

Kris Turner:

Welcome back to Wisconsin Law and Action from the University of Wisconsin Law School. I'm your host, Kris Turner. Today we're joined by Professor Anuj Desai, a leading scholar in constitutional law and the First Amendment whose work explores the evolving architecture of free speech from its historical foundations to its modern challenges in the digital age. Professor Desai's scholarship examines how institutions shape speech, how courts conceptualize speakers and conduits, and how the First Amendment adapts to new technologies and cultural pressures. At a time when debates about the boundaries of public discourse dominate headlines, his insights are especially timely and we're very fortunate to have Professor Desai on the podcast. Thank you very much for joining us today, Professor Desai.

Anuj Desai:

Thanks, Kris. It's great to be here.

Kris Turner:

Of course, this is number two, and I hope that this is just a signal that we'll have many more discussions to come on the podcast. But let's start with the big picture and just dive right into it. When people hear free speech, they often think in broad, really almost absolute terms. From a constitutional perspective, how should we understand free speech today, both as a legal principle and as a social value?

Anuj Desai:

Yeah, it's a great question to start us off, and I like the framing of legal principle, social value. As a legal principle or as legal principles, I should say the First Amendment is a morass. Free speech has multi-pronged tests and means ends assessments and all sorts of complicated stuff that a lot of constitutional law has. And so, it's very hard sometimes without knowing the details of that law to know what a court is going to say when you think there's a free speech issue. Some of them, it's become very, very easy for the courts. Others both ways, in the sense of sometimes it's pretty clear that this is a violation of free speech. Sometimes it's pretty clear that it is not a violation of free speech, even if the person on the street might think it is. And sometimes it's hard. And as I said, that's the way a lot of constitutional law is in this era.

And I really liked the question about social value because I think that really speaks to the kind of things that courts in particular, since that's at least my job to think about courts in particular, the things that are sometimes in the front of their minds, but almost always in the back of their minds as they're asking how to answer a particular free speech problem. So traditionally, the values that the free speech principle is said to further are... There are four classic traditional. One is people may have heard the phrase the marketplace of ideas, and that's a principle of free speech furthers the search for truth. So we allow people to speak in order to better understand the truth about things. A second of value, I guess I would say social value, as you've articulated it, is democracy, just broadly, how we can contribute to our democratic polity.

The third is what is sometimes called self-actualization or self-realization, this idea that I need to be able to speak in order to become a full self. And that obviously includes being able to read and learn and talk to other people. And then the fourth, which is a little connected to the second in some ways, but is what people have often talked about as the balance between stability and change. All societies change over time, and free speech is viewed as one of the vehicles through which we collectively affect social change. And without it, the fear is that the only way to affect social change is violent revolution. And so, free speech is viewed as a sort of alternate, a preferable alternate to violent revolution.

Kris Turner:

So just digging in a little bit deeper to your scholarship, it looks really closely at how different institutions, even the postal system, have shaped the development of First Amendment doctrine. What can those institutional histories teach us about how speech is structured and regulated now?

Anuj Desai:

Yeah. So it's interesting. I started by talking about the fact that the First Amendment doctrine in courts is multifaceted and has all these complex tests and prongs and all the sort of things that poor law students have to learn. But the reality is that most free speech disputes occur within particular what I'd call institutional contexts. So you pointed out that I've written a lot on the post office. The very first time that the United States Supreme Court struck down a federal law was in the 1960s, and it involved a law that regulated the mail. And this was, at that time, certainly one of the ways in which people "spoke." That is how you could communicate long distance at a time when the long distance telephone call cost about four to five hours of the average person's salary per minute was through letters or through the postal service.

And Justice Holmes back in the early 20th century once said that the US government could, if it chose, not have a postal service, but as long as it has a postal service, the postal services is much a part of free speech as our tongue. So giving this sense like it is the means through which we actually speak long distance. So there are all sorts of institutions, some of which have what you might call a speech attribute. So easy ones are things like libraries. Libraries have traditionally stalked thing we call books, and books are also a vehicle for people to speak to others. You'll notice I'm using the word speak to encompass writing, and I think there's long been a sense that that is part and parcel of what free speech is. So institutions like a library or like the institutional press or universities, public schools, there are all sorts of institutions that you have an intuition. They have something to do with free speech. You don't know exactly what maybe, but that they are speech institutions.

