



AMERICAN
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SOCIETY FOR
LAW AND POLICY

Program Guide

2017

Fighting for Our First Freedoms

On December 13, 2016, over forty prominent constitutional law scholars from across the nation signed an [open letter](#) to Donald Trump detailing their concerns that the then-President-elect's words and actions before and after the election posed profound threats to the same constitutional principles the President of the United States swears to "preserve, protect and defend" when taking the Oath of Office.

Among those constitutional principles are the foundational freedoms protected by the First Amendment: the freedoms of speech and press, assembly and petition, and religious freedom. Each of these constitutional commitments has been called into question in recent months by the statements and actions of President Trump. Threats to deny access to members of the press deemed antagonistic and to reform libel law to make it easier to sue the media, talk of criminalizing flag-burning and efforts to curb protest are all inimical to the First Amendment rights that the scholars wrote are "critical to preserving a functioning democracy." Furthermore, the targeting of Muslim citizens and immigrants for exclusion and differential treatment subverts the constitutionally protected free exercise of religion and raises Establishment Clause questions, as do recently reported plans to expand religious liberty rights in ways that may impinge on the rights of others. Some states and localities, emboldened by the new administration's actions, may seek to act similarly in ways contrary to our First Amendment traditions.

With these challenges to our constitutional order before us, ACS encourages chapters to host events in 2017 that examine and highlight the fundamental freedoms protected by the First Amendment.

This guide is designed to assist both lawyer and student chapters in developing their 2017 programming. The following sections provide three resources: (1) a short description of the legal context of the First Amendment clauses; (2) sample topic questions; and (3) links to additional information. Finally, a list of potential speakers you might consider as you plan your unique 2017 programming is included at the end of this guide. This list is not exhaustive and is only intended to provide you with a sampling of the scholars, advocates, institutions, and organizations that work on these issues. We encourage you to consider local experts, practitioners, and law school faculty members, including ACS student chapter faculty advisors, for further suggestions.

The information outlined below is by no means a complete list of the issues chapters may wish to explore, but we hope it serves as a useful starting point. ACS also recommends that chapters consult previous [program guides](#) for further information and resources on related topics.

I. The Freedoms of Speech, Protest, and the Press

“Congress shall make no law . . . 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.”

A. The Right to Free Speech

Of the freedoms protected by the First Amendment, perhaps the most fundamental is that of free speech, which is “more than self-expression; it is the essence of self-government.”¹ As Justice Brennan wrote in *New York Times v. Sullivan*, our democracy is predicated on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open....”²

While the First Amendment generally prevents the government from jailing, fining, or imposing civil penalties on people or organizations based on the content of their speech,³ this freedom is not unbounded, and the Supreme Court has limited it in two significant ways. First, the Court has identified several categories of speech that may constitutionally be restricted by the government because they are deemed to be of “low value,” and the government has historically regulated their use. These categories include defamation,⁴ fraud,⁵ incitement,⁶ obscenity,⁷ child pornography,⁸ fighting words,⁹ and commercial speech.¹⁰ Second, the government may constitutionally limit speech by imposing reasonable, content-neutral restrictions on the time, place, or manner of such speech.¹¹ For instance, although a state cannot criminalize flag burning, an individual may be prosecuted for burning a flag in contravention of a city ordinance prohibiting fires in public buildings.¹² This acceptable method of limiting speech is notably different from that of prior restraint, which is “the most serious and least tolerable infringement on First Amendment rights.”¹³ Therefore, while the

¹ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

² 376 U.S. 254, 270 (1964). This was certainly not always the common understanding. See, e.g. the Alien and Sedition Acts of 1798, which prohibited “any false, scandalous and malicious writing” against Congress or the president.

³ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 309–11 (1940); *Texas v. Johnson*, 491 U.S. 397, 406 (1989).

⁴ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Beauharnais v. Illinois*, 343 U.S. 250, 254–55 (1952).

⁵ *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

⁶ *Brandenberg v. Ohio*, 395 U.S. 444, 447–49 (1969).

⁷ See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 483 (1957).

⁸ *New York v. Ferber*, 458 U.S. 747 (1982).

⁹ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

¹⁰ *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

¹¹ See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (Protected speech may be subject to “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

¹² See *R.A.V.*, 505 U.S. at 385.

¹³ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). A “prior restraint” is a government regulation that restricts speech before it is expressed. These restrictions create a “chilling” effect that suppresses speech in contravention of the First Amendment. For more information on the unconstitutionality of prior restraints of the press, see REPORTERS

government may reasonably control where, when, and how speech occurs, it cannot go so far as to require the licensing of such speech¹⁴ or to impose a temporary restraining order or injunction against engaging in expressive activities on the basis of content.¹⁵

B. The Difficult Case of Hate Speech

In recent months, the incidence of hate speech, in particular on the internet, has seemed to most observers to increase dramatically, raising important and difficult questions for web platforms like Twitter and Facebook about their policies.¹⁶ While the First Amendment serves only to limit the actions of governmental entities, it is worth revisiting this debate, in particular since universities have in recent years grappled with whether and how to limit speech that is harmful to minority members of their communities though still constitutionally protected.

