

## **Free Speech: Transatlantic Normative and Empirical Perspectives**

Bloc Course taught by Anna-Bettina Kaiser, Jan-Werner Müller, and Silvia von Steinsdorff  
as part of the Princeton-Humboldt Strategic Partnership)

Venue tbc

Free speech has been increasingly controversial in recent years. For some it is both a core liberal principle and an indispensable aspect of democracy, for others it has become a cover for conduct that deeply violates human dignity, that of minorities in particular. In this interdisciplinary course, we examine the general normative underpinnings of free speech and the different forms that the legal (and specifically constitutional) operationalization of free speech has taken in the United States and Europe, Germany in particular. The US and Germany are often taken as paradigmatic examples of a more libertarian versus a “dignitarian” approach to free speech: we investigate to what extent that contrast is justified and also ask how the seemingly so different traditions of thinking about free speech have evolved. Finally, we look at free speech in the context of urgent contemporary challenges: how have free speech and the institutional infrastructure underpinning it (such as media pluralism) come under threat in so-called “illiberal” regimes that are dismantling democracy and the rule of law? And how should speech on the internet be regulated, if at all? Here again we will have an opportunity to weigh the advantages of a more restrictive approach, as in Germany, and a so far relatively lax stance by the American state.

At the end of the course, students will be familiar with a range of crucial debates at the intersection of law, political and legal theory, and intellectual history. They will also have a sense of different approaches to these debates in Europe and the United States. Lastly, they will be able effectively to draw on some of the key positions of scholars working in the area of comparative constitutional law.

**Grading Requirements:**

The course requirements for the participating students from PU, HU law faculty and HU social sciences department (ISW) differ slightly according to specific study regulations. However, ALL participants are expected to prepare the assigned readings and to give one presentation on questions and texts specified (15 minutes maximum; if possible, in co-operation with students from other participating universities/disciplines).

The seminar will be followed by an international workshop on the same topic, hosted by Humboldt University on June 14-15. Students are very welcome (but not required) to present research papers/work in progress during that event.

**Read as background:**

Keith Whittington, *Speak Freely*, Princeton University Press, 2018

John Stuart Mill, *On Liberty*

Dieter Grimm, "Freedom of Speech in a Globalized World", in: Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy*

Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World*

**Friday, 31.05.2019**

**9.00-9.30**

**Welcome, Introductory remarks**

**9:30-11:00**

**1. Free Speech: The Search for Normative Underpinnings**

Joshua Cohen, “Freedom of Expression,” in: *Philosophy and Public Affairs*, 22 (1993)

Rae Langton, “Whose Right? Ronald Dworkin, Women, and Pornographers,” in: *Philosophy and Public Affairs* (1990)

Rae Langton, “Speech Acts and Unspeakable Acts,” in: *Philosophy and Public Affairs* (1993)

**11:30-13:00**

**2. Freedom of Speech and Democracy, Part 1**

Kevin Saunders, *Free Expression and Democracy: A Comparative Analysis* (Cambridge University Press 2017)

James Weinstein, “Hate speech bans, democracy, and political legitimacy”, in: *Constitutional commentary*, vol. 32 (2017), 527-83.

Michel Rosenfeld, “Hate Speech in Constitutional Jurisprudence: A Comparative Analysis”, in: Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech* (Cambridge UP, 2012)

**14:00-15:30**

**3. Freedom of Speech and Democracy, Part 2: The US-Perspective**

Robert Post, “Racist Speech, Democracy, and the First Amendment”, in: *William and Mary Law Review* (1991)

Robert Post, “Religion and Freedom of Speech: Portraits of Muhammad”, in: *Constellations* (2007)

Ronald Dworkin, “The Right to ridicule,” in: *New York Review of Books* (2006), at:

<https://www.nybooks.com/articles/2006/03/23/the-right-to-ridicule/>

US Court Cases to look at: *Schenck v. United States* (1919), *Debs v. United States*, *Berger v. United States* (1921), *Dennis v. United States* (1951), *Yates v. United States* (1957), *Brandenburg v. Ohio* (1969); *Virginia v. Black* (2003)

### **16:00-17:30**

#### **4. Freedom of Speech and Democracy, Part 3: Dignitarian Alternatives**

Jeremy Waldron, *The Harm in Hate Speech* (Harvard UP), especially chapter “Protecting Dignity or Protecting against Offense?”

