At one time or another, everyone has criticized a political official or complained about a government policy. Sometimes we express such grievances privately, to friends or relatives. At other times we may join with like-minded people and communicate our opinions collectively. Speaking our minds is a privilege we enjoy in the United States, a privilege guaranteed by the First Amendment.

While the Bill of Rights was making its way through Congress and state legislatures, the First Amendment's freedom of expression provisions were hardly debated. The framers had a fundamental commitment to speech and press freedoms, especially as they related to the public discussion of political and social issues. After all, vigorous public oratory had fueled the American Revolution and helped shape the contours of the new government.

The First Amendment's language is very bold: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These words seem to provide an impregnable shield against government actions that would restrict any of the four components of freedom of expression: speech, press, assembly, and petition. But to what extent does the Constitution protect these rights? May mischievous patrons stand up in a crowded movie theater and shout "Fire!" when they know there is no fire? May a publisher knowingly print lies about a member of the community to destroy that person's reputation? May a political group attempt to spread its message by driving sound trucks through residential neighborhoods at all hours? May protesters storm onto the floor of the U.S. Senate to bring attention to their demands?

Despite the clear wording of the First Amendment, the answer to each of these questions is no. The Supreme Court never has adhered to a literal interpretation of the expression guarantees; rather, it has ruled that certain expressions, whether communicated verbally, in print, or by actions, may be restricted because of their possible effects.

This chapter is the first of three dealing with the right of expression. Here we examine the historical development of constitutional standards for freedom of expression and then address the contemporary application of First Amendment law to various kinds of expression. In the next two chapters, we look at issues specific to the freedom of the press, discuss forms of expression considered undeserving of constitutional protection, and examine the difficult First Amendment issues surrounding the Internet and other newly developed media forms.

**The Development of Legal Standards**

In the years immediately following the adoption of the Constitution, the U.S. government was weak and vulnerable. The economy was in disarray, Europe continued to pose a threat, and the ruling Federalist Party was the target of much political criticism. In response, Congress passed one of the most restrictive laws in American history, the Sedition Act of 1798. This statute made it a crime to write, print, utter, or publish malicious material that would defame the federal government, the president, or the members of Congress; that would bring them into disrepute; or that could excite the hatred of the people against them. Violations of the act were punishable by imprisonment of up to two years. The act expired in 1801 without any court challenges to its validity.

It is surprising to many that the very individuals who had just proposed the First Amendment with its strong freedom of speech guarantees would pass such repressive
legislation. But this seeming anomaly is characteristic of the way nations behave. When times are peaceful, secure, and prosperous, governments rarely resort to measures that curtail civil liberties, but it is a much different story when a country is under siege or the ruling regime is seriously threatened. Under such conditions, governments tend to tamp down opposition, curtail dissent, and generally tighten security measures. The United States is certainly not immune from this tendency. In the modern era, for example, we saw the government respond to the September 11, 2001, terrorist attacks with regulations that curtailed civil liberties and increased the government's authority to ferret out threats to the nation's security.

The history of the Supreme Court's attempts to develop a constitutional standard for interpreting the freedom of speech provision of the First Amendment is very much tied to this cycle. When government responds to crisis situations by acting in a more repressive fashion, affected parties initiate constitutional attacks on the regulations. To settle these disputes, the Court must evaluate the competing values of liberty and security. The justices, like all Americans, are influenced by the needs of the times and frequently have been more sympathetic to government restrictions when the nation has been under stress. The history of the Court's decisions illustrate the ebb and flow of forces affecting First Amendment interpretations.

**Initial Attempts: The Clear and Present Danger Test**

The Supreme Court did not face serious First Amendment challenges until the early years of the twentieth century. The outbreak of World War I in 1914 and the 1917 communist revolution in Russia caused the United States to focus its attention on the defense of America and its system of government. The resulting patriotic fervor was strong and pervasive especially after America's entry into the war. In response, Congress passed the Espionage Act of 1917 that prohibited any attempt to “interfere with the operation or success of the military or naval forces of the United States . . . to cause insubordination . . . in the military or naval forces . . . or willfully obstruct the recruiting or enlistment service of the United States.” A year later Congress passed the Sedition Act, which prohibited the uttering of, writing, or publishing of anything disloyal to the government, flag, or military forces of the United States.

Challenges to these legislative acts were inevitable, and the first to reach the Supreme Court was *Schenck v. United States* (1919). As you read *Schenck*, keep in mind that the United States had just successfully completed a war effort in which more than four million Americans were in uniform and more than one million troops had been sent to fight in Europe. The number of Americans killed or seriously wounded exceeded 300,000. Throughout this period, socialists, like Charles Schenck, and other radicals had opposed the war effort. Schenck's appeal of an espionage conviction allowed the Supreme Court to make its initial doctrinal statement on freedom of expression. What did the Court decide? What standard did it develop to adjudicate future claims?

**Schenck v. United States**

249 U.S. 47 (1919)

http://caselaw.findlaw.com/us-supreme-court/249/47.html

Vote: 9 (Brandeis, Clarke, Day, Holmes, McKenna, McReynolds, Pitney, Van Devanter, White)

**OPINION OF THE COURT: Holmes**

In 1917 Charles Schenck, the general secretary of the Socialist Party of Philadelphia, printed fifteen thousand pamphlets urging resistance to the draft. He mailed these leaflets, described by the government's case as “frank, bitter, passionate appeal[s] for resistance to the Selective Service Law,” to men listed in a local newspaper as having been called and accepted for military service. Federal authorities charged him with violating the Espionage Act; specifically, the United States alleged that Schenck conspired to obstruct military recruitment and illegally used the mail to do so. Schenck was convicted in federal district court, and he appealed on First Amendment grounds.

**ARGUMENTS:**

*For the plaintiff-in-error, Charles T. Schenck:*

- The law's harsh penalties have a chilling effect on anyone who contemplates criticizing the government. Severe punishment stops political discussion as effectively as censorship. The law imposes criminal penalties on the mere expression of opposition to a government policy.
- There is a constitutional distinction between words and actions. The First Amendment does not protect a man who violates the draft law by refusing to serve, but it does protect a man who says the draft law is wrong and ought to be repealed.

*For the appellee, United States:*

- The First Amendment does not license the distribution of materials that tend to influence persons to obstruct the draft. Schenck was found...
guilty of conspiring to cause lawfully drafted men to refuse military duty. This is an illegal act, not legitimate political agitation for a change in federal law.

MR. JUSTICE HOLMES DELIVERED THE OPINION OF THE COURT.

The document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few. It said “Do not submit to intimidation,” but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed “Assert Your Rights.” It stated reasons for alleging that anyone violated the Constitution when he refused to recognize “your right to assert your opposition to the draft,” and went on “If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.” It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, &c., &c., winding up “You must do your share to maintain, support and uphold the rights of the people of this country.” Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in §4 punishes conspiracies to obstruct as well as actual obstruction. If the act, (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

Judgments affirmed.

Oliver Wendell Holmes’s opinion in Schenck represents the first important and substantial explication of free speech. Holmes provided the Court with a mechanism, known as the clear and present danger test, for framing such cases and a standard by which to adjudicate future claims:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

This test requires consideration not only of the content of the expression but also of the context in which the words are uttered, the consequences of those words, and when those consequences may occur.