And so, we have a lot of disputes about free speech in those institutions, but we also have a lot of disputes about free speech in institutions that aren't necessarily speech institutions in that sense, but that have questions about free speech in them. So the classic is a park, a public park. Nobody would say the purpose of a public park is to speak, but at the same time, it is clearly the kind of space, the kind of forum in the language of the law that people use to speak and that the First Amendment doctrine acknowledges as a place where people have pretty robust speech rights. So the institutions, obviously I should, maybe obviously this is the wrong way to say it, but even though the court often won't say it explicitly, the institutional context in which a speech dispute occurs really is part and parcel of how the doctrine, the legal doctrine develops.

Kris Turner:

The use of parks as free speech is something that I also struggle to connect because it's not a concept, like you said, a vehicle for free speech that you technically always consider. I actually remember traveling to the Smokies National Park one time, and they have a sign up that says this is a First Amendment free speech area. There's an entire area that they have set aside for just something that helped me like, wait a minute, why do we have a free speech area within a park when I feel like that's something that should encompass the entire area? But this is something that really helped me draw further parallels for how free speech and speech in general just interacts in a lot of different ways. And that was a very strange moment for me, but it also shifted my entire perspective.

Anuj Desai:

Right. And you can see how in a national park, at core, the purpose is for people to enjoy nature. The purpose of the national park is not to speak. And so, I suspect, I don't know that particular park well enough or the details of their free speech zone, so to speak, but I suspect what they were saying implicitly was you get to hand out leaflets here or you get to stand here and talk in a Hyde Park way, perhaps even just as loud as you want and say whatever you want. But most of the rest of this park is for people to go enjoy and commune with nature. And we're not going to let you hand out leaflets or bring a bullhorn and make a political point out in the higher reaches of the mountains because that's not what the purpose of that space is.

Kris Turner:

And you also read my mind about libraries with book challenges and questions of displays and just use of the space for free speech, which is a complex area, but also one that's off top of mind for many people in the current situation, but also just going backwards in time, because I think that that postal service case that you referred to actually did impact libraries in some sense, correct?

Anuj Desai:

Yeah. So a lot of cases about the post office created doctrine that is used throughout in lots of other institutions and lots of other places. So the short answer is yes, but core, the nature of what the post office does is so different from the nature of what a library does, that the precise application of the doctrine is just going to play out differently. I mean, one way to think about it is the post office can have a situation where anything and everything that will put into the category of communication, we'll just say words for a moment, can pass through it. There's no limit of sorts. Anybody who wants to can post something, can send something, can do that kind of thing, can use the post office as a means of speech. But the library obviously has some limits, right? There's shelf space, there's probably the interest of the patrons of any given particular library, and all of that means not everybody can have their speech in the library in a way that you can in the post office. And so, the law is going to treat the library shelves in a very different way. And obviously, and you raised the issue of displays, even fewer people can have a display in a library than can have their book they authored in a library.

Kris Turner:

And cost comes into it, all sorts of different factors for free speech limitations on that. We've started to pave the way for this next question because you've written a lot about the speakers and the conduits that exist along a continuum. Not all platforms function the same way, speakers react in a different way. How does that framework help us think more about the modern digital platforms and their role in public discourse?

Anuj Desai:

Yeah, it's a great question, and it really speaks to the contrast between the way in which the court has to articulate doctrine and the messy reality of multiple institutions and multiple situations that are all very different. So the core distinction that you described in the question is between a speaker on the one hand, so conceptualizing someone as a speaker, and obviously the two of us are speakers right now in this conversation and a conduit. So we are right now talking over Zoom and through mediated through a computer network, so Zoom or the University of Wisconsin's division of information technologies pipes, we might say, would be the conduit through which the two of us as speakers are communicating.

And First Amendment doctrine treats those two categories quite differently for obvious reasons. And so, we talked earlier about the post office, which is the historical traditional conduit, the classic conduit. Generally speaking, we conceive of a post office as a means through which people other than the United States government, which then owned, it's now a quasi-private, quasi-public corporation, but in its initial form, it was a US government agency, purely a US government agency, but nobody thinks of it as an agency that is speaking on behalf of the US government when you are sending letters. And so, in that sense, it's a conduit, just like Zoom. I probably shouldn't say exactly like Zoom, because as we know, Zoom has features that are different from the features of the post office that we would just say is a traditional dichotomy, and that dichotomy gets pushed on by the development of new technological means to communicate and control, disseminate, and organize information.

