

## KYLE LANGVARDT

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### TEACHING POSITIONS

#### **University of Nebraska College of Law, Lincoln, NE**

*Assistant Professor of Law*, Aug. 2020-present

*Faculty Fellow, Nebraska Governance and Technology Center*, Aug. 2020-present

Courses: Constitutional Law I, Legislation and Regulation (through College of Business), Law for Startups (through College of Business)

Faculty advisor: American Constitution Society

#### **University of Detroit Mercy School of Law, Detroit, MI**

*Associate Professor of Law*, Mar. 2015-Aug. 2020

*Assistant Professor of Law*, Aug. 2012-Mar. 2015

Tenured 2016

Courses: First Amendment, Constitutional Law, Contracts, Administrative Law, First Amendment Seminar: Regulating Online Communications, Property

Committees: Admissions, Moot Court, Faculty Recruitment, Petitions, Library, Honor Council, Orientation, McElroy Annual Lecture on Law and Religion

Honors: James T. Barnes, Sr. Memorial Faculty Scholar Award, 2019

Faculty advisor: American Constitution Society, Law Students for Reproductive Justice, Student Law Review Notes

#### **Indiana University Kelley School of Business, Bloomington, IN**

*Lecturer in Business Law and Ethics*, Aug. 2010-Jul. 2012

*Visiting Lecturer in Business Law*, Aug. 2009-Jul. 2010

Courses: L201 Legal Environment of Business, L293 Honors Legal Environment of Business, L250 Law and the Arts, L575 Legal Issues in the Arts

### EDUCATION

#### **University of Chicago Law School, Chicago, IL**

J.D., 2007

Mandel Legal Aid Clinic (Civil Rights and Police Accountability Project)

#### **Earlham College, Richmond, IN**

B.A., 2004

Philosophy major; Economics minor

Phi Beta Kappa

College and Departmental Honors (Highest Honors)

## PUBLICATIONS

*Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129 (2019).

Describes possible regulatory strategies to mitigate addictive design features in tech products and discusses arguments for and against their constitutionality.

*A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341 (2019).

Surveys threats that online platforms such as Facebook and Google pose to online discourse, and ultimately, the freedom of speech. Outlines policies that regulators might adopt in response to diverse problems including false news, online addiction, arbitrary censorship, and the revenue crisis in online publishing. Describes how First Amendment doctrine should evolve to accommodate a wider role for government in regulating online platforms.

*Four Modes of Speech Protection for Algorithms*, book chapter forthcoming in CAMBRIDGE HANDBOOK ON LAW AND ALGORITHMS, ed. Woodrow Barfield (Cambridge Univ. Press).

Evaluates four arguments that computer algorithms might sometimes enjoy First Amendment protection: 1) because they utter speech; 2) because they *are* speech; 3) because they can be used as props or illustrations in support of speech; and 4) because they are communications technologies.

*Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018).

Proposes legislation to conform online social media platforms' content moderation practices to free speech norms.

*A Model of First Amendment Decisionmaking at a Divided Court*, 84 TENN L. REV. 833 (2017).

Identifies four methodological tenets as highly predictive of the Supreme Court's approach to First Amendment questions since the appointment of Anthony Kennedy, and argues that the Court's liberal and conservative blocs divide with surprising consistency on each of them.

*Remarks on 3D Printing, Free Speech, and Lochner*, 17 MINN. J.L. SCI. & TECH. 779 (2016) (symposium piece).

Presented at symposium on 3D-printing and the law. Argues that contemporary First Amendment doctrine would produce Lochner-like results in an economy with large markets for 3D-printable goods.

*The Doctrinal Toll of "Information as Speech,"* 47 LOY. U. CHI. L.J. 761 (2016).

