

SYLLABUS PART 2. FREE SPEECH AND THE FIRST AMENDMENT, OLLI COURSE, SPRING, 2026

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Class # & Date with readings:

5. March 24, 2026. SYMBOLIC SPEECH – Draft card burning, flag burning, (compare with cross burning).

a. **Texas v. Johnson**, 491 U.S. 397 (1989). A 5-4 decision; burning the flag as symbolic speech.

BUT See Trump's Executive Order purportedly "reversing" this decision:

<https://www.whitehouse.gov/presidential-actions/2025/08/prosecuting-burning-of-the-american-flag/>

b. **United States v. O'Brien**, 391 U.S. 367 (1968). Draft card burner can be punished; symbolic speech not recognized here. Why not? Note Justice Douglas's dissent, arguing: this case raises the issue of the constitutionality of a draft during an undeclared war. "Send it back for a determination of this constitutional question."

c. **Tinker v. Des Moines School District**. 393 U.S. 503 (1969). Landmark case; School kids can wear black armbands. Several good YouTube videos on this.

Brain exercises:

Rethink the cross burning cases, **R.A.V. v. St. Paul**, 505 U.S. 377 and **Virginia v. Black**, 528 U.S. 343 (2003).

Q. If the school can't punish a student for wearing a black armband, can it punish a student for wearing a **swastika**?

Q. Don't school authorities have plenary power over what goes on in the classroom?

See also **Meyer v. Nebraska**, 262 U.S. 390 (1923) – in the era of anti-German hysteria -- early case holding that the state could not constitutionally outlaw teaching German language in the public schools.); and

Mahanoy Area School Dist. v. B.L. 141 S. Ct. 2038 (2021) (Brandi Levy, age 14, junior cheerleader, posts angry F-bomb Snapchat because she didn't make varsity squad.) **Held:** school violated 1st Amendment when it suspended her for a year from cheerleading. Whose decision do you agree with? Majority, concurrence, dissent? What lesson for Brandi? What lesson for the school? What conduct on the Internet can be punished by school officials? Bullying? Sexting? Doxxing fellow students? Using AI to portray students in sexually explicit ways?

6. March 31, 2026. Obscenity, Pornography, censorship, prurient interests, community standards, and the Miller Test. When can time/place/manner restrictions

prevail against First Amendment claims? Is the community standard in rural Utah the same as that in NYC? Should National Standards apply? How determined?

a. **Miller v. California**, 413 U.S. 15 (1973) and its background: *Roth v. United States*, 354 U.S. 476 (1957) citing a 19th century. British case defining “obscene” as material tending to deprave and corrupt those whose minds are open to such immoral influences,” failed to question whether the materials were obscene that were mailed. (Suggesting the higher castes of society aren’t open to immoral influences & can enjoy Fanny Hill?)

What’s the **Miller Test**? Is it too vague? Too broad? Should all obscenity law be banished - at least for adults? Does the Internet render obscenity laws obsolete?

b. **Paris Adult Theater I v. Slaton** 413 U.S. 49 (1973). What justifications for limiting public displays of sexually explicit materials?

Optional: c. **American Booksellers Ass’n v. Hudnut**, 771 F.2d 323 (7th Cir., 1985). Minneapolis ordinance says pornography discriminates against women and banishes it. Supreme Court disagrees. Your thoughts? Catherine MacKinnon’s views were powerfully at work behind this ordinance. Feminists do not all agree.

d. **Erznoznik v. Jacksonville**, 422 U.S. 205. Dirty nudie movies at drive-in theater. - okay?

7. April 7, 2026. Speech and other media: indecency, protecting children (?)

a. **FCC v. Pacifica Foundation**. 438 U.S. 726 - George Carlin’s “7 Dirty Words” meet the FCC. A divided Court can’t come together on this one. What are your thoughts?

b. **Sable Communications, Inc., v. FCC**. 492 U.S. 115 (1989). Dirty, sexy phone calls for hire - can they be prohibited by the federal government? Why or why not?

c. **Violent video games: can they be prohibited?** The court divides:
Brown v. Entertainment Merchants Association, 564 U.S. 786 (2011)

d. **Can Congress prohibit “crush” videos of cruelty to animals?** **United States v. Stevens**, 559 U.S. 460 (2010)

e. **Attacks on school and public libraries vs. 1st Amendment issues.**
**Suggestion: view the film, “The Librarians.” Please do some quick ChatGPT or other research (short) on how libraries have been targeted and how they have fought back to preserve access to books. What is your own thinking on these issues? School libraries

versus public libraries? What's the role of the librarian? Talk with your Pima county librarians and learn their tricks for avoiding outside censors trying to purge books.

8. The Pentagon Papers Case, Prior Restraint, and government punishment of whistle blowing.

a. NEW YORK TIMES V. UNITED STATES. 403 U.S. 713 (1971) Note this was a 6-3 decision. How might it be decided today under the current Supreme Court?

b. Snepp v. United States, 444 U.S. 507 (1980). Former CIA agent tells all but doesn't reveal classified material. Court fabricates a new punishment: seizure of all his book royalties.

c. Haig v. Agee, 453 U.S. 280 (1981). Another CIA whistle blower who does reveal classified material; US Govt revokes his passport and condemns him, like the Flying Dutchman, to sail the seas with no place to call home. Cuba finally takes him in.

d. The case of Edward Snowden - martyr or villain? From the National Whistleblower Center:

"Snowden still faces U.S. criminal charges for violating the Espionage Act, despite the fact that such a prosecution is unconstitutional." (??)

"The law is vague and over-broad with a long and sordid history of suppressing legitimate dissent." A partisan view, but does it strike home?

****But Snowden's leaks were cited in a 2020 federal case, where the court observed that gov't surveillance likely unconstitutional and that such surveillance resulting in criminal charges might have caused evidence to be excluded under the exclusionary rule (4th Amendment issue = evidence seized in violation of 4th amendment's unreasonable search & seizure provisions may be excluded as "fruits of the poisonous tree.").* **United States v. Moalin**, 973 F. 3d 977 (9th Circuit, 2020).