (30%)
3. Reading Responses (25%)

- a. Students will be expected to write responses of no more than 500 words to each week's reading. I will provide more details about the expectations for such papers in class.
4. Active & Informed Class Participation (20%)
 - a. Attendance, *thoughtful* participation and respectful engagement with the ideas of fellow students are a means not only towards one's own learning, but also an important element of the seminar's overall success. Thus, one has to *earn* credit for participation by actively and informatively engaging in classroom discussion. This entails coming prepared with questions, informed criticisms and comments on the readings.

Reading Schedule:

Students should purchase:

John Stuart Mill *On Liberty and Other Essays* Oxford World Classics.
The Course Reading Packet.

Details about the course packet will be provided on the first day of class.

Foundations

1. Introduction (1/29)
2. The Traditional Justification for Free Speech (2/5)
 - a. John Stuart Mill "On Liberty" Ch. 1-2, and 5.

Reading Questions: What is the "one very simple" principle defended by Mill and what kinds of policies does it prohibit? Given that Mill forgoes reliance on abstract rights in arguing for this principle, what is the justification for it? Is Mill's defense of free expression persuasive? Are there types of speech that Mill would, in your view, wrongly permit?

3. Alternative Justifications (2/12)
 - a. Joshua Cohen "Freedom of Expression" *Philosophy & Public Affairs* 22/3: 207-263.
 - b. Alexander Meiklejohn "The Rulers and the Ruled" *Free Speech and its Relation to Self-Government*.

Reading Questions: How do the defenses of free expression offered by Cohen and Meiklejohn differ from Mill's? Which position is most persuasive? Why?

Free Speech and Democratic Governance

4. Deliberation 1 (2/19)

- a. Bruce Ackerman and James Fishkin "Deliberation Day" *The Journal of Political Philosophy* Vol. 10, No. 2, 129-152.
- b. Jon Elster "The Market and the Forum: Three Varieties of Political Theory" ed. Jon Elster and Aanund Hylland *Foundations of Social Choice Theory*, 103-132.
- c. I. Shapiro "Enough of Deliberation: Politics is about Interests and Power"

Reading Questions: Would you support the introduction of deliberation day? Why or why not? How might Ackerman and Fishkin respond to Shapiro? On Elster's view, what problems with aggregative democracy (social choice theory) does deliberation address? How does it do so?

5. Deliberation 2 (2/26)

- a. Robert Goodin "Democratic Deliberation Within" *Philosophy & Public Affairs* 29/1: 81-109.
- b. Lynn Sanders "Against Deliberation" *Political Theory* Vol. 25, No. 3, 362-373.
- c. Jane Mansbridge *et al.* "The Place of Self-Interest and the Role of Power in Deliberative Democracy" *The Journal of Political Philosophy* (2010) 18/1: 64-100.

Reading Questions: How might advocates of deliberation respond to Sanders? Why does Goodin think that internal deliberation is helpful? Is it an adequate substitute for the kind of deliberation that Fishkin and Ackerman advocate?

6. Public Reason (3/5)

- a. John Rawls "The Idea of an Overlapping Consensus" *Political Liberalism*
- b. John Rawls "The Idea of Public Reason Revisited" pp. 131-156 & 164-175.
- c. Michael J. Sandel "A Response to Rawls's Political Liberalism" pp. 195-218.

Reading Questions: What kinds of arguments does the idea of public reason rule out? Why? Would you prefer to live in a society guided by the idea of public reason? Why or why not? Do Sandel's criticisms of Rawls effectively address the position that he defends?

7. Midterm Exam (3/12)

Spring Break (3/19)

8. Corruption & Campaign Finance (3/26)

- a. Excerpts from *Buckley v. Valeo* & *Citizens United*
- b. Lawrence Lessig *Republic, Lost* Ch. 10.
- c. David Strauss "Corruption, Equality, and Campaign Finance Reform" *Columbia Law Review* 1994 94 (4): 1369-1389.
- d. Ronald Dworkin "The Decision that Threatens Democracy" *The New York Review of Books*.

Reading Questions: Are there good corruption-based reasons to restrict campaign donations? Can there be corruption without *quid pro quo* agreements? Are there any good reasons *not* rooted in corruption for limiting campaign related spending?

9. Equality & Campaign Finance 2 (4/2)

- a. Excerpts from *Harper v. Canada* (827-833)
- b. Bruce Ackerman "Crediting the Voters" *American Prospect*
- c. Joshua Cohen "Money, Politics, Political Equality"
- d. Daniel Ortiz "The Democratic Paradox of Campaign Finance Reform" *Stanford Law Review* 50/3: 893-914.

Reading Questions: What is the main difference between *Harper* and *Buckley*? Does *Citizens United* fundamentally change the framework set out by *Buckley*? What kind of arguments does Cohen give in favor of a more egalitarian campaign finance regime than the Court allows in *Buckley*? Are his arguments persuasive? Why or why not? Does a commitment to free expression grounded in Millian arguments prohibit restrictions on campaign-related speech?

10. Security & Expression (4/9)

- a. "Edward Snowden, Whistle-Blower" *The New York Times* Editorial 1 Jan. 2014.
- b. Richard Posner "The Right to Privacy" *Not a Suicide Pact* (Oxford: Oxford University Press, 2006).
- c. Jeremy Waldron "Security and Liberty: The Image of Balance" *The Journal of Political Philosophy* (2003) 11/2: 191-210.
- d. Rahul Sagar "On Combating the Abuse of State Secrecy" *The Journal of Political Philosophy* (2007) 15/4: 404-427.

Reading Questions: Is there a right to privacy that is violated by the programs uncovered by Snowden? Did Snowden act wrongly? Should Snowden be offered clemency?

Free Speech for a Society of Equals

11. Pornography (4/16)

- a. Catherine MacKinnon "Pornography & Speech" pp. 8-60
- b. Joshua Cohen "Freedom, Equality, Pornography" *Justice and Injustice in Law and Legal Theory*

Reading Questions: Is MacKinnon's argument persuasive? Is it consistent with Mill's harm principle? Do the reasons that we have for protecting expression apply to pornography?

12. Hate Speech 1 (4/23)

- a. Newspaper articles: Confederate flag, Danish newspaper cartoons, & Holocaust denial.
- b. Ronald Dworkin "Foreward" *Extreme Speech and Democracy*
- c. Jeremy Waldron *The Harm in Hate Speech* pp. 65-111.
- d. Edwin Baker "Autonomy and Hate Speech" pp. 142-146 and 150-157.

Reading Questions: In what sense does silencing hate speech undermine the legitimacy of a government? Waldron's argument is meant to be based on the harm, as opposed to the offense, associated with hate speech: is it possible to distinguish between the two? Would you favor restrictions on the types of speech discussed in the various newspaper articles? Are Baker's points about the ineffectiveness of regulating hate speech persuasive responses to Waldron?

13. Hate Speech 2 (4/30)

- a. Corey Brettschneider *When the State Speaks, What Should it Say?* Intro. & Ch. 3
- b. Guest Speaker: Corey Brettschneider

Reading Questions: Criticize some element of Brettschneider's position. (It may help to think about how Waldron, Dworkin, or Baker might respond to him.) Bring 2-3 questions about Brettschneider's position to class.

14. Final Exam: In Class (5/7)