Critiques what Justice Kennedy describes in *IMS Health v. Sorrell*, 564 U.S. 552 (2011) as "the rule that information is speech" as an invitation to opportunistic First Amendment claims by parties who deal in data or software. Proposes that expansive protections for emerging non-expressive technologies such as cryptographic algorithms, blockchain, computer-aided design files, and synthetic biology will in the long run dilute core First Amendment protections. Cited extensively, and favorably, in Note, *Fifth Circuit Declines to Enjoin Regulation of Online Publication of 3d-Printing Files*, 130 HARV. L. REV. 1744 (2017).

*The Replicator and the First Amendment*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (2015). Anticipates litigation over the First Amendment status of 3D-printable products, see *Def. Distributed v. United States Dep't of State*, 865 F.3d 211, 212 (5th Cir. 2017)), and warns of attempts to create a First Amendment “freedom to manufacture” for the twenty-first century. Cited extensively, and favorably, in Note, *Fifth Circuit Declines to Enjoin Regulation of Online Publication of 3d-Printing Files*, 130 HARV. L. REV. 1744 (2017).

*The Lawless Rule of the Norm in the Government Religious Speech Cases*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 405 (2014).

Argues that Supreme Court doctrine on public religious displays largely amounts to a factfinding exercise in which government religious speech activities are measured against “normal” majoritarian cultural expectations.

*The Sorry Case for Citizens United: Remarks at the 2012 Charleston Law Review and Riley Institute of Law and Society Symposium*, 6 CHARLESTON L. REV. 569 (2012) (symposium).

Symposium remarks criticizing *Citizens United v. FEC*, 558 U.S. 310 (2010) while arguing that certain popular criticisms – “money is not speech” and “corporations are not people” – distract from the opinion’s most dangerous flaws.

*Imagining Change Before and After Citizens United*, 3 ALA. C.R. & C.L.L. Rev. 227 (Spring 2012).

Postulates that the Overton Window phenomenon explains the Supreme Court’s road to *Citizens United*.

*Unwise or Unconstitutional?: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193 (2004) (with Arlen Langvardt).

Critiques Supreme Court opinion upholding retroactive copyright extensions against constitutional challenge.

## PRESENTATIONS

*Checking Apex Platforms*, Federalist Society Junior Scholars Workshop: “Regulating Giant Platforms.” University of Minnesota Law School, Minneapolis, MN, Dec. 5, 2019

*Checking Apex Platforms*, Washburn Law School Symposium: “The Future of Cyber Speech, Media, and Privacy.” Washburn University School of Law, Topeka, KS, Nov. 6, 2019

*Checking Apex Platforms*, University of Nebraska College of Law, Lincoln, NE, Nov. 4, 2019

*Panel Discussion: Impeachment*, University of Detroit Mercy School of Law, Detroit, MI, October 30, 2019

*Panel Discussion: Transactional Practice* (moderator), University of Detroit Mercy School of Law, Detroit, MI, October 24, 2019

*The Fifth Branch*, Central States Law Schools Association 2019 Annual Conference, University of Toledo College of Law, Toledo, OH, September 20-21, 2019

*Regulating Habit-Forming Technology*, American Constitution Society Constitutional Law Scholars Forum, Barry University School of Law, Orlando, FL, March 1, 2019

*Regulating Habit-Forming Technology*, Tech Law and Policy Colloquium, Georgetown University Law Center, Washington, D.C., February 21, 2019

*Behaviorally Addictive Speech*, Ninth Annual Constitutional Law Colloquium, Loyola University Chicago School of Law, Chicago, IL, Nov. 2-3, 2018

*Toward a First Amendment Jurisprudence for the Platform Economy*, National Conference of Constitutional Law Scholars, Tucson, AZ, Mar. 16-17, 2018.

*Toward a First Amendment Jurisprudence for the Platform Economy*, University of Detroit Mercy School of Law, Mar. 12, 2018.

*Regulating Online Content Moderation*, University of Toledo, Toledo, OH, Jan. 2018.