In addition, Holmes’s opinion was a politically astute compromise. On one hand, the clear and present danger test was a rather liberal interpretation of expression rights. On the other, the justices recognized that free speech rights were not absolute, and they found room within the clear and present danger test to uphold the conviction
of an unpopular opponent of the war effort. In Schenck, Holmes was able to write into law a test favorable to expression rights that was acceptable to his colleagues and did not arouse the ire of Congress. As for Charles Schenck, although the crime for which he was convicted carried a sentence of up to ten years in prison for each count, he served a sentence of only six months.

One week after Schenck, Holmes applied his clear and present danger standard to two other challenges to the Espionage Act. In Frohwerk v. United States, a newspaper editor and an editorial writer for the Missouri Staats Zeitung urged the Court to overturn their convictions for publishing a series of articles accusing the United States of pursuing an imperialistic policy toward Germany. In Frohwerk's companion case, Debs v. United States, Eugene V. Debs, a leader of the Socialist Party in the United States, had been convicted of violating the Espionage Act with a speech he delivered in Canton, Ohio, extolling the virtues of socialism and praising the Bolshevik Revolution. Continuing

the Court's policy set in Schenck, the justices applied the clear and present danger test, but again upheld the convictions. The Court's unwillingness to read the freedom of speech clause literally or absolutely was reflected in Holmes's statement “that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not intended to give immunity for every possible use of language.”

The Bad Tendency Test and Incorporation

It appeared to most observers that the clear and present danger test represented a settled approach to First Amendment controversies, but the perceived permanence of the approach proved to be an illusion. Just eight months after the Debs and Frohwerk decisions, a majority of justices banished this test to a legal exile that would last for almost two decades. The first hint of their disaffection came in Abrams v. United States (1919).

Abrams concerned the plight of five well-educated Russian immigrants, all of whom possessed anarchist, revolutionary, or socialist philosophies. In October 1918, they had published and distributed leaflets, written in English and Yiddish, criticizing President Woodrow Wilson's decision to send U.S. troops into Russia and calling for a general strike to protest that policy. The leaflets were written in language characteristic of the rhetoric of the Russian Revolution: “Workers of the World! Awake! Rise! Put down your enemy and mine!” and “Yes friends, there is only one enemy of the workers of the world and that is Capitalism.” They described the government of the United States as a “hypocritical,” “cowardly,” and “capitalistic” enemy. The protesters branded President Wilson a “kaiser.” The government charged Abrams and the others with intent to “cripple or hinder the United States in the prosecution of the war.” The trial court found them guilty and sentenced them to prison terms of fifteen to twenty years.

At the Supreme Court, John H. Clarke wrote for a seven-justice majority upholding the convictions. In his opinion, Clarke abandoned the clear and present danger test, instead articulating a standard that became known as the bad tendency test. This approach, derived from English common law, asks: “Do the words have a tendency to bring about evil consequences?” This, of course, is a sharp departure from the standard used in Schenck, Debs, and Frohwerk that removed First Amendment protections only if the words would clearly bring about an immediate substantive evil.

Holmes, joined by Justice Louis D. Brandeis, dissented. To this pair of justices, it is “only the present
danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.” As to Abrams and his coconspirators, Holmes said, “[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger” to the nation’s war effort.

Why the majority shifted constitutional standards is a mystery; but regardless of motivation, by the early 1920s it was obvious that a majority of justices rejected the clear and present danger standard in favor of a bad tendency test that made it much easier for the government to justify the regulation of speech.

The next major case, Gitlow v. New York (1925), exemplifies this shift, but with a slightly different twist. Gitlow involved a state prosecution. Just as the federal government wanted to foster patriotism during wartime, the states also felt the need to promulgate their own versions of nationalism. The result was passage of so-called state criminal syndicalism laws, which made it a crime to advocate, teach, aid, or abet in any activity designed to bring about the overthrow of the government by force or violence. The actual effect of such laws was to outlaw any association with views “abhorrent” to the interests of the United States, such as communism and socialism. Would the Court be willing to tolerate state intrusions into free speech?

Gitlow v. New York
268 U.S. 652 (1925)
Vote: 7 (Butler, Reynolds, Sanford, Stone, Sutherland, Taft, Van Devanter)
2 (Brandeis, Holmes)

OPINION OF THE COURT: Sanford
Dissenting Opinion: Holmes

FACTS:
The issues in Gitlow v. New York arose during the early part of the twentieth century when fear of communist subversion gripped the United States. To combat the so-called red menace, several states, including New York, created commissions to investigate subversive organizations. In 1919 and 1920, New York’s commission ordered raids on the leaders of socialist and communist groups and seized their materials. Among those arrested was Benjamin Gitlow, a socialist charged with distributing a pamphlet titled Left Wing Manifesto, which called for mass action to overthrow the capitalist system in the United States. Gitlow was prosecuted in a New York trial court for violating the state’s criminal anarchy law. Under the leadership of famed trial lawyer Clarence Darrow, Gitlow’s defense attorneys alleged that the statute violated the First Amendment’s guarantee of freedom of expression. The court, however, found Gitlow guilty and imposed a prison term of five to ten years. Gitlow, with the support of the American Civil Liberties Union, appealed to the Supreme Court.

ARGUMENTS:
For the plaintiff-in-error, Benjamin Gitlow:
• The “liberty” identified in the Fourteenth Amendment due process clause includes the liberty of speech and press.
• The New York law is an unconstitutional restraint on liberty of expression because it is not restricted to circumstances under which expression causes an immediate substantive evil.

For the defendant-in-error, State of New York:
• Advocacy of the doctrine of criminal anarchy can be distinguished from expressing political beliefs.
• The Fourteenth Amendment does not prevent the states from limiting the freedom of speech or press.
• A state may punish expression that endangers the government, and it need not wait until the danger becomes immediate.
The sole contention here is, essentially, that as there was no evidence of any concrete result flowing from the publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of “doctrine” having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences; and that, as the exercise of the right of free expression with relation to government is only punishable “in circumstances involving likelihood of substantive evil,” the statute contravenes the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract “doctrine” or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action. Advocacy is defined in the Century Dictionary as: “1. The act of pleading for, supporting, or recommending; active espousal.” It is not the abstract “doctrine” of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose.

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:

“The proletariat revolution and the Communist reconstruction of society—the struggle for these—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!”

This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement.

The means advocated for bringing about the destruction of organized parliamentary government, namely, mass industrial revolts usurping the functions of municipal
government, political mass strikes directed against the parliamentary state, and revolutionary mass action for its final destruction, necessarily imply the use of force and violence, and in their essential nature are inherently unlawful in a constitutional government of law and order. That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overthrowing organized government by force, violence and unlawful means, but action to that end, is clear.

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States. . . .

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom. Reasonably limited . . . this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a State in the exercise of its police power may punish those who abuse this freedom by utterances iminical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . .

And, for yet more imperative reasons, a State may punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means. These imperil its own existence as a constitutional State. Freedom of speech and press . . . does not protect disturbances to the public peace or the attempt to subvert the government. It does not protect publications or teachings which tend to subvert or imperil the government or to impede or hinder it in the performance of its governmental duties. It does not protect publications prompting the overthrow of government by force; the punishment of those who publish articles which tend to destroy organized society being essential to the security of freedom and the stability of the State. And a State may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several States, by violence or other unlawful means. In short this freedom does not deprive a State of the primary and essential right of self-preservation; which, so long as human governments endure, they cannot be denied. . . .

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so iminical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. And the case is to be considered “in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare”; and that its police “statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise authority vested in the State in the public interest.” That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler’s scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency. . . .

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.

This being so, it may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. In other
words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such case it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. And the general statement in the *Schenck* Case, that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and it has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.

The defendant's brief does not separately discuss any of the rulings of the trial court. It is only necessary to say that, applying the general rules already stated, we find that none of them involved any invasion of the constitutional rights of the defendant. It was not necessary, within the meaning of the statute, that the defendant should have advocated "some definite or immediate act or acts" of force, violence or unlawfulness. It was sufficient if such acts were advocated in general terms; and it was not essential that their immediate execution should have been advocated. Nor was it necessary that the language should have been "reasonably and ordinarily calculated to incite certain persons" to acts of force, violence or unlawfulness. The advocacy need not be addressed to specific persons.

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the Court of Appeals is affirmed.

**MR. JUSTICE HOLMES, dissenting.**

MR. JUSTICE BRANDEIS and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right, then I think that the criterion sanctioned by the full Court in *Schenck v. United States* applies. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the State] has a right to prevent." It is true that in my opinion this criterion was departed from in *Abrams v. United States*, but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it and *Schaefer v. United States* [1920] have settled the law. If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of
free speech is that they should be given their chance and have their way.

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.

Gitlow’s effects on the development of civil liberties law are somewhat mixed. Perhaps the most enduring contribution of Gitlow is the statement that for “present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.” This sweeping incorporation vastly expanded constitutional guarantees for freedom of expression. The prohibition against infringing on the freedoms of speech and press now applied to state and local governments as well as the federal government.

But the Court in Gitlow also limited personal freedom by moving further away from the clear and present danger approach and embracing the bad tendency test. Look carefully at Justice Edward T. Sanford’s majority opinion. He emphasized that the possible danger resulting from speech need not be immediate to justify regulation: “A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.” In addition, the Court held that great deference should be given to the legislature’s determination of what dangers warrant regulation and that “every presumption is to be indulged in favor of the validity of the statute.”

In dissent, Holmes continued to press his clear and present danger standard, arguing that Gitlow’s actions posed no obvious and immediate danger. He challenged the majority’s view that speech can be regulated for evil effects that might occur sometime in the future by arguing that “every idea is an incitement.” For Holmes, whatever danger Gitlow’s message might pose, it was too inconsequential and too remote to justify government repression of expression rights.

Two years after Gitlow, the Court solidified its allegiance to the bad tendency test in Whitney v. California (1927). The case involved Charlotte Whitney, a well-known California heiress and a niece of Stephen J. Field, a former Supreme Court justice. Initially she was an active member of the Oakland branch of the Socialist Party, but later helped create the Communist Labor Party of the United States and the Communist Labor Party of California.

Although Whitney personally opposed a radical, revolutionary agenda, she nevertheless continued to serve as a leader in the party. Based on her organizing activity and continuing membership in a party dedicated to overthrowing the U.S. government, California authorities charged Whitney with violating the state’s syndicalism law. In 1920 she was found guilty and sentenced to one to fourteen years in San Quentin State Prison.

On appeal to the Supreme Court, Whitney was represented by attorneys Walter Pollak and Walter Nelles from the newly formed American Civil Liberties Union (see Box 5-1). Pollak and Nelles had previously handled Benjamin Gitlow’s appeal to the Supreme Court. They argued that the California act violated the free speech clause of the First Amendment, but the justices upheld Whitney’s conviction. They treated her claim just as they had Gitlow’s, relying on the bad tendency test. The majority in Whitney asserted that

[t]he freedom of speech which is secured by the Constitution does not confer an absolute right to speak . . . whatever one may choose . . . and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

The Court’s ruling allowed the punishment of mere membership in a subversive organization without requiring proof of any concrete criminal actions to overthrow the government by illegal means.

Brandeis and Holmes filed a concurrence in Whitney. They favored a return to the clear and present danger standard, but with this modification: that the evil take the form of behavior. Justice Brandeis wrote, “No danger flowing from speech can be deemed clear and present, unless the incidence of evil apprehended is so imminent that it may befall before there is opportunity for full discussions.” What is even more curious (and a matter of some scholarly interest) is why these two justices concurred rather than dissented. It seems clear that Whitney’s behavior did not meet the standard they articulated, making the question all the more intriguing. One reasonable hypothesis
By almost every measure, the American Civil Liberties Union (ACLU) is one of the largest and most complex organizations dedicated to public interest litigation in the United States. In 2018 it claimed 1.75 million members and has organizations in every state, the District of Columbia, and Puerto Rico. It employs more than one hundred staff attorneys and enjoys the services of more than two thousand volunteer lawyers. The nonpartisan, nonprofit organization handles about two thousand cases annually.

Given its current form, the humble origins of the ACLU may come as a surprise. The ACLU’s roots lie in a small organization called the Henry Street Group, which was started by several leaders of the Progressive Movement to combat growing militarism. One year later, this group united with another to become the American Union Against Militarism (AUAM).

Between 1915 and 1917, the AUAM tried to lobby against any legislation designed to stimulate the U.S. “war machine.” But in 1917, when Germany announced “its intention to resume unrestricted warfare,” the AUAM turned its attention to the draft. The organization sought to defend those who had conscientious objections to serving in the military. This goal was handled primarily by an agency within the AUAM, the Bureau of Conscientious Objectors (BCO).

Under the leadership of the young, charismatic Roger Baldwin, the BCO eventually dominated the AUAM. Baldwin’s BCO doubled the size of AUAM’s membership and spent more than 50 percent of its funds. Clearly, Baldwin was an effective leader, but the AUAM’s old-line Progressive leaders disliked his strategy of providing direct assistance to conscientious objectors, and they threatened to resign. To save the AUAM and to show solidarity with its “greater” agenda, Baldwin changed the name of the BCO to the Civil Liberties Bureau (CLB). This last-ditch effort failed, however, and in 1917 the new National CLB (NCLB) split from its parent organization, which expired shortly thereafter.

Between 1917 and 1919, the NCLB continued to defend conscientious objectors, but it could not prevent Baldwin’s imprisonment for draft violations in 1918. Ironically, during Baldwin’s jail term the seed was planted for what is now known as the American Civil Liberties Union. In prison Baldwin became acquainted with the activities of a radical labor union, the Industrial Workers of the World (IWW), an organization that made no secret of its use of violence and sabotage to achieve its policy needs.

After 1920 the newly formed ACLU would never again be a single-purpose organization; by 1925 it was speaking out for labor, pacifists, and persons who had been caught up by government raids during the “red scare.” Defending the right of free speech eventually became the ACLU’s major trademark as the organization moved into the 1930s, 1940s, and 1950s. While cultivating expertise in this area, ACLU leaders also realized that they had to “nationalize” the group. They took steps that included fuller recognition of the growing chain of ACLU affiliates throughout the United States and provision of more information to their membership, which increased by almost five thousand annually.