In contrast to categorically “low-value” speech, hate speech that “expressly denigrates individuals based on such characteristics as race, religion, gender, national origin, and sexual orientation,” has received First Amendment protection because the Court has held that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable” and because it has not historically been subject to government regulation.¹⁷ Therefore, the hateful speaker who does not incite immediate, violent action, no matter the emotional or other harm caused, is protected by the First Amendment freedom of speech.¹⁸

The protection afforded hate speech under American law, however, differs greatly from its treatment in other liberal western democracies in that “there appears to be a strong international consensus that the principles of freedom of expression are either overridden or irrelevant when what is being expressed is racial, ethnic, or religious hatred.”¹⁹ Indeed, some scholars and litigants have argued that hate speech should be included in the Supreme Court’s list of low-value speech because they contend that the marginalization of minorities is a social cost that outweighs the value of

COMM. FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT HANDBOOK, 35–46 (7th ed. 2011), <http://www.rcfp.org/rcfp/orders/docs/FAHB.pdf>.

¹⁴ Freedman v. Maryland, 380 U.S. 51, 57–58 (1965).

¹⁵ New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

¹⁶ See Marne Levine, *Controversial, Harmful and Hateful Speech on Facebook*, FACEBOOK (May 28, 2013, 4:51PM), <https://www.facebook.com/notes/facebook-safety/controversial-harmful-and-hateful-speech-on-facebook/574430655911054/>; Katie Benner, *Twitter Adds New Ways To Curb Abuse and Hate Speech*, N.Y. TIMES (Nov. 15, 2016), https://www.nytimes.com/2016/11/16/technology/twitter-adds-new-ways-to-curb-abuse-and-hate-speech.html?_r=0.

¹⁷ Geoffrey R. Stone, *Fixing Free Speech*, NAT’L CONSTITUTION CTR.: INTERACTIVE CONSTITUTION (Sept. 2015), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/free-speech-today/interp/33>; see also R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) and Texas v. Johnson, 491 U.S. 397, 414 (1989).

¹⁸ Compare *R.A.V.*, 505 U.S. at 393 (“The content-based discrimination . . . assuredly does not fall within the [fighting words] exception[, which] are categorically excluded from the protection of the First Amendment [because] their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey.”) with *Cantwell v. Connecticut*, 310 U.S. 296, 309–11 (1940) (“Resort to epithets or personal abuse is not in any proper sense communication or information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.”).

¹⁹ Frederick Schauer, *The Exceptional First Amendment* (Kennedy Sch. of Gov’t Working Paper No. RWP05-021, 2005), <https://ssrn.com/abstract=668543>.

protecting such speech.²⁰ Nevertheless, the Supreme Court thus far has made clear that it is not likely to recognize new forms of low-value speech or to curb hateful speech that causes emotional harm.²¹

C. The Right to Protest

In addition to expressly protecting the freedom of speech, the drafters of the Constitution addressed the “right of the people to peaceably assemble, and to petition the Government for redress of grievances.” The Supreme Court has treated these two clauses not as conferring independent rights “serv[ing] distinct ends,” but as belonging to the larger “freedom of expression” guaranteed by the Free Speech Clause.²² Indeed, the Supreme Court has not decided a case explicitly on the basis of the Assembly Clause in over thirty years.²³ Instead, the often non-verbal, mass communication that constitutes assembly is typically recognized as part of the “right of association.”²⁴ Moreover, although the right to petition played a crucial role in the founding of the United States, some scholars contend that the modern Court has all but written the clause out of the Constitution, likewise treating it as fully subsumed by the Free Speech Clause.²⁵

In the courts, protests are governed by the public forum doctrine, which allows for the imposition of reasonable time, place, and manner restrictions.²⁶ As we have seen recently in the examples of the Dakota Access Pipeline protest in Standing Rock, North Dakota, and Black Lives Matter demonstrations across the country, in practice, these restrictions “grant police broad discretion to regulate public assemblies in the name of preserving public order.”²⁷ Therefore, although Supreme Court precedent requires that valid permit laws are enforced equally, the fundamental freedom of assembly is often subject to local law enforcement decisions.²⁸ Additionally, some state legislatures have recently proposed more restrictions on the right of assembly. For example, in the weeks preceding the 2017 Women’s Marches in multiple U.S. cities, several state legislators introduced bills

²⁰ JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2014).

²¹ *See* *United States v. Stevens*, 559 U.S. 460, 472 (2010) (“Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”) and *Snyder v. Phelps*, 562 U.S. 443 (2011).