So in the '70s, the United States Supreme Court had to deal with, on the one hand, a newspaper, and on the other hand, a radio station. And my guess is that most of your listeners intuitively don't think of those two categories of things as all that different from each other. They're probably corporate owned entities of some kind, but most of us probably think of them as speakers of sorts. They're not literally speakers, but they may be agglomerations of different people who speak together through a corporate form. So if we just compare CBS with the New York Times as two traditional examples of, on the one hand, broadcast and on the other hand, a newspaper. They don't seem that different, but partly because of the technological development of radio and then subsequently television through broadcast, we have a system of licensing of radio stations and television stations.

And in this day and age, it seems bizarre, quite frankly, because almost all of us get it either streaming or if you're watching it live on television, you either have cable or you're live on television is through Netflix or through some other, the equivalent of streaming on the internet. But this distinction was very important in the '60s and early '70s. And the court in essence said a newspaper is a speaker and a radio station is not really a speaker, even though they recognized that it was in fact a speaker. They in effect conceptualized the radio station as a conduit that had its goal as serving the public interest.

And the reason for that, which will seem bizarre to listeners now, was that at core, when radio first developed, the licensing system was set up in order to avoid a cacophony of voices. And so, licenses were given out in order to allocate what was, in essence, limited space, so to speak, on the radio spectrum. What that meant was that not everyone who wanted a radio station could have one. And so, if you got one, what that meant is you got a special license and with that license came a responsibility, and that responsibility allowed the government to regulate to a certain extent your speech in a way that the government could not regulate a newspaper.

And even though this seems like ancient history, just literally just this past week, so we're now in February 2026, just this past week, there was a controversy involving Steven Colbert, the late night host who wanted to have a Senate candidate from Texas on his show and the FCC and his show is on CBS, which is a broadcast station. And the FCC had recently reminded broadcast stations of their requirement in essence to provide equal time to posing candidates if they give one candidate time on broadcast. So even today, in 2026, we're still living with this legacy of limited broadcast spectrum.

Kris Turner:

You can feel the decisions and the reverberations of those decisions down from the '70s, talking about the equal time doctrine and the FCC reminding CBS about that. As you said, that was just last week as we were recording this, but let's throw a few wrenches into the situation such as social media and you mentioned a cacophony of voices. We're going to talk about social media now. Courts and lawmakers are just wrestling with whether these platforms function more as a private publisher or like a modern public square where people can go and have that First Amendment discussion. From your perspective,

what's the most important misconception that people have about First Amendment and how it applies or doesn't apply in this situation?

Anuj Desai:

Right. That really is a core question that a lot of people care about today. So to start, the social media companies are all private companies. And so, as a legal matter, and they are not licensed, so in contrast to broadcast that we were just talking about. And so, as a legal matter under the First Amendment, they are not going to be subject to any First Amendment constraints. So the question becomes, can the government regulate them? And now you can see the question is what kind of law could the government use to regulate them in such a way that the government's law would not violate the First Amendment?

And so, this is where this paradigm that I described for you earlier of speaker and conduit becomes very important because if the government says to Zoom, let's say, just to make things easy, or to your internet service provider, which again is not quite like the post office or Federal Express, let's say, but is pretty similar conceptually. I mean, when you think about AT&T, let's say, or Charter Communication, these are two of the main broadband providers here in Madison, Wisconsin, they feel really like a conduit. I mean, nobody thinks when I'm using my AT&T broadband at home, that AT&T is speaking, I'm speaking. We understand that.

Kris Turner:

That'd be an interesting argument to be made at courts. I don't know if that would be a winner.

Anuj Desai:

It would be, although I will tell you that AT&T, there's a series of cases back from the late '90s in which AT&T made just that argument, and as did cable companies in the '90s, and the idea was, well, cable companies are speakers, and so providing internet service is very similar to just a channel on cable. And so, the cable company should be able to control, just like we can decide whether you get HBO or ESPN, or back then MTV, I don't know whether MTV is still around, maybe MTV still is around, but those were options back then. They said, "Well, we should be able to control your internet access too." But I think you're exactly right. Today, people don't really conceive of it that way. Although again, I will say variations of the argument that the internet service providers should have control over their own pipes, so to speak.

