The cultural and social struggles over what constitutes “free” speech have defined the nature of American democracy. In 1989, when Supreme Court Justice William Brennan was asked to comment on his “favorite part of the Constitution,” he replied, “The First Amendment, I expect. Its enforcement gives us this society. The other provisions of the Constitution really only embellish it."

"Of all the issues that involve the mass media and popular culture, none are more central, or explosive, than freedom of expression and the First Amendment. Our nation’s fundamental development can often be traced to how much or how little we tolerated speech during particular historical periods.

Focusing on the impact of cameras in the courtroom, we will examine some of the clashes between the First and Sixth Amendments. With regard to film, we review the social and political pressures that gave rise to early censorship boards and the current film ratings system. We turn to issues in broadcasting and examine why it has been treated differently from print media. Among other topics, we inspect the idea of indecency in broadcasting and the demise of the Fairness Doctrine. Finally, we explore the newest frontier in speech—concerns about expression on the Internet."
The Origins of Free Expression and a Free Press

- In Europe throughout the 1600s, in order to monitor—and punish, if necessary—the speech of editors and writers, governments controlled the circulation of ideas by requiring printers to obtain licenses.
- In 1695, England stopped licensing newspapers, and most of Europe followed. In many democracies today, publishing a newspaper, magazine, or newsletter remains one of the few public or service enterprises that require no license.

Models for Expression and Speech

- The international human rights organization Freedom House comparatively assesses political rights and civil liberties in 195 nations and territories. The most recent map counts 63 countries as “Not Free,” including Angola, Belarus, China, Cuba, Egypt, Iran, Iraq, North Korea, Russia, and Zimbabwe.

The authoritarian model developed about the time the printing press arrived in sixteenth-century England. Its advocates held that the general public, largely illiterate in those days, needed guidance from an elite, educated ruling class. Government criticism and public dissent were not tolerated, especially if such speech undermined “the common good”—an ideal that elites and rulers defined and controlled. Censorship was frequent, and the government issued printing licenses primarily to publishers who were sympathetic to government and ruling-class agendas.
Under most authoritarian models, the news is still controlled by private enterprise. But under the communist or state model, press control resides in government. Speaking for ordinary citizens and workers, state leaders believe they are enlightened and that the press should serve the common goals of the state. Although some state systems encourage media and government cooperation, political and military leaders still dictate the agendas for newspapers and the broadcast media.

The libertarian model, the flip side of state and authoritarian systems, encourages vigorous government criticism and supports the highest degree of freedom for individual speech and news operations. In a strict libertarian model, no restrictions are placed on the mass media or on individual speech. Libertarians tolerate the expression of everything, from publishing pornography to advocating anarchy. In North America and Europe, many political and alternative newspapers and magazines operate on such a model.

Along with the libertarian model, a social responsibility model characterizes the main ideals of mainstream journalism in the United States. The concepts and assumptions behind this model coalesced in the controversial 1947 Hutchins Commission, which was formed to examine the increasing influence of the press. The report argued that the mass media had grown too powerful and needed to become more socially responsible. Key recommendations encouraged comprehensive news reports that put issues and events in context, more news forums for the exchange of ideas, better coverage of society’s range of economic classes and social groups, and stronger overviews of our nation’s social values, ideals, and goals.
A socially responsible press is usually privately owned (although the government technically operates the broadcast media in most European democracies). In this model, the press functions as a Fourth Estate—that is, as an unofficial branch of government that monitors the legislative, judicial, and executive branches for abuses of power. In theory, private ownership keeps the news media independent of government. Thus they are better able to watch over the system on behalf of citizens. Under this model, which is heavily influenced by the libertarian view, the press supplies information to citizens so they can make wise decisions regarding political and social issues; the press also operates without excessive government meddling in matters of content.

Censorship as Prior Restraint

In the United States, the First Amendment has theoretically prohibited censorship. Over time, Supreme Court decisions have defined censorship as prior restraint. This means that courts and governments cannot block any publication or speech before it actually occurs, on the principle that a law has not been broken until an illegal act has been committed.