²² John Inazu & Burt Neuborne, *Right To Assemble and Petition*, NAT’L CONSTITUTION CTR.: INTERACTIVE CONSTITUTION (Sept. 2015), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/assembly-and-petition-joint/interp/34>.

²³ *Id.*

²⁴ *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958).

²⁵ *See, e.g.*, Julie M. Spanbauer, *The First Amendment Right To Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 49–51 (1993).

²⁶ John Inazu, *Beyond Speech and Association*, NAT’L CONSTITUTION CTR.: INTERACTIVE CONSTITUTION (Sept. 2015), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/assembly-and-petition-inazu/interp/34>.

²⁷ Burt Neuborne, *Reading the First Amendment as a Whole*, NAT’L CONSTITUTION CTR.: INTERACTIVE CONSTITUTION (Sept. 2015), <https://constitutioncenter.org/interactive-constitution/amendments/amendment-i/assembly-and-petition-neuborne/interp/34>.

²⁸ *Id.*

that would disincentivize protest by threatening to hold protesters liable for costs incurred by law enforcement and exempting drivers from liability for injuries to protesters in roadways.²⁹

D. A Free Press

I. The Presumption Against Prior Restraints

While Supreme Court jurisprudence has largely subsumed the Press Clause within the right to free speech and does not provide special First Amendment protections for the press, there are important cases addressing the relationship between the government and the press and the limits that government may place on reporting. One such case is *New York Times v. United States*, also known as the “Pentagon Papers” case, in which the Nixon Administration sought to enjoin The New York Times and Washington Post from printing classified information about U.S. involvement in Vietnam. Despite the fact that the information the newspapers sought to publish was received illegally, the Court refused to enjoin publication. As Justice Black explained:

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.³⁰

Nonetheless, Justice Brennan cautioned “that there is a single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation ‘is at war.’”³¹ How exactly to understand this potential exception to the rule, including what definition of “war” would apply given our amorphous “war on terror,” is not fully clear, since even the 9/11 attacks and ensuing military conflicts have not produced significant free speech cases on this question.³²

2. The Press and Libel Law

In the spring of 1960, the Montgomery, Alabama public safety commissioner brought a libel suit against The New York Times for publishing a full-page ad that claimed the City’s arrest of Rev. Martin Luther King, Jr. was intended to silence and intimidate the civil rights leader. Reviewing the claim, the Supreme Court in *New York Times Co. v. Sullivan* unanimously held that the First Amendment protects the publication of all statements about the conduct of public figures or officials, regardless of falsity, unless the subject of the publication can prove that the statements were made with “actual malice.”³³ In rejecting the libel claim on First Amendment grounds, the

²⁹ See H.B. 1203, 65th Legis. Assemb. (N.D. 2017); H.F. 322, 90th Leg. (Minn. 2017); S.B. 285, 120th Gen. Assemb., 1st Reg. Session (Ind. 2017).

³⁰ *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971).

³¹ *Id.* at 726 (Brennan, J., concurring) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)); see generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2005).

³² Dahlia Lithwick, *War and Speech: Why hasn't the War Against Terrorism Produced Any Great First Amendment Cases?*, SLATE (Nov. 26, 2010, 2:52 PM),

http://www.slate.com/articles/news_and_politics/jurisprudence/2010/11/war_and_speech.html.

³³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 281–83 (1964).

Court explained that “[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.”

It is worth noting that the American approach to libel, like that of hate speech, is also not the dominant one in western liberal democracies. European legal systems place a higher value on reputational interests and thus offer them greater protection than in the American legal system, where matters of public debate are given the greatest level of protection. A majority of European Union member states allow criminal liability for defamation under which journalists may be imprisoned,³⁴ and under the British legal system, the burden is on the defense to prove that allegedly defamatory statements are true in order to avoid liability.³⁵

3. Extraconstitutional Protections for the Press

While courts have understood the First Amendment to confer no additional rights on journalists than on the general public, federal and state lawmakers have stepped in to provide important newsgathering privileges that bolster the freedom of the press. For example, members of the press enjoy protections from subpoenas and newsroom searches and seizures,³⁶ reduced fees associated with Freedom of Information Act (FOIA) requests,³⁷ and increased access to government records and proceedings.³⁸ In addition, the President and the Attorney General have a considerable amount of control over the policies and priorities of the Department of Justice Office of Information Policy (OIP), which oversees agency compliance with FOIA and adjudicates administrative appeals from denials of FOIA requests.³⁹

4. Fake News and the First Amendment

While everyone seems to agree that so-called “fake news” has proliferated as traditional media outlets have declined in influence and the internet has made it possible to spread disinformation to millions in a matter of seconds, it is not clear how to determine what news is “fake” and who decides. Indeed, President Trump has used the term regularly to denigrate media outlets that publish unfavorable reports and polling about him.⁴⁰ Yet this phenomenon is not without real consequences.