*Regulating Online Content Moderation*, "All Things in Moderation" Conference, University of California, Los Angeles, Los Angeles, CA, Dec. 6-7, 2017.

*After the Marketplace of Ideas*, Eighth Annual Constitutional Law Colloquium, Loyola University Chicago School of Law, Chicago, IL, Nov. 3-4, 2017.

*Panel Discussion: Hate Speech After Charlottesville*, University of Detroit Mercy School of Law, Detroit, MI, Oct. 18, 2017.

*Regulating Online Content Moderation*, University of Nebraska College of Law, Lincoln, NE, Oct. 17, 2017.

*Regulating Online Content Moderation*, University of Detroit Mercy School of Law, Detroit, MI, Oct. 4, 2017.

*Panel Discussion: Presidential Powers and the Trump Administration*, University of Detroit Mercy School of Law, Detroit, MI, Sept. 13, 2017.

*What is the Constitution?* Louis Pasteur Elementary School, Detroit, MI, Feb. 24, 2017.

*Panel Discussion: The Muslim Ban*, University of Detroit Mercy School of Law, Detroit, MI, Feb. 1, 2017.

*The First Amendment at a Divided Court*, University of Detroit Mercy School of Law, Detroit, MI, Mar. 27, 2017.

*The First Amendment at a Progressive Court*, Seventh Annual Constitutional Law Colloquium, Loyola University Chicago School of Law, Chicago, IL, Nov. 5, 2016.

*Panel Discussion: The Garland Nomination*, University of Detroit Mercy School of Law, Detroit, MI, Oct. 31, 2016.

*Remarks on 3D Printing, Free Speech, and Lochner*. Minnesota Journal of Law, Science & Technology 2016 Symposium: "Disruptive Innovation: Legal Concerns in 3D Printing." University of Minnesota Law School, Minneapolis, MN, Mar. 4, 2016.

*Free Speech's Tech Bubble*, Address at the Loyola Annual Constitutional Law Colloquium, Loyola University Chicago School of Law, Chicago, IL, Nov. 7, 2015.

*The Doctrinal Toll of "Information as Speech,"* Address at the Central States Law Schools Association Annual Conference, University of Toledo School of Law, Toledo, OH, Oct. 9, 2015.

*The Replicator and the First Amendment*, Address at the Loyola Annual Constitutional Law Colloquium, Loyola University Chicago School of Law, Chicago, IL, Nov. 8, 2014.

*The Demise of "Tests" in the Government Religious Speech Cases*, Southeastern Law Scholars Conference, Charleston School of Law, Charleston, SC, Oct. 5, 2013.

*Election Law Panel Discussion*, Charleston School of Law, Charleston, SC, Feb. 22, 2013.

## **OTHER LEGAL EXPERIENCE**

**Locke Lord Bissell & Liddell LLP**, Chicago, IL

*Associate*, 2007-2009

*Summer Associate*, 2006

Drafted trial and appellate documents and legal memos on issues ranging from architectural copyright to bail bonds. Represented Darfuri refugee in pursuit of asylum.

**Civil Rights and Police Accountability Project, Mandel Legal Aid Clinic**, Chicago, IL

*Intern*, 2005-2007

Investigated, drafted memoranda for, and prepared filings in litigation involving systematic police misconduct.

## **BAR ADMISSIONS**

Bar of the Supreme Court of Illinois, admitted 2007

Bar of the United States District Court for the Northern District of Illinois, admitted 2007

## REFERENCES

Julie Cohen  
Mark Claster Mamolen Professor of Law  
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**Research Agenda**

Over the past few years, two broad themes have drawn my interest. First, I am interested in the law's adaptation to social and economic changes wrought by information technologies. Second, I am interested in the decades-long extension of First Amendment doctrine to cover an ever-expanding field of public and private affairs. There is a whole universe of questions in the overlap between these two interests, and the following three represent only the part of it where I have already begun to work. I see potential in each area to build new projects on top of existing work.