The ACLU’s efforts to build and regroup during the 1950s were quite timely because the 1960s turned out to be critical years for the organization. Not only was the decade meaningful in the development of law governing civil rights and liberties but also the ACLU itself seemed to embody the goals of the nation. The union’s stance against the Vietnam War, President Richard Nixon, and racism proved to be highly popular, as did its defense of draft dodgers and student protesters. Between 1966 and 1973, the ACLU’s membership skyrocketed from 77,200 to 222,000, and its litigation activities exploded.

To deal with its increasing caseload and to focus its energies on specific areas of the law, the ACLU established the ACLU Foundation in 1967. This foundation, in turn, established special national projects, including the National Prison, Women’s Rights, and Reproductive Freedom Projects.

is that Brandeis wanted to demonstrate that the clear and present danger test was not necessarily a vehicle created to overturn convictions but merely a more equitable way to analyze First Amendment claims.

Although Whitney lost her appeal, she was saved from serving her full sentence (see Box 5-2). Following her release, she continued her efforts on behalf of radical causes for the rest of her life.

Regardless of the philosophical debates triggered by the series of cases from Schenck to Whitney, one fact remains clear: the justices seemed swept away by the wave of nationalism and patriotism in the aftermath of World War I. With but one exception, they acceded to the wishes of Congress and the states, which centered on the complementary goals of promoting nationalism and suppressing radicalism.¹

Preferred Freedoms Doctrine

As the anxieties of World War I and its aftermath faded, the debate over seditious speech was argued in calmer voices. As part of this general trend, the Supreme Court began to reevaluate its decisions from Schenck to Whitney. For

¹The exception was Fiske v. Kansas (1927), decided the same day as Whitney. The justices concluded that there was insufficient evidence to sustain Fiske’s conviction, and the Court for the first time overturned a conviction under a state syndicalism law.
example, in *Stromberg v. California* (1931), the justices overturned the conviction of Yetta Stromberg, a nineteen-year-old member of the Young Communist League, who was charged with the state crime of publicly raising a red banner as a symbol of opposition to organized government or in support of anarchy. And in *DeJonge v. Oregon* (1937) the Court ruled in favor of a member of the Communist Party who had organized a meeting of those interested in protesting police raids on the homes of Communist Party members in Portland, Oregon. The meeting was orderly and peaceful until the police raided it. In both cases the Court extended greater protections for unpopular speech than it had during the previous decade.

Of even greater import was a seemingly insignificant bit of writing—a footnote contained in Justice Harlan Fiske Stone’s opinion in *United States v. Carolene Products* (1938). This case dealt with a federal ban on the shipment of a certain kind of milk—an economic, not a First Amendment, issue. But Stone’s fourth footnote in this opinion included a statement of the following principles:

- Whenever a government regulation appears on its face to be in conflict with the Bill of Rights, the usual presumption that laws are constitutional should be reduced or waived altogether.
- The judiciary has a special responsibility to defend those rights essential to the effective functioning of the political process, a class of liberties that clearly includes the freedom of expression.
- There is a special role for the Court in protecting the rights of discrete and insular minorities (for example, religious, national, and racial minorities) and unpopular groups.

The standard flowing on the principles expressed in Footnote Four has become known as the preferred freedoms doctrine. This doctrine has notable significance for First Amendment claims because it means that the judiciary will apply special scrutiny to laws that appear to restrict freedom of expression, especially as those laws may relate to the articulation of unpopular political views. The doctrine considers laws restricting fundamental rights as especially dangerous to a well-functioning democracy.

The importance of Justice Stone’s footnote goes beyond its obvious declaration of a new standard for evaluating First Amendment claims. In *Carolene Products*, Stone announced a modification in the fundamental role of the Court. He declared that the Court would assume a special responsibility for protecting civil rights and civil liberties and be particularly vigilant in guarding the rights of minorities and the politically unpopular. Although the groundwork for his position had been laid by earlier justices (including Holmes, Cardozo, and Brandeis), Stone’s statement marked a major change in course for an institution that had, for its entire history, been tilted toward settling private economic disputes and wrestling with questions of government power. From this point forward, the civil liberties docket began to grow, and the Court rapidly began to evolve into an institution with a primary focus on civil liberties issues.

The years immediately following the *Carolene Products* decision saw a significant turnover in Court personnel, with President Franklin Roosevelt appointing new members who had a more supportive view of civil liberties than the justices they replaced. To these new justices the preferred freedoms approach had significant appeal. As a result, the Court began handing down decisions consistent with preferred freedoms principles.

Take, for example, the 1945 decision in *Thomas v. Collins*. The case arose when R. J. Thomas, president of the United Automobile, Aircraft and Agricultural Workers (UAW) and vice president of the Congress of Industrial Organizations (CIO), arrived in Houston, Texas, to deliver a speech to a group of workers the CIO wanted to organize. Six hours before Thomas was to speak, Texas authorities served him with a restraining order, prohibiting him from making his scheduled address. Believing that the order constituted a violation of his free speech guarantees, Thomas delivered his speech anyway to an audience of about three hundred people. The meeting was described as “peaceful and orderly,” but authorities arrested Thomas. He was sentenced to three days in jail and a $100 fine. Thomas appealed to the Supreme Court.

In a 6–3 opinion, the justices ruled against the state using a preferred freedoms approach to reach that conclusion. The words of Justice Wiley Rutledge, writing for the majority, clearly reflect the principles included in the *Carolene Products* footnote with an acknowledgment of its historical roots:

> [This] case confronts us again with the duty our system places on this Court to say where the individual’s freedom ends and the State’s power begins. Choice of that border, now as always delicate, is perhaps more so where the usual presumptive supporting legislation is balanced by the preferred place given in

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our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. For [this reason] any attempt to restrict those liberties must be justified by clear public interest, threatened not remotely, but by a clear and present danger.

Constitutional experts claim that this decision represented another major breakthrough in the area of freedom of speech. But why? First, it reinforced the view that the preferred freedoms doctrine provides an appropriate solution to First Amendment problems. Second, Rutledge’s language—"Any attempt to restrict the liberties of speech and assembly must be justified . . . by a clear and present danger"—indicated that the Court, instead of abandoning Holmes’s standard, had combined the clear and present danger standard with the preferred freedoms framework. The preferred freedoms “concept was never a repudiation of the notion of clear and present danger, but was seen as giving its purposes a firmer base and texture—incorporating it much as Einsteinian physics incorporates Newtonian.”

Aftermath of World War II: Competing Tests and a Divided Court

As Thomas v. Collins indicates, by the mid-1940s it seemed as if the Court had finally settled on an approach to solve First Amendment problems. Stone’s preferred freedoms doctrine had gained acceptance among the justices even though it served as a vehicle by which to overturn many laws restricting speech. Like previous tests, however, the preferred freedoms doctrine was short lived. In the late 1940s and early 1950s, the Court began to turn back toward more conservative interpretations of the First Amendment.