³⁴ See *Defamation Laws in Europe 2016-2017*, INT’L PRESS INST., <http://legaldb.freemedia.at/defamation-laws-in-europe/> (last visited Feb. 13, 2017).

³⁵ Stephen Bates, *Libel Capital No More? Reforming British Defamation Law*, 34 HASTINGS COMM. & ENT. L.J. 233, 246–47 (“The defendant in a British defamation action must prove truth . . . whereas in the United States, the plaintiff must generally prove falsity.”).

³⁶ See, e.g., *The Reporter’s Privilege*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/reporters-privilege> (last visited Jan. 18, 2017) (providing a complete collection of state and federal reporter’s shield laws); 42 U.S.C. § 2000aa (2001).

³⁷ 5 U.S.C. § 552(a)(4)(A)(ii) (2006).

³⁸ See *Open Government Guide*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/open-government-guide> (last visited Jan. 18, 2017) (providing a complete collection of state open-records and open-meeting laws); FEDERAL OPEN GOVERNMENT GUIDE, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2009) <http://www.rcfp.org/rcfp/orders/docs/HOW2FOI.pdf>.

³⁹ *About the Office*, O.I.P., U.S. DEP’T OF JUSTICE, <https://www.justice.gov/oip/about-office> (Aug. 4, 2014).

⁴⁰ See, e.g., Alex Griswold, *Donald Trump Calls New York Times “Fake News” for Perfectly Accurate Reporting*, MEDIAITE (Feb. 10, 2017, 9:19 AM) <http://www.mediaite.com/online/donald-trump-calls-new-york-times-fake-news-for-perfectly->

In November, a man showed up at a popular pizza restaurant in Washington, D.C. armed with an automatic weapon because he had read online that Hillary Clinton was running a child sex ring on the site. As with hate speech, social media companies have had to develop responsive policies.⁴¹

Just how First Amendment principles should apply to “fake news” is very much a subject of debate.⁴² As we’ve seen with traditional publishers in *New York Times v. Sullivan*, the dissemination of false information without malice is protected from liability under civil libel law. Recently, MSNBC Legal Reporter Ari Melber proposed treating “fake news” as we do other fraudulent products and having the Federal Trade Commission regulate it in order to protect consumers. Were this idea to gain any traction, courts would have to determine whether such regulation comports with the First Amendment. Moreover, a broad conception of news and journalism could be helpful in advancing progressive law and policy by including citizen-critics and activists within the First Amendment framework.

DISCUSSION QUESTIONS

- *What are the advantages and disadvantages of the Court’s First Amendment jurisprudence, which essentially subsumes the rights of assembly, petition and press under the free speech clause? Are there unique characteristics about each freedom that cannot be addressed or protected adequately by this approach?*
- *Should the Press Clause be understood to confer special protection upon the institutional press that individual citizens and less traditional news sources do not also enjoy? What are the advantages and disadvantages of such an approach?*
- *How should public institutions balance their responsibility to protect public safety with the First Amendment rights of politically controversial speakers, groups, and events? What are the unique First Amendment challenges facing universities and how should they be resolved?*
- *At a time when military conflicts last for over a decade and elected officials declare a “war on terror,” how deferential should courts be to the government’s claims of necessity to restrict speech on national security grounds?*
- *Should there be categories of “low-value” speech that receive less constitutional protection? If so, what should be the criteria for determining what speech is of low*

[accurate-reporting/](#); David Sherfinski, *Donald Trump: “Any Negative Polls Are Fake News,”* WASH. TIMES (Feb. 6, 2017), <http://www.washingtontimes.com/news/2017/feb/6/donald-trump-any-negative-polls-are-fake-news/>.

⁴¹ See, e.g., Samantha Schmidt, *Facebook and Google Take Action Against Fake News Sites*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/11/15/facebook-and-google-take-action-against-fake-news-sites/?utm_term=.72ed543b7a47.

⁴² For discussion of how the First Amendment applies at this moment when journalism and activism have merged and media outlets have multiplied, see Michael C. Dorf & Sidney Tarrow, *Stings and Scams: “Fake News,” the First Amendment, and the New Activist Journalism* (Cornell Legal Studies Research Paper No. 17-2, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906444.

value? How should the First Amendment be applied to hate speech and how should social media platforms address hate speech on their sites?

- Should the government be in the business of regulating “fake news”? If so, what standards might be employed to ensure that government does not end up censoring speech and disfavored speakers? How should social media platforms address the problem, if at all?