They own, so this is where law students will recognize property law starts coming into this, this idea that I have a property right in my physical wires, my fiber wires, so to speak. But yes, I think you're right. The core idea that they're probably pretty close to a pure conduit is a pretty good argument. So in contrast, social media, as you said, doesn't really feel like that for most people because it is a vehicle. I mean, so people do text on social media. And so, in some circumstances, if I text you on Instagram, then Instagram is serving not too differently from the telephone company or the post office. It's I'm communicating with you and we are the speakers and Instagram is really just the equivalent of a pipe. That's one formulation.

But obviously, social media does way more than that. And in particular, social media's algorithms determine for most people, most of the time, what they receive. So the social media companies will say, "Well, we're speakers." And that is where it gets tricky. So you'll recall before, I talked about the newspaper as being the court saying unquestionably a speaker. But if you think about a newspaper for a moment, in practice, a newspaper isn't really a single speaker, it's an agglomeration of speakers. There's a whole bunch of reporters who write articles, and then there are editors who edit those articles, and

then there's a editor-in-chief who decides which of those articles will even be in there and what place they'll be on, what'll be on page one and what'll be... So there's all sorts of people who are going together and we conceive of that entity as the speaker. It's the New York Times, even though in a lot of circumstances, it's Adam Liptak who's speaking, but it is conceived of as the New York Times.

And social media is in some ways pretty similar to that. And this is where it gets tricky. Sometimes they have their own employees, so to speak, who might actually be speaking, but most of the time what they're doing is aggregating speech of people who don't work for them. And that's the thing that gets tricky, because we know when the New York Times writes an article, okay, that's the New York Times, but if I'm on Instagram and I follow the New York Times, and the New York Times... And in my feed, every 17th thing that comes around is a New York Times article. Well, yes, I know the New York Times just spoke to me, but somebody actually, namely the socially Instagram, made a decision to make it every 17th article or every 13th article or every 2 articles or whatever it is.

And so, the selection of other people's speech is also often viewed as a choice. Well, it's clearly viewed as a choice, but it's a choice that one could characterize as the choice of a speaker, even if Instagram never speaks to you ever. Instagram as Instagram is owned by Meta, the whole thing. And so, I think this is the dilemma that we really haven't solved and there may never be a complete resolution to it, but that the courts have to deal with and that legislature have started to deal with, but will continue to have to deal with.

Kris Turner:

I guess I won't ask you to solve it right now. It sounds like an extremely complicated problem. I'll let you off the hook. I did look it up while we were chatting. MTV does still exist, just no music. Take away the M and we just get TV.

Anuj Desai:

Oh, is that really what it's called now? Oh, interesting.

Kris Turner:

No, no, no. I'm just calling it that for our sources. That'd be pretty funny though if they just went with TV and like, oh, that's a little bit... I'm not sure if you can copyright that one, MTV, but you can try.

Anuj Desai:

Exactly.

Kris Turner:

To continue with social media, we're also seeing a lot of debates about state efforts to regulate social media content moderation. What are the constitutional stakes in those cases and what tensions do they reveal about free speech in our very polarized era we're in?

Anuj Desai:

On top of the First Amendment issues, the one other big thing that state government regulation of social media would entail or would raise is federalism issues. So it is, I think, now fairly safe to say that almost all of the social media companies are largely engaged in interstate commerce and international commerce indeed. And so, there is a whole doctrine about... Well, two separate kinds of doctrines. One that relates to federal statutes. So there are federal statutes that many social media companies and

many of the courts, quite frankly, have argued effectively immunize social media companies from regulation about their content. So this is what is known as Section 230 of the Communications Decency Act of 1996. So that just gives you a sense of how it is a 30-year-old law. So many people would say it's outdated. Some people would say it's not outdated, and it's one of the reasons we have such a robust internet now.

Others would say, yes, it's one of the reasons we have such a robust and damaging to society internet now. But the key is there is a federal law still on the books that has provided not just social media companies, any internet intermediary with immunity for speech in circumstances in which someone else is what they call the information content provider, and they are instead playing the role of the conduit in essence. And so, this is another place where it gets tricky. Are they the conduit if they are actually doing some kind of selection to determine what's in your feed? And to be frank, the social media companies have effectively tried to have it both ways. That is, for purposes of that law, they say we're a conduit, but for purposes of First Amendment doctrine, they say, "We're a speaker."