**1: How has the shift toward the 21st Century “information economy” affected the “marketplace of ideas?”**

In two papers – one in the Georgetown Law Journal and another in the George Mason Law Journal – I have written on the consequences of a shift from a printing press-based media market to one mediated by massive platforms such as Facebook and Google. I argue that this shift is best understood as the passage of power from one set of monopolists to another, with profound consequences for the system of free speech.

In *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2018) (“*Content Moderation*”), I addressed the free speech concerns that arises from highly-profitable online platform monopolies’ exercise of “editorial power.” Facebook, Twitter, Google, and other online platforms employ a vast corps of human and algorithmic content moderators to screen millions and take down thousands of comments, status updates, and photos every day. In doing so, these corporations exercise censorship capabilities traditionally reserved exclusively for sovereigns. I argue that the platforms are not reliable guardians of free speech standards over the long term, and that it is time to consider legislation to ensure that private content moderation does not transgress free speech norms by too wide a margin. But in outlining what this legislation would require, I make clear that there is no going back to the *laissez-faire* deregulatory approach that has traditionally defined First Amendment law. Instead, any effort to regulate online content moderation would require close and ongoing administrative oversight of a privately-owned censorship leviathan.

*A New Deal for the Online Public Sphere*, forthcoming in 26 GEO. MASON L. REV. \_\_\_\_ (2019) (“*A New Deal*”) widens the lens. I argue that the rise of false news and ideological polarization on online platforms is mostly a structural consequence of the platforms’ advertising-based business model. Over time, the demands of that business model have substantially weakened online public sphere’s ability to police itself through the traditional means of counterspeech. Troublingly, we now turn to blunt-force private censorship of the sort described

in *Content Moderation* as a first line of defense against dangerous speech. I outline the a range of structural interventions that might help to restore ordinary function to the public sphere. I also describe ways that First Amendment doctrine might adapt to accommodate the new reality.

*A New Deal's* scope is in many ways more fitting for a book-length treatment, and I may decide to take on such a project in the next couple of years. In the meantime, I have begun to write law review articles that develop themes hinted at *A New Deal*.

*Regulating Habit-Forming Technology*, forthcoming in 88 FORDHAM L. REV. \_\_\_\_\_ (2019) (*Habit-Forming*), was the first of these pieces. The article describes the rise of “persuasive design” in software – user interface tricks, essentially, that draw on behavioral research to drive compulsive use. I examine the economic drivers behind this trend as well as the potential social harms that flow from it. The piece surveys the beginnings of a movement in the United States to regulate habit-forming technology, as well as the relatively extreme measures that have already been taken in some Asian countries. I outline the mechanics of implementing various policies – gauging, for instance, the amount that the FTC and state gambling commissions could do on their own without legislative intervention. Finally, I weigh the First Amendment challenge that app developers would raise against these policies.

*Checking Apex Platforms*, my primary work in progress, offers a simple theory of giant information platforms’ relationship to American government. When a platform acquires the ability to structure entire markets – what I call “planning at scale” – it should be considered a “nonstate regulator” subject to a set of special regulatory checks by the political branches. These checks should perform two broad functions. First, they should ensure that nonstate regulators do not “disrupt” the overall primacy of elected and judicial institutions. Second, government must ensure that nonstate regulators do not encroach on individual liberties in ways that the Constitution would not allow a state actor. Courts, in turn, should consider these two objectives to represent compelling governmental interests for purposes of constitutional review. I warn, however, about a dynamic of regulatory escalation in which governmental efforts to counter platform overreach result in new and dangerous extensions of state power.