FOR MORE INFORMATION, see REPORTERS COMM. FOR FREEDOM OF THE PRESS, [THE FIRST AMENDMENT HANDBOOK](#) (7th ed. 2011); PEN AMERICA, [AND CAMPUS FOR ALL: DIVERSITY, INCLUSION, AND FREEDOM OF SPEECH AT U.S. UNIVERSITIES](#) (Oct. 17, 2016); [Know Your Rights: What To Do If Your Rights Are Violated at a Demonstration or Protest](#), ACLU (last visited Feb. 13, 2017); [Clauses of the First Amendment](#), NAT’L CONSTITUTION CTR.: INTERACTIVE CONSTITUTION (Sept. 2015); [Race, Speech and Inclusion on Campus](#), AM. CONSTITUTION SOC’Y (June 10, 2016); [The Digital Age on the Global Stage: Can the Law Keep Up?](#), AM. CONSTITUTION SOC’Y (June 12, 2015); [We the People: Have We Lost Our First Amendment Rights of Assembly and Petition](#), NAT’L CONSTITUTION CTR. (Jan. 7, 2016, 4:00PM); [We the People: The State of Campus Free Speech](#), NAT’L CONSTITUTION CTR. (Nov. 24, 2016, 3:00AM).

II. The Freedom of Religion

“Congress shall make no law respecting an establishment of religion,
or prohibiting the free exercise thereof.”

In their letter, the constitutional scholars responded to a number of statements made by candidate Trump during the campaign about Muslims, including that he would prohibit them from entering the U.S.,⁴³ would “strongly consider” closing mosques in reaction to the 2015 Paris terror attacks,⁴⁴ and that he was entertaining creating a “Muslim registry.”⁴⁵ The scholars warned:

[Y]our identification of an entire group of people for differential treatment based only on their religious upbringing, affiliation, or beliefs raises extraordinarily troubling questions about how your administration will understand the rights of religious minorities. These rights are expressly protected by the Free Exercise Clause

⁴³ Press Release, Donald J. Trump for President, Inc., Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2017), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

⁴⁴ Nick Gass, *Trump: “Absolutely No Choice” but To Close Mosques*, POLITICO (Nov. 18, 2015, 6:45 AM), <http://www.politico.com/story/2015/11/trump-close-mosques-216008>.

⁴⁵ Abby Phillip & Abigail Hauslohner, *Trump on the Future of Proposed Muslim Ban, Registry: “You Know My Plans,”* WASH. POST (Dec. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/12/21/trump-on-the-future-of-proposed-muslim-ban-registry-you-know-my-plans/?utm_term=.2b4ee594ea75.

of the First Amendment, and respecting them is a value fundamental to our constitutional tradition.

On January 20, 2017, President Trump made good on his campaign promise to restrict Muslim immigration by signing an executive order barring admission into the United States from seven predominantly Muslim countries for 90 days, suspending all refugee admissions for 120 days, and barring any entry by Syrian refugees without time limitation. Religious minorities are prioritized once refugee admissions are allowed again, and the President has stated that this was intended to assist Christians in the Middle East.

The response to the Executive Order was swift, with lawsuits filed by both the ACLU and state attorneys general. Among the arguments asserted by the various challengers to the order is that it is “substantially motivated by animus toward—and has a disparate effect on—Muslims”⁴⁶ in violation of the equal protection guarantee contained in the Fifth Amendment’s Due Process Clause. With regard to the First Amendment, some litigants argued that the order violated the First Amendment’s Establishment Clause by “preferring on religion over another” in that it was “intended to disfavor Islam and favor Christianity.”⁴⁷ The courts have largely thus far agreed with the challengers, and the Administration has promised to issue a revised version of the order.

A. Establishment Clause

At its most basic, the Establishment Clause bars only the federal government from establishing a national church, though the Supreme Court has held that the Clause applies with equal force to state governments through the Fourteenth Amendment.⁴⁸ With regard to the government’s favoring of one religion or targeting another for unfavorable treatment, the Court has said that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,” and that “[t]his constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause.”⁴⁹

Over the last several decades, the Supreme Court has announced a number of different tests for Establishment Clause violations and among the factors it analyzes is whether the government has a secular purpose for the challenged action.⁵⁰ As Justice Kennedy has explained, “[i]n our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”⁵¹ The government may not send “a message to nonadherents that they are outsiders, not full members of the political

⁴⁶ Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Darweesh v. Trump*, No. 1:17-cv-00480 1:17 (E.D.N.Y. Jan. 28, 2017), https://www.aclu.org/sites/default/files/field_document/1-complaint.pdf.

⁴⁷ Complaint for Declaratory and Injunctive Relief, *Washington v. Trump*, No. 2:17-cv-00141 (W.D. Wash. Jan. 30, 2017), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Complaint%20as%20Filed.pdf

⁴⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

⁴⁹ *Larson v. Valente*, 456 U.S. 228 (1982).