A major factor in this rather dramatic turnaround was a significant change in the external environment. After World War II the United States entered into the Cold War with the Soviet Union, a nation possessing nuclear weapons and perceived as having world domination goals. This period was characterized by an intense fear of communism, not unlike the time following World War I. Led by Senator Joseph McCarthy, R-Wis. (1947–1957), some politicians fed the fear by alleging that Communist Party sympathizers had infiltrated the upper echelons of the U.S. government. Others asserted that the Communist Party of the United States was growing in strength and spreading its philosophy by infiltrating America’s labor unions, entertainment industry, and educational system.

Reflecting this fear of communism, Congress enacted legislation to suppress subversive activity. Several states followed suit with similar statutes. These laws made it a crime to advocate, advise, or teach the necessity of overthrowing the U.S. government by force or violence. Similarly, organizing a group of individuals to encourage the violent overthrow of the government became a criminal act. Other legislation imposed loyalty oaths as an employment requirement for government positions. Both the U.S. House and Senate held controversial hearings attempting to identify communist activities and persons involved in subversive organizations.

Changes within the Court itself also helped spur a shift to more conservative case outcomes on freedom of expression issues. Chief Justice Frederick M. Vinson replaced Stone, the author of Footnote Four, in 1946. Three years later, two relatively conservative justices, Tom C. Clark and Sherman Minton, took the place of two liberals, Frank Murphy and Wiley Rutledge. In addition, individual justices began expressing some dissatisfaction with the preferred freedoms approach. In one opinion, for example, Justice Felix Frankfurter described preferred freedoms as little more than a “mischievous phrase.”

Given this backdrop, it is not surprising that the Court became much more sympathetic to government restrictions on civil liberties. In addition, the justices battled over alternative standards to employ in such cases. Two new tests emerged, both inherently leading to more conservative results than would the preferred freedoms approach.

The first of these, called ad hoc balancing, was advocated by Justices Frankfurter and Harlan. This test was based on the notion that the values of liberty and order must be wisely balanced. Under this approach, courts consider disputes on a case-by-case basis, asking whether the interests of the individual or the interests of the government should prevail. Stated in these terms and applied to the internal security cases of the 1950s, this test clearly favored the government. After all, which interest is more important, the right of a communist to advocate for the violent overthrow of the government or the government’s right to preserve our democratic system? Imposing a balancing approach was a stark departure from the preferred freedoms doctrine, which presumed the elevated importance of Bill of Rights freedoms above other interests.

The second alternative was the clear and probable danger test. As might be evident, this test followed the general structure of the clear and present danger test except for the temporal element. Under Justice Holmes’s approach in Schenck, the evil the government sought to combat must
be “present,” or immediately about to occur. Advocates of clear and probable danger, however, required only that the evil be probable. Although this test has some of the same elements as clear and present danger, in reality it may be closer in effect to the bad tendency test, which, as you may recall, allowed the government to regulate speech if it would tend to bring about evil. Announcing the judgment of the Court in *Dennis v. United States* (1951), Chief Justice Vinson described the test this way: “In each case courts must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” In *Dennis*, the Court used the test to affirm the conviction of eleven Communist Party leaders for advocating the overthrow of the government by force and organizing a party for that purpose.

The more conservative approach of this era was not accepted by all the justices. Prominent among those having a different view were Justices Hugo Black and William O. Douglas. In various opinions they advocated for what has become known as the *absolute freedoms test*. This standard is based on a literal interpretation of the First Amendment. Its proponents hold that the First Amendment allows for no exceptions to its command that “Congress shall make no law . . . abridging the freedom of speech.” And “no law” means no law. The absolute freedoms test, unlike the others we have examined, never commanded a majority of the justices, but it was powerfully argued in a number of dissenting and concurring opinions.

In sum, during the 1940s and 1950s, we once again see the Supreme Court responding to perceived threats to national security. As was the case during the 1920s, when the justices moved from a clear and present danger test to a bad tendency standard, in the 1950s they moved from a preferred freedoms approach to clear and probable danger and ad hoc balancing. In his dissenting opinion in *Dennis v. United States*, Justice Black reflected on what was occurring during these years and expressed optimism that change might come about:

> Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

Black’s words were indeed prophetic. As the 1950s drew to a close, the high emotions of the anticommunist postwar period dissipated. Senator McCarthy, whose campaign against domestic communism had fueled much of the repressive legislation, was discredited and censured
by the Senate. Although the nation remained concerned about the communist threat and the possibility of nuclear war, the hysteria died down.

Once the red scare was over, the Supreme Court, now under the leadership of Chief Justice Earl Warren, began taking positions defending freedom of expression and association against the repressive legislation passed during the McCarthy era. It handed down a series of decisions upholding the constitutional rights of communists and other so-called subversives. For example, in *Albertson v. Subversive Activities Control Board* (1965), the justices repudiated federal laws requiring communist organizations to register with the government. In *Eligbrandt v. Russell* (1966) and *Whitehill v. Elkins* (1967), loyalty oath requirements directed at subversives were found constitutionally defective. The Court also struck down laws and enforcement actions barring communists from holding office in labor unions (*United States v. Brown*, 1965); prohibiting communists from working in defense plants (*United States v. Robel*, 1967); and stripping passports from Communist Party leaders (*Aptheker v. Secretary of State*, 1964). The Court even overruled some of its older precedents, such as *Whitney v. California* (1927) that had allowed mere membership in a subversive group to be a crime (*Brandenburg v. Ohio*, 1969). Clearly, such decisions and others handed down during these more tranquil years would have been unheard of during the heights of anticommunist fervor.

By the end of the 1960s, the Court had developed approved, and later discarded a number of tests to be used in freedom of speech cases (see Table 5-1). Each of those tests was a reaction to the laws passed by the political branches of government and the subsequent constitutional challenges to them. Each also was a response to the needs, conditions, and public mood of the times.

As the nation entered the modern era, the justices once again were confronted with the perennial issue of applying the words of an eighteenth-century document to contemporary modes of expression. In devising ways to confront this task, would the justices rely on past doctrines or develop new approaches? Whichever the case, it is important to realize that the United States is not alone in facing conflicts between the principle of free expression and the exercise of that right in a manner the government views as undesirable. Box 5-3 provides examples of the way expression rights have been incorporated into the constitutions of several nations. Many countries have adopted democratic regimes quite recently, following histories of authoritarian rule. Like the United States before them, these nations must develop ways to apply constitutional principles to actual disputes. It is the application of abstract doctrine to real situations that will ultimately determine the level of openness and freedom the citizens of those nations will enjoy.

**CONTEMPORARY TESTS AND CONSTITUTIONAL GUIDELINES**

Although the Warren Court had taken a more supportive position on expression rights, the nation faced new challenges and concerns after the fear of communist infiltration ebbed. In the 1960s and 1970s, the war in Vietnam captured the nation’s attention. During this same period, the civil rights movement was at its peak. Shortly thereafter, the women’s movement and the controversies over abortion and sexual orientation began stealing headlines. Then came September 11, the war on terror, and disputes over immigration, taxation, health care, and foreign policy. The controversial presidency of Donald Trump touched off new political ferment.