During a declared war, for instance, if a U.S. court judged that the publication of an article would threaten national security, such expression could be restrained prior to its printing. In fact, during World War II the U.S. Navy seized all wireless radio transmitters. This was done to ensure control over critical information about weather conditions and troop movements that might inadvertently aid the enemy. In the 1970s, though, the Pentagon Papers decision and the Progressive magazine case tested important concepts underlying prior restraint.

The Pentagon Papers Case

Daniel Ellsberg, a former Defense Department employee, stole a copy of a forty-seven-volume document, "History of U.S. Decision-Making Process on Vietnam Policy." A thorough study of U.S. involvement in Vietnam from World War II to the present, the papers were classified by the government as top secret. Ellsberg and a friend leaked the study—nicknamed the Pentagon Papers—to the New York Times and the Washington Post.

In June 1971, the Times began publishing articles based on the study. To block any further publication, the Nixon administration received a temporary restraining order to prepare its case, arguing that publishing the documents posed "a clear and present danger" to national security. A lower U.S. district court supported the newspaper's right to publish, but the government's appeal placed the case in the Supreme Court less than three weeks after the first articles were published. In a 6–3 vote, the Court sided with the newspaper. Justice Hugo Black, in his majority opinion, attacked the government's attempt to suppress publication: "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints."
Unprotected Forms of Expression

- The Espionage Acts of 1917 and 1918, which were enforced during World Wars I and II, made it a federal crime to disrupt the nation’s war effort. These acts also authorized severe punishment for seditionist statements. In fact, in 2006, after the New York Times, the Wall Street Journal, and the Los Angeles Times all published articles on the Bush administration’s secret program to track banking records of suspected terrorists, one congressman called for the Times “to be prosecuted for violating the 1917 Espionage Act.”

- Beyond the federal government, state laws and local ordinances have on occasion curbed expression, and over the years the court system has determined that some kinds of expression do not merit protection as speech under the Constitution. Today, for example, false or misleading advertising is not protected by law; nor are expressions that intentionally threaten public safety.

Copyright & Libel

- A copyright legally protects the rights of authors and producers to their published or unpublished writing, music and lyrics, TV programs and movies, or graphic art designs. As noted earlier, file-swapping on the Internet has raised an entirely new class of copyright concerns, not only in the music industry but also in every media sector. Copyright protection was extended with the Digital Millennium Copyright Act of 1998, which goes beyond traditional copyright protection to outlaw technology or actions that circumvent copyright protection systems.

- The biggest single legal worry that haunts editors and publishers is the issue of libel, another form of expression that is not protected as speech under the First Amendment. Whereas slander constitutes spoken language that defames a person’s character, libel refers to defamation of character in written or broadcast expression. Inherited from British common law, libel is generally defined as a false statement that holds a person up to public ridicule, contempt, or hatred or injures a person’s business or occupation.

The Right to Privacy

- Where libel laws safeguard a person’s character and reputation, the right to privacy protects an individual’s peace of mind and personal feelings.

- In the simplest terms, invasion of privacy addresses a person’s right to be left alone, without his or her name, image, or daily activities becoming public property. Invasions of privacy occur in different situations, the most common of which are listed here:
  - intrusion, in which unauthorized tape recorders, wiretaps, microphones, or other surveillance equipment are used to secretly record a person’s private affairs.
  - the publication of private matters, such as the unauthorized disclosure of private statements about an individual’s health, sexual activities, or economic status.
  - the unauthorized appropriation of a person’s name or image for advertising or other commercial benefit.
For most of this nation’s history, it has generally been argued that obscenity does not constitute a legitimate form of expression. The problem, however, is that little agreement has existed on how to define an obscene work. Battles over obscenity continued. In a landmark case, Roth v. United States, the Supreme Court in 1957 offered this test of obscenity: whether to an “average person,” applying “contemporary standards,” the major thrust or theme of the material, “taken as a whole,” appealed to “prurient interest” (in other words, was intended to “incite lust”).