*Checking Apex Platforms* has sprouted other projects in related areas. One such project would address the role of information platforms as highly-configurable election infrastructure. Plenty of attention has been given to Facebook’s negligence in failing to root out foreign meddlers in the 2016 election cycle. Much less attention has been given to the danger that at some point, a major social platform may itself interfere with an election. Well-publicized behavioral experiments conducted by Facebook several years ago demonstrated that the company could both drive voter turnout and influence mood on election days through real-time tweaks in the News Feed and the user interface. To be sure, there is no evidence that Facebook or any other platform has ever sought to tip an election. But the long-term risk of catastrophic harm nevertheless justifies some regulatory safeguards. This paper would map them out.

## **2: Is everything “speech” now?**

The category of activities protected by the First Amendment grows decade by decade, and the courts have not articulated any clear limiting principle. This growth in the First Amendment’s scope of coverage has two consequences. First, it has given rise to a “First Amendment Lochnerism” in which mundane business laws – such as the state of New York’s law against credit surcharge fees<sup>1</sup> – are placed in constitutional jeopardy. Second, the growth in

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<sup>1</sup> See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).



the First Amendment's breadth threatens a long-term dilution in the depth of protection enjoyed by core speech.

Both consequences are on display in the case law involving computer code, which today is treated, in principle at least, as a "language" used to express ideas about mathematics or software. In *The Replicator and the First Amendment*, *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* (2015), I anticipated litigation over the digital blueprints used to manufacture 3D-printable objects. I argued against the courts' long-standing assumption that computer code was *per se* expressive. Under that assumption, I pointed out, virtually all regulation of 3D-printable objects would be subject to strict scrutiny.

In a subsequent paper, *The Doctrinal Toll of "Information As Speech,"* 47 *LOY. U. CHI. L.J.* 761 (2016), I demonstrated that the courts' treatment of code as "speech" for First Amendment purposes mostly amounts to lip service, and that they consistently avoid the "code as speech" doctrine's absurd consequences by watering down First Amendment doctrine. I argued that this kind of selective "watering down" tends to dilute the larger body of First Amendment doctrine, and that courts should resist calls to analyze an ever-wider field of high technology under a First Amendment rubric. Both *Doctrinal Toll* and *The Replicator* were cited heavily in the Harvard Law Review's Note on the ongoing litigation over 3D-printable guns.<sup>2</sup>

I have begun work on another article, tentatively titled *Speech and Control*, that will propose that speech protections should not extend to purely "control-oriented communications." Avoiding waste and shortfalls within a supply chain, for example, requires constant communication about supply and demand conditions at all points. But considered alone, these informational exchanges bear no necessary relationship to what we usually think of as "freedom." Instead, they tend to point in the opposite direction – away from spontaneity and toward certainty. I would argue that the "control-oriented communications" paradigm, however broad and however debatable in its application, sheds better light on 21st-century speech controversies than more established paradigms such as the "marketplace of ideas." In particular, the question of control clarifies questions around certain types of "borderline" speech – computer code, information platform management, behavioral nudges.

### **3: Are the foundations of First Amendment analysis shifting?**

In *A Model of First Amendment Decisionmaking at a Divided Court*, 44 *TENN. L. REV.* \_\_\_\_ (2017) ("*First Amendment Decisionmaking*"), I identified four deep methodological tenets that have shaped the Supreme Court's First Amendment jurisprudence since Justice Kennedy's appointment to the bench in 1988. These tenets – for instance a preference for a small rather than a large set of First Amendment "rules" – are not obviously ideological in nature. But to my surprise, I found that the Court's conservative and liberal blocs have split reliably on each of these tenets, putting the basic style of First Amendment doctrine on a knife's edge.

I expect that one or more of the Court's four methodological tenets identified in *A Model of First Amendment Decisionmaking* will eventually change—whether in response to changes in Court personnel, or because social or technological changes have rendered them obsolete. When that occurs, I expect to write a piece signaling the end of one era of the First Amendment and the beginning of a new one.

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<sup>2</sup> Note, *Fifth Circuit Declines to Enjoin Regulation of Online Publication of 3d-Printing Files*, 130 *HARV. L. REV.* 1744 (2017).