Such controversies spurred increased levels of political expression. These ranged from individual protests, to mass demonstrations, to new forms of speech spawned by technological advances. The nation became increasingly polarized, raising the intensity of the conflict. Some observers even questioned the value of freedom of expression itself. As might be expected, state and federal governments took various actions to regulate speech activities, and these regulations often generated litigation over First Amendment protections that landed at the doorstep of the Supreme Court.

**New Approaches to the First Amendment**

The contemporary Court has borrowed elements from several tests that arose out of the internal security cases but has not fully endorsed any single one. Consistent with the preferred freedoms doctrine, the Court has placed a high priority on the First Amendment’s expression rights, recognizing the fundamental position those freedoms hold in an open society. The justices, however, have never gone so far as to hold that freedom of speech is absolute. As Justice Holmes argued in the clear and present danger test, expression can be regulated. Government’s constitutional ability to regulate expression depends not only on the words uttered but also on the circumstances under which the expression takes place and whether the speech results in substantive evils that the government has authority to prevent. Flowing from this, the justices have taken the position that the degree of protection offered by the First Amendment varies according to the nature of the speech,
<table>
<thead>
<tr>
<th>Standard</th>
<th>Major Proponents</th>
<th>Example</th>
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<tr>
<td><strong>Clear and Present Danger Test</strong></td>
<td>Holmes, Brandeis</td>
<td><em>Schenck v. United States</em>, 1919</td>
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<tr>
<td>&quot;Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent.&quot;</td>
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<td><strong>Bad Tendency Test</strong></td>
<td>Clarke, Sanford</td>
<td><em>Abrams v. United States</em>, 1919</td>
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<td>Do the words have a tendency to bring about something evil?</td>
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<td><strong>Preferred Freedoms</strong></td>
<td>Douglas, Stone, Rutledge</td>
<td><em>United States v. Carolene Products</em>, 1938; <em>Thomas v. Collins</em>, 1945</td>
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<td>&quot;There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments.&quot;</td>
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<td><strong>Absolute Freedoms</strong></td>
<td>Black, Douglas</td>
<td>Never adopted. See Douglas’s dissent in <em>Dennis v. United States</em>, 1951; Douglas and Black dissenting in <em>Roth v. United States</em>, 1957</td>
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<td>&quot;The First Amendment, its prohibition in terms absolute, was designed to preclude courts as well as legislatures from weighing values of speech against silence.&quot;</td>
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<td><strong>Ad Hoc Balancing</strong></td>
<td>Frankfurter, Harlan</td>
<td>Frankfurter’s concurrence in <em>Kovacs v. Cooper</em>, 1949; Harlan’s opinion in <em>Barenblatt v. United States</em>, 1959</td>
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<tr>
<td>&quot;On a case by case basis, the government’s interest in regulation is weighed against the individual’s interest in expression. Because the legislative process naturally involves a consideration of a wide range of societal interests, the courts normally defer to the government and presume that the regulation is valid.&quot;</td>
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<td><strong>Clear and Probable Danger</strong></td>
<td>Vinson</td>
<td><em>Dennis v. United States</em>, 1951</td>
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<td>&quot;Whether the gravity of the ‘evil,’ discounted by its improbability, justifies such an invasion of free speech as is necessary to avoid danger.”</td>
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the place in which the expression occurs, the interests the government is pursuing by its restrictions, and the kind of regulation the government imposes.

**Content and Viewpoint Discrimination.** A central principle in the modern Court’s freedom of expression jurisprudence is its content discrimination doctrine. Contemporary justices make a sharp distinction between content-based and content-neutral speech regulations. Content-based regulations are those that discriminate based on subject matter of the message conveyed. Regulation of content carries a presumption of unconstitutionality. As Justice Thurgood Marshall stated in *Chicago Police Department v. Mosley* (1972), “But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.” When a government regulation is found to discriminate on the basis of content, it is subject to *strict scrutiny*, the highest and most exacting standard of judicial oversight. A government action subjected to strict scrutiny can
As the following quotations from constitutional documents indicate, the United States is not the only country to guarantee its citizens freedom of expression. Many others protect the right as well.

**Belgium—Constitution (Article 19)**

“Freedom of worship, its public practice and freedom to demonstrate one’s opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished.”

**Brazil—Constitution (Article 5)**

“[E]xpression of intellectual, artistic, scientific, and communication activity is free, independent of any censorship or license.”

**Bulgaria—Constitution (Article 39)**

“Everyone shall be entitled to express an opinion or to publicize it through words, written or oral, sound, or image, or in any other way.”

**Georgia—Constitution (Article 19)**

“Everyone has the right to freedom of speech, thought, conscience, religion and belief.”

**Germany—Basic Law (Article 5)**

“Every person shall have the right freely to express and disseminate his opinion in speech, writing and pictures and to inform himself without hindrance from generally accessible sources.”

**Ireland—Constitution (Article 40)**

“The State guarantees . . . the right of the citizens to express freely their convictions and opinions.”

**Japan—Constitution (Article 21)**

“Freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed.”

**South Africa—Constitution (Chapter 2, Section 16)**

“Everyone has the right to freedom of expression, which includes freedom of the press and other media; the freedom to receive or impart information or ideas; the freedom of artistic creativity; and academic freedom and freedom of scientific research.”

The presence of a right in the constitution, however, does not guarantee that citizens can exercise it. For example, the former Soviet Union—by all accounts, a highly repressive society—guaranteed its citizens the “freedom of speech, of the press, and of assembly, meetings, street processions, and demonstrations,” but these rights were without meaning.

Moreover, courts do not always interpret the words of constitutional documents in literal or absolute fashion. Consider, for example, the Canadian Charter of Rights and Freedoms, which reads: “Everyone has the following fundamental freedoms: freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication.” These words would seem to work to the advantage of James Keegstra, a high school teacher who promoted anti-Semitism in his classroom. Keegstra described Jews to his students as “subversive,” “money-loving,” and “child killers.”

But the Canadian Supreme Court did not rule in Keegstra’s favor when he was found guilty of violating the criminal code by “unlawfully promoting hatred against an identifiable group.” Rather, in a 1990 decision, the Court held:

> [G]iven the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful, [we are] unable to see the protection of such expression as integral to the democratic ideal.

How did the Court hurdle the charter’s freedom of expression provision? It did so, in part, by pointing to another provision—a provision unlike any in the U.S. Constitution: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

Similar provisions are not unusual in newer constitutional documents, as South Africa’s illustrates. After guaranteeing “everyone” the right to freedom of expression, the constitution specifically states that this right does not extend to “advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.” Such provisions, at least on their face, seem to give courts great latitude in punishing those who engage in “hate speech,” even though, as we have seen in the United States, they are not necessarily required to do so.

**Source:** Links to the constitutional documents of the world’s nations are available at https://www.constituteproject.org.
survive constitutional challenge only if it is narrowly tailored to serve a compelling state interest. That is, the law should impose the least restriction of expression necessary for the government to achieve its compelling goals.