Winfried Brugger, “The Treatment of Hate Speech in German Constitutional Law”, in: *German Law Journal* (2003)

Christian Hillgruber, “Legal Limits of a Permissible Criticism of Religion”, in: *German Law Journal* (2016)

M. Payandeh, “The Wunsiedel Decision”, in: *German Law Journal*, 2010

BVerfG, Order of the First Senate of 04 November 2009 - 1 BvR 2150/08 - paras. (1-87), *Wunsiedel*, at:

[https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104\\_1bvr215008en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/11/rs20091104_1bvr215008en.html)

Frederik Schauer, ‘Social Epistemology, Holocaust Denial, and the Post-Millian Calculus, Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech* (Cambridge UP, 2012)

Julie C. Suk, “Denying Experience”, in: Michael Herz and Peter Molnar (eds.), *The Content and Context of Hate Speech* (Cambridge UP, 2012)

**Saturday, 01.06.2019**

**09:30-11:00**

**5. The Political Weaponization of Free Speech?**

Citizens United v. Federal Election Commission (2010)

Robert Post, *Citizens Divided: Campaign Finance Reform and the Constitution* 3-94 (Harvard UP 2014)

Mathias Hong, Campaign Finance and the First Amendment – A Transatlantic Perspective, in: Anna-Bettina Kaiser, Niels Petersen, and Johannes Saurer (eds.), *U.S. Constitutional Law in the Obama Era – A transatlantic perspective*

Jedediah Purdy, “Beyond the Bosses’ Constitution”, in: *Columbia Law Review*, 2018

Jack Balkin, “The First Amendment in the Second Gilded Age”, in: *Buffalo Law Review*, 2019

**11:30-13:00**

**6. Free Speech in autocratizing and/or autocratic regimes, Part 1**

Yochai Benkler et al., *Network Propaganda* (Oxford UP, 2018), Parts II and III, open access at:

<https://global.oup.com/academic/product/network-propaganda-9780190923631?cc=us&lang=en&>

John Keane, Mediated Despotism—A World Beyond Democracy, in: Jan Zielonka (ed.) 2015, *Media and Politics in New Democracies. Europe in a Comparative Perspective*, Oxford University Press, pp. 248-264.

Joel Simon, *The New Censorship: Inside the Global Battle for Media Freedom*. New York: Columbia University Press, 2014, chapters 2-4,6-7.

**14:00-15:30**

**7. Free Speech in autocratic (or autocratizing) regimes, Part 2**

Gleb Bogush, Criminalisation of Free Speech in Russia, in: *Europe-Asia Studies*, 2017, Vol 69/8, pp. 1242-1256.

Gábor Polyák, “Media in Hungary: Three Pillars of an Illiberal Democracy,” in: Eva Połońska and Charlie Beckett (eds.), *Public Service Broadcasting and Media Systems in Troubled European Democracies*

Eva Połońska, “Watchdog, Lapdog, or Attack Dog? Public Service Media and the Law and Justice Government in Poland”, in: Eva Połońska and Charlie Beckett (eds.), *Public Service Broadcasting and Media Systems in Troubled European Democracies*.

Simon A. Waldman and Emre Caliskan, ‘Power, Patronage, and Press Freedom: The Political Economy of Turkey’s Media’, in: Eva Połońska and Charlie Beckett (eds.), *Public Service Broadcasting and Media Systems in Troubled European Democracies*

## **Sunday, 02.06.2019**

### **9.30-11.00**

#### **8. Freedom of Speech in the Age of the Internet, Part 1**

Cass Sunstein, #Republic. *Princeton University Press 2017*, chapter 7-9, pp.176-233.

Anupam Chander, Googling Freedom. *California Law Review*, (2011) 99(1), 1-45.

Matthew Scott Hindman, The Internet Trap. *Princeton University Press 2018*, pp.1-37

Tim Wu, “Is the First Amendment Obsolete?”, *Knight First Amendment Institute*, at: <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>

Jack Balkin, “Free Speech is a Triangle”, in: *Columbia Law Review*, 2018

Jack Balkin, “Free Speech in the Algorithmic Society”, in: *UC Davis Law Review*, 2018

### **11.30-13.00**

#### **9. Freedom of Speech in the Age of the Internet, Part 2**

##### **(German Netzwerkdurchsetzungsgesetz)**

Thomas Wischmeyer, ‘What is illegal offline is also illegal online’ – The German Network Enforcement Act 2017 Draft Paper. A revised version will appear in: *Bilyana Petkova/Tuomas Ojanen (eds.), Fundamental Rights Protection Online: the Future Regulation of Intermediaries, Edward Elgar 2019*.

Andrej Lang, “Netzwerkdurchsetzungsgesetz und Meinungsfreiheit. Zur Regulierung privater

Internet-Intermediäre bei der Bekämpfung von Hassrede“, in: AöR 143 (2018), 220-250.

Human Rights Watch, “Germany: Flawed Social Media Law”, at:

<https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>