And so, you can't regulate us because we're a speaker because it would violate the First Amendment. On the other hand, the states can't regulate us or other laws can't regulate us because this Section 230 immunizes us from any liability for the content of the speech that is found on social media because it's not our content originally. It's whoever else originally spoke.

Kris Turner:

Let's turn from social media to campuses where there's also a lot of flashpoints right now for free speech discussions about protests, invited speakers, institutional neutrality, among many other issues. What do you see as the most pressing First Amendment challenge facing public universities today?

Anuj Desai:

The short answer is all of the above, I think. The conceptualization of universities and free speech is, first of all, quite tricky. I think trickier than most people recognize, partly because where we started, people clearly have this sense that universities fall into a category of First Amendment institutions. So if I were to categorize, there might be some things that are on the line, libraries, as I said, post office, probably, the universities. They're clearly in that First Amendment institution category. The problem, I don't want to say probably the wrong way, the issue is that universities have at core a very specific purpose.

Now, to be fair, they have become multipurpose institutions, and I think this is where we start seeing some of the clashes, but at core, the university purpose, the university purposes are first and foremost, academic research, and secondly, education. And both of those purposes, and there can be a lot of other purposes, We have the Wisconsin idea here, so serving the state and the nation and the world, and there can be a whole bunch of other purposes, but those are the core ones. And I think when people think about those core ones, they realize both of them are infused with something to do with speech.

And the tricky part comes when people conceptualize free speech in what I will call the Hyde Park model. That is, if you conceptualize speech as a unadulterated good, the more of it you get of any kind, then you can see, well, that's not the point of a university. It's not more is better or anybody gets to say what they want. The astronomy department can deny tenure to somebody who does not accept the Copernican view of the solar system. And so, that speed, you could say, "Well, I think Ptolemy is right and Copernicus was wrong." That speech, but the university's purposes do not, I don't want to say do not permit, but would permit them to "suppress that speech" or not allow that speech in the university context. The tricky part comes because universities have lots of, I'll say just broadly lots of purposes, but also lots of places. And by that, I'm using that term place both physically and metaphorically.

Here at the University of Wisconsin, Madison, we have Library Mall. Library Mall has traditionally been a place where it's pretty close to Hyde Park. That is, yeah, anybody wants to can come and say whatever they want. And sometimes they can do it with a bullhorn. I mean, not at three in the morning because maybe there are some dorms that are within earshot, but in essence, we can hand out whatever leaflets you want. You were talking earlier about Smoky Mountain National Park. So Library Mall is the place where that happens.

And so, that actually, maybe that's part of the university's purpose, but assuming it is, notice it's a very different purpose than what happens in a classroom, whether a seminar where students and professors are engaged in discourse together or a lecture hall where a professor may just be giving a lecture. It's also very different from what happens in academic research. And so, all of these different purposes militate towards different kinds of what I'll call rules that allow more regulation in some portions of the university, some spaces of the university than in others.

Kris Turner:

There's also a tension between protecting free speech and addressing harms like harassment, misinformation, hate speech, things like that. From a constitutional standpoint, where does the law draw those lines where it's still unsettled?

Anuj Desai:

This actually is where the intertwining of all that we've been talking about before and the legal doctrine can come in. So if we take something like misinformation, it is probably the case that a university classroom can be a place where the professor, even in a public university, can make it a no misinformation zone. I mean, I think people may have debates about what is or isn't misinformation, but they're clearly allowed to control the speech that is and isn't permitted in the classroom. Indeed, even in assignments. No, you can't give me misinformation on your assignment and expect to still get an A. And in contrast, go to social media or your own blog or whatever it is, a lot of misinformation would be permitted under the First Amendment and no one is allowed to regulate it because it is a different space. It's what the court and one of the world's premier First Amendment scholars, Robert Post has called "public discourse." And in the sphere of public discourse, the government just doesn't get to regulate at all, is the core.