A good example of content discrimination is provided by Reed v. Town of Gilbert (2015). This dispute involved a challenge to the sign ordinance regulations imposed by Gilbert, Arizona. The law specified a number of different kinds of signs that might be erected, with varying restrictions assigned to each. At issue in the case was the category “temporary directional signs,” which included signs that directed the public to a particular event. Such signs were to be no larger than six square feet and could be displayed no more than twelve hours before the event or one hour after. Good News Community Church was a small, recently established church that had not yet built a permanent place of worship. Services were held at various temporary locations. The church and its pastor, Clyde Reed, were cited for violating the ordinance by posting signs communicating the location and time of church services early on Saturdays and not removing them until midafternoon on Sundays. The church challenged the ordinance as an unconstitutional form of content discrimination. Signs that were classified under the ordinance as “ideological” or “political,” for example, were allowed to be much larger in size and remain in place for longer periods of time. The Court found the ordinance to discriminate on the basis of content and to fail strict scrutiny standards.

An especially egregious form of content discrimination occurs when regulation is based on the viewpoint expressed. It would be one thing for a municipality to allow public demonstrations on all issues except those dealing with an ongoing war (content discrimination), but a much different matter if the city allowed public demonstrations on all issues except those in opposition to the war (viewpoint discrimination). As we will see in the cases that followed, the First Amendment prohibition against viewpoint discrimination applies even when the views expressed are offensive or disparaging.

Content-neutral regulations, by contrast, do not take into account the subject matter of the expression or the viewpoint expressed. A local ordinance, for example, that prohibits all door-to-door solicitation in residential areas between 8:00 p.m. and 8:00 a.m. is content neutral. The ban applies to religious proselytizers, political campaign workers, and even youngsters selling Girl Scout cookies. Here, the government is pursuing the legitimate interest of ensuring a peaceful atmosphere at a time when most residents are resting. There is no government censorship based on the content or the views expressed. The Court takes a much more lenient position on content-neutral regulations, permitting governments to impose reasonable time, place, and manner restrictions if they are narrowly tailored to serve a significant government interest.

A Hierarchy of Expression. Not all speech merits the same level of constitutional protection. Inherent in the Constitution is an acknowledgment that some forms of expression may be subject to more government regulation than others. The highest levels of protection are accorded to speech that centers on political and social issues. This is consistent with the framers’ reasons for adopting the First Amendment. An environment of robust debate over political and social matters was considered a prerequisite for a thriving democracy. Government suppression of such discussion constituted a step toward tyranny.

In contrast, the Constitution allows the government much greater authority to regulate less noble forms of expression, such as advertising and commercial speech. These varieties of expression are judged to be of lower societal importance. Finally, some forms of expression are considered altogether unprotected by the Constitution. These include obscenity and libel, as well as forms of criminal speech such as conspiracy, perjury, and inciting violence.

The Location of the Expression. The setting in which the expression occurs is also relevant. The justices have designated four categories of places where expression might occur. The first is called a traditional public forum. This category refers to streets, sidewalks, parks, and other areas where the public freely congregates and traditionally exchanges views. Speech that occurs in a traditional public forum is accorded a high level of constitutional protection. A slightly lower degree of protection is given to speech that occurs in a designated public forum, which includes areas such as city auditoriums and public meeting rooms. These locations are dedicated to organizational activities and related expression, but are places where reasonable government regulation is necessary. A third category is a limited public forum. This term describes places that the government has opened up for a specific purpose. For instance, if a state university creates a website for students to post comments about the quality of the campus food service, the university may regulate the website consistent with the purpose for which it was created. It could, consequently, remove comments criticizing the school’s football coach. The lowest level of protection is given to speech that occurs in a nonpublic forum. This category encompasses government facilities that traditionally have not been locations for public discourse (jails, defense plants, polling places, nuclear facilities, and so on) and private property where the owner has not given consent.
Government Interests and Speech Regulation

In pursuit of this general approach to expression rights, the Supreme Court has designated legitimate interests that justify government regulation as well as forms of regulation that are inconsistent with First Amendment commands.

Under what conditions, then, may the government restrict expression? From the Court’s decisions, we can distill general categories of expressive behavior that implicate legitimate government interests and may trigger valid government regulation:

- **Violence.** The government has authority to protect citizens from personal injury. If expression takes a violent form or incites others to violence, the government may regulate it.

- **Property Damage.** The government has a legitimate interest in protecting private and public property from being destroyed or damaged. Antiwar protesters, for example, who express themselves by setting fire to a National Guard armory have gone beyond their First Amendment guarantees and can be arrested for their conduct.

- **Criminal Speech.** Some forms of expression are crimes by their very nature. For example, the Constitution does not protect those who might give military secrets to the enemy in time of war, engage in conspiracies to violate valid criminal laws, or lie under oath.

- **Encroaching on the Rights of Others.** Freedom of expression does not provide a license to infringe on the rights of others. If animal rights protesters block an entrance to a zoo or pro-life groups prevent access to an abortion clinic, the government may intervene. In both cases, the protesters have curtailed the right of the public to move about without interference.

- **Burdens on Government Functions.** Regulation is permissible if expression places a burden on a legitimate government function. If, for example, environmentalists lie down in front of bulldozers to prevent the construction of a dam by the U.S. Army Corps of Engineers, the government may remove them.

- **Trespass.** The freedom of expression does not include the right to speak anywhere one wishes. A political campaign worker, for example, does not have the right to come into your home without permission to promote the candidate’s cause. Similarly, some public facilities are not legitimate places for groups of demonstrators to congregate. The government may, for example, prohibit antiwar activists from conducting a rally on a military base or demonstrators from entering a Veterans Administration hospital to protest the quality of medical care provided.

Restraints on Government Power

Although the Court has been sympathetic to the government’s need to regulate expression under certain carefully defined conditions, the justices also have been careful to place restraints on the government to prevent abuse. The Court has constructed generally accepted criteria to hold the government’s power within acceptable bounds:

- **Appropriate Purpose.** Any government restriction on freedom of expression must have a clearly defined, valid government purpose. A law that makes inciting to riot a crime, for example, would rest on the legitimate government purpose of curtailing violence. A law prohibiting criticism of the president, motivated by an interest in keeping incumbents in power, would clearly fail this test. In some areas the Court has demanded that the government’s purpose be legitimate; in others, the justices have required a higher standard—that the purpose be a substantial or compelling one.

- **Prior Restraint.** Government may prosecute individuals who violate legitimate restrictions on expression but, absent extraordinary circumstances, may not intervene before the fact. For example, the government may not constitutionally require a speaker to submit for review a copy of his or her speech before its delivery to ensure that nothing in it may incite the audience to violence.

- **Overbreadth.** Any regulation of expression must be narrowly tailored to meet the government’s objectives. If a legislature, concerned with protests that cause violence, passes a law prohibiting all public demonstrations, the statute would fail the narrow construction requirement. This regulatory scheme would be overbroad,
going far beyond what is necessary to deal with the legislature’s legitimate concern by restricting constitutionally protected expression along with unprotected speech.

- **Vagueness.** Legislatures must draft laws restricting freedom of expression with sufficient precision to give fair notice as to what is being regulated. If normally intelligent people have to guess what a statute means and are likely to come to different conclusions about what is prohibited by it, the statute is unconstitutionally vague.