⁵⁰ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵¹ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁵²

How these principles will apply to the executive order and any similar future executive actions will have to be decided by the courts. Nationality-based immigration restrictions that discriminate against Muslim populations are not wholly new. In response to the 9/11 attacks, the Bush Administration established the National Security Entry-Exit Registration System (NSEERS), which increased the screening of immigrants from 25 countries—24 of which were predominantly Muslim—and required some already within the United States to report regularly to immigration officials.⁵³ The NSEERS program was roundly criticized on policy grounds, but experts disagree as to whether it would be held unconstitutional (the program was ended in 2011).⁵⁴ With respect to the Trump executive order, the Ninth Circuit, which reviewed the government’s appeal from a Washington State district court ruling against it, did not reach the Establishment Clause claim. However, at least one federal district judge in issuing a preliminary injunction relied explicitly on her finding that the challengers were likely to succeed on their claim that the government had discriminated against Muslims in violation of the Establishment Clause.⁵⁵

B. Free Exercise

For most of the second half of the 20th century, Supreme Court jurisprudence prohibited the government from infringing on religious liberty rights unless there was a “compelling state interest” for doing so.⁵⁶ The Court moved away from this doctrine in the 1990 case *Employment Division v. Smith*, holding that the Free Exercise Clause “does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”⁵⁷ Nonetheless, even after the Smith decision, the Court emphasized that “[f]acial neutrality is not determinative. . . . The Free Exercise Clause protects against governmental hostility which is masked as well as overt.”⁵⁸ Among the factors relevant to the neutrality inquiry are “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the

⁵² *Wallace v. Jaffree*, 472 U.S. 38 (1985).

⁵³ 8 C.F.R. § 264.1. Advocates at the time argued that “by focusing on certain regions and countries that are dominated by certain religions, the Muslim religion in particular,” the special registration system ‘disproportionately impacted’ Muslim individuals based on their religion.” See *War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the Subcomm. on Immigration, Border Security, & Claims of the H. Comm. on the Judiciary*, 108th Cong. 102 (May 8, 2003) (statement of Laura Murphy, Director, Washington National Office, American Civil Liberties Union), http://commdocs.house.gov/committees/judiciary/hju86954.000/hju86954_0f.htm.

⁵⁴ See Michael Price & Faiza Patel, *Muslim Registry or NSEERS Reboot Would Be Unconstitutional*, LAWFARE (Nov. 22, 2016, 12:45 PM), <https://www.lawfareblog.com/muslim-registry-or-nseers-reboot-would-be-unconstitutional>; Louis Nelson, *Trump’s Muslim Registry Wouldn’t Be Legal, Constitutional Law Experts Say*, POLITICO (Nov. 17, 2016, 11:25 AM), <http://www.politico.com/story/2016/11/donald-trump-muslim-registry-constitution-231527>.

⁵⁵ *Aziz v. Trump*, No. 1:15-cv-00115-LMB-TCB (E.D. Va. Feb. 13, 2017), <http://lawprofessors.typepad.com/files/azizmemo.pdf>

⁵⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963).

⁵⁷ *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that the Free Exercise Clause does not protect the sacramental use of peyote).

⁵⁸ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”⁵⁹

Those challenging the executive order contend that an examination of the facts surrounding the issuance of the order demonstrate that it was intended to discriminate on the basis of faith in violation of the Free Exercise Clause. In addition, some have argued that the order violates the Religious Freedom Restoration Act (RFRA),⁶⁰ which was enacted in the wake of the Supreme Court’s *Smith* decision and requires that the government have a compelling interest for burdening religious exercise and is employing the least restrictive means to achieve it. Applying a RFRA analysis to the executive order would mean that courts need not inquire into the legitimacy of the government’s motive, and as one group of scholars has written, “people holding valid visas are substantially burdened when they are denied entry because of the executive order, especially if they face deportation to a country where practicing their faith is dangerous.”⁶¹

It should be noted that RFRA, itself, has become a source of great controversy in recent years as more religious individuals and institutions have sought exemption from civil rights laws. As the Trump Administration considers issuing an executive order expanding religious liberty rights, potentially at the expense of LGBT people and women seeking reproductive services, this debate may become more and more critical.⁶² Since the Supreme Court held that RFRA only applies constitutionally to the federal government,⁶³ twenty-one states have enacted a version of the statute.⁶⁴ And following the Supreme Court’s 2014 *Hobby Lobby* decision extending religious liberty rights and the ability to seek exemption from generally applicable laws to for-profit corporations,⁶⁵ a number of “complicity-based” religious objector claims have been raised by merchants associated with the wedding industry who do not wish to serve LGBT clients.⁶⁶ Such claims, in which religious objectors assert that anti-discrimination law compels them to be complicit in the allegedly sinful conduct of others, have not met with success, but the Supreme Court has yet to review one of these cases.⁶⁷

⁵⁹ *Id.*

⁶⁰ 42 U.S.C. § 2000bb (1993).