Refining Roth, the current legal definition of obscenity derives from the 1973 Miller v. California case, which involved sanctions for using the mail to promote or send pornographic materials. After a series of appeals, the Supreme Court argued that an obscene work had to meet three criteria:

- The average person, applying contemporary community standards, would find that the material as a whole appeals to prurient interest
- The material depicts or describes sexual conduct in a patently offensive way
- The material, as a whole, lacks serious literary, artistic, political, or scientific value

The Child Online Protection Act makes it illegal to post “material that is harmful to minors,” but an early version of the law was declared unconstitutional.

In 2007—nearly ten years after Congress first passed the Child Online Protection Act—a federal district court again ruled against the law, finding that it would infringe on the right to free speech on the Internet. Moreover, the judge stated that the act would be ineffective, as it wouldn’t apply to pornographic Web sites from overseas, which account for up to half of pornographic sites. The ruling suggested that the best protections for children are parental supervision and software filters.

Gag Orders and Shield Laws

- gag orders: legal restrictions prohibiting the press from releasing preliminary information that might prejudice jury selection.
- shield laws: laws protecting the confidentiality of key interview subjects and reporters’ rights not to reveal the sources of controversial information used in news stories.
Cameras in the Courtroom

The debates over intrusive electronic broadcast equipment and photographers actually date to the sensationalized coverage of the Bruno Hauptmann trial in the mid-1930s. Hauptmann was convicted and executed for the kidnap-murder of the nineteen-month-old son of Anne and Charles Lindbergh (the aviation hero who made the first solo flight across the Atlantic Ocean in 1927). During the trial, Hauptmann and his attorney had complained that the circus atmosphere fueled by the presence of radio and flash cameras prejudiced the jury and turned the public against him.

As broadcast equipment became more portable and less obtrusive, however, and as television became the major news source for most Americans, courts gradually reevaluated their bans on broadcast equipment. In fact, in the early 1960s the Supreme Court ruled that the presence of TV equipment did not make it impossible for a fair trial to occur, leaving it up to each state to implement its own system.

Social and Political Pressure on the Movies

Film Review Boards

Public pressure on movies came both from conservatives, who saw them as a potential threat to the authority of traditional institutions, and from progressives, who warned that movies were more attractive to movie houses than to social organizations and urban education centers. With that in mind, civic leaders publicly escalated their pressure, organizing local review boards that screened movies for their communities.

Industry Self-Regulation

As the film industry expanded after World War I, the impact of public pressure and review boards began to affect movie studios and executives who wanted to ensure control over their economic well-being. The movie industry formed the Motion Picture Producers and Distributors of America (MPPDA) and hired as its president Will Hays, former Republican National Committee chair. Hays was paid $100,000 annually to clean up “sin city.” Known as the Hays Office, the MPPDA attempted to smooth out problems between the public and the industry. Hays blacklisted promising actors or movie extras with even minor police records. Later, he developed an MPPDA blacklist of union members and independent producers who refused to submit to the Hays Office’s moral codes.

The Motion Picture Production Code

During the 1930s, the movie business faced a new round of challenges. First, various conservative and religious groups—including the influential Catholic Legion of Decency—increased their scrutiny of the industry. Second, deteriorating economic conditions during the Great Depression forced the industry to tighten self-regulation to keep harmful public pressure at bay. In 1927, the Hays Office had developed a list of “Don’ts and Be Carefuls” to steer producers and directors away from questionable sexual, moral, and social themes. Nevertheless, pressure for a more formal and sweeping code mounted. In the early 1930s, the Hays Office established the Motion Picture Production Code, whose overseers officially stamped almost every Hollywood film with a moral seal of approval.
Rating Movie Content

The current voluntary movie rating system—the model for the advisory labels the music business and television now use—developed in the late 1960s after another round of pressure over movie content. In 1966, the movie industry hired Jack Valenti to run the MPAA (Motion Picture Association of America, formerly the MPPDA), and in 1968 he established an industry board to rate movies. Eventually, G, PG, R, and X ratings emerged as guidelines for the suitability of films for various age groups.

Rating

G - General Audiences: All ages admitted; contains nothing that would offend parents when viewed by their children.