So you also mentioned harassment. Generally speaking, with very, very limited exceptions, in public discourse, there can be a lot of harassment. It's protected by the First Amendment unless it rises to the level of threats or incitement. Just to give one example, sexual harassment or racial harassment is all protected by the First Amendment in those kind of spaces. Now, again, Instagram can have their own rules because again, they're a private company or TikTok. If they want to say no harassing videos on TikTok, TikTok is perfectly permitted to do that, but the government can. Now, on the other hand, the university is both an educational space, but it's also an employer. And so, for example, in employment, I mean, we can talk about in the educational space, and this probably makes a lot of sense, of course, the university, even though it's a public university, can regulate what constitutes harassment, sexual harassment, racial harassment within the classroom.

Why? Because it's not Hyde Park, right? I mean, because the space has a purpose. The purpose is pedagogical and harassing a student or even a professor in that space undermines the pedagogical goal. And the same thing in the employment context, we have very complex rules about sexual harassment, racial harassment that permit employers to, in some cases, require employers to regulate harassing speech in order to ensure that employees are able to do their jobs in essence. And so, a lot of it really

does have to do with the space that one is in. And again, I mean space in both the physical and metaphorical sense.

Kris Turner:

Obviously, you spend a lot of time thinking about researching and writing on these topics, but you also spend a lot of time teaching it to students here at the law school. Just as we start to wrap up here, what would you recommend to students who are interested in constitutional law or First Amendment practice in policy, academia, or litigation for entering this field right now?

Anuj Desai:

I guess I would say a couple things that I tell my students. People traditionally think of First Amendment cases and controversies, if not explicitly, at least implicitly through the lens of what I described earlier as First Amendment institutions. So the idea is if you want to do First Amendment stuff, get a job at the New York Times or at Fox News, surely that would be a great place to get a job. And there's nothing wrong with that. Those hard jobs are hard to get, I will say, as are jobs at the firms that do that kind of work for them, but no doubt that is a place to do that kind of thing. And even though local and regional press has decreased quite dramatically since the advent of the internet, there are still jobs of that sort, not many, but jobs of that sort all over. But if that's what you want to do, then probably the First Amendment institutions you're after are in New York and LA and San Francisco, places like that.

But the other kind of First Amendment work that people don't really, I think, think about, and it only becomes apparent once they start taking a First Amendment class, is that it turns out that the vast majority of First Amendment doctrine, at least at the appellate levels and Supreme Court level, actually comes from municipalities, sometimes states, but municipalities. And the reason I think is, I mean, some of it may be because municipalities maybe are more likely to violate the First Amendment, maybe one response, but I think it's partly because we have one federal government. It's true, it's a large federal government. It's got many departments and many agencies and sub-agencies and all sorts of stuff. And I suppose they can all violate the First Amendment too, but there's only one and we've got 50 states and there's 50 of them, but the number of municipalities is with the thousands.

And the reality is that many of them deal with questions that implicate the First Amendment all the time, not so much because they own First Amendment institutions, but because they are directly in the quote line of fire, so to speak, of regulating spaces and people directly. And these days, so much implicates the First Amendment in so many different sub areas that municipalities are often dealing with questions that really do implicate the First Amendment. And so, becoming, I don't want to say it necessarily has to be a small town, but becoming a lawyer for a local government is sometimes the best way to get some First Amendment work.

Kris Turner:

This is tricky, as you said, to enter this field right now, but also it sounds like there are opportunities and needs for lawyers to be working on in this area for both local-

Anuj Desai:

Absolutely.

Kris Turner:

... but all the way up to the news corporations and beyond. Professor Desai, thank you once again for joining the podcast to discuss such a critical aspect of your scholarship and instruction and research. We'll link out to Professor Desai's scholarship on our podcast page. I really implore you to take some time to dive it further into his work. It's engaging and thought-provoking and above all important in our current moment. Thank you again for joining the podcast, Anuj.

Anuj Desai:

It's really, really been my pleasure, Kris.

Kris Turner:

Thank you all for listening. This was Wisconsin Law and Action from the University of Wisconsin Law School. To hear more conversations with our faculty about their research and its real world impact, visit wilawinaction.law.wisc.edu. You can stay up to date on Wisconsin Law School's scholarship by subscribing to this podcast via the Apple iTunes store or follow the Wisconsin Law School on whatever social media you may be on for updates on faculty news and publications. I'm Kris Turner. See you next time and happy researching.