⁶¹ Nelson Tebbe, Richard Schragger & Micah Schwartzman, *How Trump’s Executive Order on Immigration Violates Religious Freedom Laws*, JUST SECURITY (Jan. 31, 2017, 11:40 AM), <https://www.justsecurity.org/37061/trumps-executive-order-immigration-violates-religious-freedom-laws/>.

⁶² See Sarah Posner, *Leaked Draft of Trump’s Religious Freedom Order Reveals Sweeping Plans To Legalize Discrimination*, THE NATION (Feb. 1, 2017), <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/>.

⁶³ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶⁴ *State Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps/religious-exemption-laws> (last visited Jan. 23, 2017).

⁶⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

⁶⁶ See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53(N.M. 2013); *Washington v. Arlene’s Flowers*, No. 91615-2 (Wash. Feb. 16, 2017) (en banc).

⁶⁷ See Reva Siegel & Douglas NeJaime, *Conscience and the Culture Wars*, AM. PROSPECT (June 29, 2015), <http://prospect.org/article/conscience-and-culture-wars>.

DISCUSSION QUESTIONS

- Does the Trump administration's executive order violate either of the religion clauses of the First Amendment? Does it matter that the order does not make any reference to religion?
- How much deference should courts show the administration with respect to its motives and the fit between its purported goals and the means chosen to achieve them?
- What, if anything, does the experience with NSEERS tell us about the legality and/or wisdom of such programs?
- Can the rights of religious objectors and the rights of others to be free from discrimination both be protected? Should religious exemptions be limited to circumstances in which they do not inflict material or dignitary harms on other citizens? Should "complicity-based" claims be cognizable by the courts?

FOR MORE INFORMATION, see Muzaffar Chishti & Claire Bergeron, [*DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*](#), MIGRATION POL'Y INST. (May 17, 2011); David Cole, [*Why Trump's Proposed Targeting of Muslims Would Be Unconstitutional*](#), ACLU (Nov. 22, 2016, 10:30AM); Ira C. Lupu & Robert W. Tuttle, [*The Legality of Muslim Exclusion, Part II: The Establishment Clause*](#), ACSBLOG (Dec. 10, 2015); Ilya Somin, [*Why Trump's Refugee Order Is Unconstitutional*](#), WASH. POST (Feb. 5, 2017); Kaveh Waddell, [*America Already Had a Muslim Registry*](#), THE ATLANTIC (Dec. 20, 2016); [*When Rights Collide?: Religious Liberty, Equality, and the Fallout from Hobby Lobby*](#), AM. CONSTITUTIONAL SOC'Y (June 13, 2015).

Speakers List

The following list includes a variety of First Amendment scholars, advocates, and litigators you may contact when planning your chapter's events this year. The speakers are listed in alphabetical order, according to their location, and we have provided their title, organization, and the broad First Amendment clause(s) into which their research, litigation, or advocacy falls. Please note that these categories are necessarily simplistic. When considering any of the experts listed below for your programming, we encourage you to research the speaker to ensure their specific specialties would be appropriate for your event.

Please note that the potential speakers included in this guide are not an exhaustive list of all possible experts you might consider as you plan your 2017 programming. Instead, this list is intended to provide you with a sampling of the scholars, advocates, institutions, and organizations that work on these issues. When developing your events, we also encourage you to consider local experts and practitioners and to consult law school faculty members, including ACS student chapter faculty advisors, for further suggestions.

Name	Title	Organization	State	Specialty
Erwin Chemerinsky	Dean, Distinguished Professor of Law; Raymond Pyrke Professor of First Amendment Law	University of California, Irvine School of Law	CA	Speech
Nomi Stolzenberg	Nathan & Lilly Shapell Chair in Law	University of Southern California, Gould School of Law	CA	Speech; Religion
Trevor Timm	Co-Founder, Executive Director	Freedom of the Press Foundation	CA	Press
Kristen A. Carpenter	Council Tree Professor of Law	University of Colorado Law School	CO	Religion
Helen Norton	Professor and Ira C. Rothgerber, Jr. Chair in Constitutional Law	University of Colorado Law School	CO	Speech
Mark Silverstein	Legal Director	ACLU of Colorado	CO	Speech; Religion
Abed A. Ayoub	National Legal & Policy Director	American-Arab Anti-Discrimination Committee	DC	Religion
David Cole	National Legal Director	ACLU	DC	Speech
Laura R. Handman	Partner; Co-Chair, Appellate Practice	Davis, Wright, Tremaine LLP	DC, NY	Speech; Press
Charles C. Haynes	Vice President; Founding Director, Religious Freedom Center	Newseum Institute	DC	Religion