PG - Parental Guidance Suggested: Parents urged to give “parental guidance” as it may contain some material not suitable for young children.

PG-13 - Parents Strongly Cautioned: Parents should be cautious because some content may be inappropriate for children under the age of 13.

R - Restricted: The film contains some adult material. Parents/guardians are urged to learn more about it before taking children under the age of 17 with them.

NC-17 - No one 17 and under admitted: Adult content. Children are not admitted.

The MPAA copyrighted all ratings designations as trademarks, except for the X rating, which was gradually appropriated as a promotional tool by the pornographic film industry. In fact, between 1972 and 1989, the MPAA stopped issuing the X rating. In 1990, however, based on protests from filmmakers over movies with adult sexual themes that they did not consider pornographic, the industry copyrighted the NC–17 rating—no children age seventeen or under—and awarded the first NC–17 to Henry and June. In 1995, Showgirls became the first movie to intentionally seek an NC–17 to demonstrate that the rating was commercially viable.

FCC Rules, Broadcasting, and Indecency

Print vs. Broadcast Rules

Two cases—Red Lion Broadcasting Co. v. FCC (1969) and Miami Herald Publishing Co. v. Tornillo (1974)—demonstrate the historic legal differences between broadcast and print.

“IT is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”

--Supreme Court decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 June 9, 1969

“A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”

--Supreme Court decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 June 25, 1974
Dirty Words, Indecent Speech, and Hefty Fines

- Although considered tame in a culture that now includes shock jock Howard Stern’s lurid sexual programming, topless radio in the 1960s featured deejays and callers discussing intimate sexual subjects in the middle of the afternoon. The government curbed the practice in 1973, when the chairman of the FCC denounced topless radio as “a new breed of air pollution . . . with the suggestive, coaxing, pear-shaped tones of the smut-hustling host.”
- In theory, communication law prevents the government from censoring broadcast content. Accordingly, the government may not interfere with programs or engage in prior restraint, although it may punish broadcasters for indecency or profanity after the fact. Over the years, a handful of radio stations have had their licenses suspended or denied after an unfavorable FCC review of past programming records.

Political Broadcasts and Equal Opportunity

- In addition to indecency rules, another law that the print media do not encounter is Section 315 of the 1934 Communications Act, which mandates that during elections, broadcast stations must provide equal opportunities and response time for qualified political candidates. In other words, if broadcasters give or sell time to one candidate, they must give or sell the same opportunity to others.
- Supporters of the equal opportunity law argue that it has provided forums for lesser-known candidates representing views counter to those of the Democratic and Republican parties. They further note that one of the few ways for alternative candidates to circulate their messages widely is to buy political ads, thus limiting serious outside contenders to wealthy candidates, such as Ross Perot, Steve Forbes, or members of the Bush or Kennedy families.

The Demise of the Fairness Doctrine

- Considered an important corollary to Section 315, the Fairness Doctrine was to controversial issues what Section 315 is to political speech. Initiated in 1949, this FCC rule required stations (1) to air and engage in controversial-issue programs that affected their communities, and (2) to provide competing points of view when offering such programming.
- With little public debate, the Fairness Doctrine ended in 1987 after a federal court ruled that it was merely a regulation rather than an extension of Section 315 law. Over the years, broadcasters had argued that the doctrine forced many of them to play down controversial issues; they claimed that mandating opposing views every time a program covered a controversial issue was a burden not required of the print media. Since 1987, periodic support for reviving the Fairness Doctrine surfaces.
Watchdog Citizens

As we struggle to determine the future of converging print, electronic, and digital media and to broaden the democratic spirit underlying media technology, we need to stay engaged in spirited public debates about media ownership and control, about the differences between commercial speech and free expression. As citizens, we need to pay attention to who is included and excluded from the opportunities not only to buy products but also to speak out and shape the cultural landscape. To accomplish this, we need to challenge our journalists and our leaders. More important, we need to challenge ourselves to become watchdogs—critical consumers and engaged citizens—who learn from the past, care about the present, and map mass media’s future.