The American Constitution Society for Law and Policy

Name	Title	Organization	State	Specialty
Richard B. Katskee	Legal Director	Americans United for Separation of Church and State	DC	Religion
Michael Lieberman	Washington Counsel	Anti-Defamation League	DC	Speech; Religion
Frank LoMonte	Executive Director	Student Press Law Center	DC	Press
Ira C. Lupu	F. Elwood and Eleanor Davis Professor of Law	George Washington University Law School	DC	Religion
Paul M. Smith	Vice President of Litigation Strategy	Campaign Legal Center	DC	Speech; Press
Katie Townsend	Litigation Director	Reporters Committee for Freedom of the Press	DC	Press
Caroline Mala Corbin	Professor of Law	University of Miami School of Law	FL	Speech; Religion
Gerry Weber	Senior Staff Counsel	Southern Center for Human Rights	GA	Speech; Press
Sonja R. West	Otis Brumby Distinguished Professor in First Amendment Law	University of Georgia School of Law	GA	Press
Rita Bettis	Interim Program Director & Legal Director	ACLU of Iowa	IA	Speech; Press; Religion
Michael Giudicessi	Partner	Faegre Baker Daniels	IA	Speech; Press
Andrew M. Koppelman	John Paul Stevens Professor of Law	Northwestern University School of Law	IL	Speech; Religion
Geoffrey R. Stone	Edward H. Levi Distinguished Service Professor of Law	University of Chicago Law School	IL	Speech
Jonathan Peters	Assistant Professor of Journalism	University of Kansas	KS	Press
Frederick Clarkson	Senior Fellow for Religious Liberty	Political Research Associates	MA	Religion
Jay D. Wexler	Professor of Law	Boston University School of Law	MA	Religion
Heidi Kitrosser	Professor of Law	University of Minnesota Law School	MN	Speech; Press
Gregory P. Magarian	Professor of Law	Washington University School of Law	MO	Speech; Press; Religion
Charles D. "Charlie" Mitchell	Associate Dean; Associate Professor	The University of Mississippi, Meek School of Journalism and New Media	MS	Press

Name	Title	Organization	State	Specialty
Jody Owens	Managing Attorney, Mississippi	Southern Poverty Law Center	MS	Speech
Joseph Blocher	Professor of Law	Duke University School of Law	NC	Speech
William P. Marshall	William Rand Kenan, Jr. Distinguished Professor of Law	University of North Carolina School of Law	NC	Speech; Press; Religion
Mike Rispoli	Director, Journalism Campaign; Director, New Voices: NJ	Free Press	NJ	Press
Floyd Abrams	Senior Counsel, Litigation Group	Cahill Gordon & Reindel LLP	NY	Speech
Baher Azmy	Legal Director	Center for Constitutional Rights	NY	Religion
Katy Glenn Bass	Deputy Director, Free Expression Programs	PEN America	NY	Speech
George Freeman	Executive Director	Media Law Resource Center	NY	Press
Kent Greenawalt	University Professor	Columbia Law School	NY	Speech; Religion
Laura R. Handman	Partner; Co-Chair, Appellate Practice	Davis, Wright, Tremaine LLP	NY, DC	Speech; Press
Brian T. Markley	Partner	Cahill Gordon & Reindel LLP	NY	Speech; Press
Burt Neuborne	Norman Dorsen Professor of Civil Liberties; Founding Legal Director, Brennan Center for Justice	New York University Law School	NY	Speech
Steven K. Green	Fred H. Paulus Professor of Law; Director, Center for Religion, Law & Democracy	Willamette University College of Law	OR	Religion
James M. Oleske, Jr.	Associate Professor of Law	Lewis & Clark Law School	OR	Religion
Marci A. Hamilton	Fox Family Pavilion Distinguished Scholar in Residence Program for Research in Religion	University of Pennsylvania Law School	PA	Religion
Robert Richards	Founding Director, Pennsylvania Center for the First Amendment	Pennsylvania State University College of Communications	PA	Speech; Press
Mary Catherine Roper	Deputy Legal Director	ACLU of Pennsylvania	PA	Speech; Religion
Thomas P. Crocker	Distinguished Professor of Law	University of South Carolina School of Law	SC	Speech

Name	Title	Organization	State	Specialty
David L. Hudson Jr.	Adjunct Professor of Law	Vanderbilt Law School	TN	Speech; Religion
Kenneth A. Paulson	President & CEO, First Amendment Center; Dean, College of Media & Entertainment	Newseum Institute; Middle Tennessee State University	TN	Speech; Press
Dale Carpenter	Judge William Hawley Atwell Chair of Constitutional Law; Professor of Law	Southern Methodist University, Dedman School of Law	TX	Religion
Lawrence Sager	Alice Jane Drysdale Sheffield Regents Chair	The University of Texas at Austin School of Law	TX	Religion
Frederick Gedicks	Guy Anderson Chair; Professor of Law	Brigham Young University Law School	UT	Religion
J. Joshua Wheeler	Director; Co-Director	Thomas Jefferson Center for the Protection of Free Expression; First Amendment Clinic, University of Virginia School of Law	VA	Speech

March 3, 2017