- **Chilling Effect.** A law intended to regulate certain forms of illegitimate expression cannot be written so as to make people fearful of engaging in legitimate activity. Often such a chilling effect stems from statutes that are vague or overbroad. Assume that a state legislature, concerned about sexual activity at nightclubs, passes a law making it illegal to serve alcohol in any establishment featuring nude entertainment. In response to that law, museum officials might be fearful of sponsoring a gathering at which patrons would sip wine while viewing an exhibition of paintings that includes nude figures. Here a statute intended to curb obscenity and indecent behavior creates a chilling effect on the exercise of legitimate activities.

**CONTENT AND CONTEXTS**

As you read the cases and commentary in the rest of this chapter and the two that follow, keep in mind the principles discussed in the previous section. You will observe many examples of the justices debating whether the expression in question merits regulation and whether the methods of regulation are constitutionally proper. You will witness the flexibility of these standards as the Court adjusts them to different contexts. Finally, you will see how individual justices differ in the ways they apply these standards based on their own ideologies and preferences.

**Symbolic Speech**

The First Amendment specifically protects the freedoms of speech and press, two forms of expression with which the framers were thoroughly familiar. In the days of the American Revolution, political protest customarily took the form of eloquent addresses, sharply worded editorials, and fiery pamphlets. Verbal expression and published communication were the methods of political debate, and the founders unambiguously sought to protect them from government encroachment by drafting and ratifying the First Amendment.

But much has changed since then. The breadth and complexity of political and social views held by Americans have increased exponentially since the Revolution. The development of modern technology has multiplied the ways Americans can express those views, both individually and collectively. Many of these new methods go well beyond the traditional spoken and printed word.

Since the early 1960s, protest movements of all kinds have shown their opposition to government policies by expressive actions such as mass demonstrations, picketing, effigy burnings, and even flag desecration. But if a point is made by such actions rather than by verbal expression, does the First Amendment still grant immunity from government regulation? This question deals with symbolic speech. That is, does expressive conduct qualify as speech under the meaning of the First Amendment?

Most of the symbolic speech cases have occurred in the modern period, but the debate over expressive conduct began much earlier. Recall our previous mention of *Stromberg v. California* (1931). In that case a young camp counselor was convicted not because of anything she said but because she raised a red flag signaling her opposition to the U.S. government. This expressive act violated California’s criminal code. In reversing Stromberg’s conviction on First Amendment grounds, the Supreme Court acknowledged that at least some forms of symbolic speech merit constitutional protection. Similarly, *Thornhill v. Alabama* (1940) struck down state laws that prohibited labor union picketing. For the Court, Justice Murphy concluded, “In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”

Decisions such as these established the principle that symbolic actions can qualify as speech and be accorded First Amendment protection. This principle does not mean, however, that the First Amendment shields from government regulation *any* act committed to express an idea or opinion. No one, for example, would seriously claim that assassination is a protected form of expressing political opposition. Perhaps even more than verbal expression, symbolic speech presents especially difficult questions of drawing constitutional boundaries, and the issue grows in complexity when expression combines speech and nonspeech elements.

The turbulence of the late 1960s brought a number of vexing symbolic expression issues before the Court.
One of the first of these cases was *United States v. O'Brien* (1968), in which the defendants had expressed their opposition to the war in Southeast Asia by publicly and illegally burning their draft cards. The case presents a clash of values. The Warren Court had demonstrated a growing tolerance for First Amendment expression claims, but would this trend continue? Or would the fact that thousands of American troops were engaged in combat abroad influence the Court?

**United States v. O’Brien**

391 U.S. 367 (1968)


Vote: 7 (Black, Brennan, Fortas, Harlan, Stewart, Warren, White)

1 (Douglas)

OPINION OF THE COURT: Warren

CONCURRING OPINION: Harlan

DISSSENTING OPINION: Douglas

NOT PARTICIPATING: Marshall

FACTS:

On March 31, 1966, David Paul O’Brien and three others burned their draft cards on the steps of a South Boston courthouse. A sizable, hostile crowd gathered. Agents of the Federal Bureau of Investigation took the four into the courthouse to protect them and to question them. The agents told O’Brien that he had violated a 1965 amendment to the Selective Service Act of 1948 that made it illegal to “destroy or mutilate” draft cards. O’Brien replied that he understood but had burned his card anyway because he was “a pacifist and as such [could not] kill.” O’Brien was convicted and received a sentence of up to six years. A federal appeals court, however, reversed the conviction, finding that O’Brien’s expressive actions were protected by the First Amendment. The United States asked the Supreme Court to hear the case.

ARGUMENTS:

For the petitioner, United States:

- Draft card burning is conduct, not speech.
- The burning of a document that plays a valid and important role in the operation of the Selective Service System does not qualify as constitutionally protected symbolic speech.
- Requiring the possession of draft cards is a reasonable congressional action supporting the effective administration of the Selective Service Act.

For the respondent, David Paul O’Brien:

- Congress passed the 1965 amendment to the Selective Service Act with the intent to stifle dissent. The law does not serve any rational legislative purpose.
- The law unconstitutionally restricts freedom of symbolic expression recognized in *Stromberg v. California* and *West Virginia State Board of Education v. Barnette*.
- The clear and present danger test should be used to decide this case.

O’Brien... argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected “symbolic speech” within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of “communication of ideas by conduct,” and that his conduct is within this definition because he did it in “demonstration against the war and against the draft.”

We cannot accept the view that an apparently limitless variety of conduct can be labeled “speech” whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to §12(b)(3) of the Universal Military
Training and Service Act meets all of these requirements, and consequently that O’Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. The power of Congress to classify and conscript manpower for military service is “beyond question.” Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system’s administration.

O’Brien’s argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O’Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates’ destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. . . . Additionally, in a time of national crisis, reasonable availability to each registrant
of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrants were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them. . . .

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial government interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted. . . .

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended §462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

Warren's opinion explicitly rejected the position that conduct used to express an idea automatically merits First Amendment protection. Rather, he wrote that when speech and nonspeech elements are combined,

a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if
the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.

As applied in this case, the Court found that O'Brien's conduct (burning the draft card) placed a burden on a legitimate and important government activity (the power to raise and support armies). The government had a substantial interest in exercising its military authority, and the draft registration system was a reasonable means of achieving that end. The government regulations challenged in this case were directed at achieving these military interests; they were not designed to curtail freedom of expression. Consequently, the government had the constitutional power to prosecute individuals who violated the Selective Service laws even if the acts in question communicated a message of political protest.

Although O'Brien is an important case in the development of symbolic expression doctrine, it did not seem to give the Court much trouble. Only Justice Douglas dissented. Such consensus was not the case for the flag desecration cases; indeed, among all symbolic expression issues, none has caused the Court greater difficulty. As a national symbol, the American flag evokes intense emotional feelings, especially among those, like members of the Supreme Court, who have long histories of public service. Even the justices who were most committed to freedom of speech indicated their discomfort in extending First Amendment protection to those who destroy the flag as a method of political expression.

The justices had two important opportunities to deal with the flag desecration issue during the days of civil rights and antiwar protests. But they faced their most significant flag case in 1989 in Texas v. Johnson. How did the justices respond?

**FACTS:**

In the summer of 1984, the Republican Party held its national convention in Dallas, Texas, and overwhelmingly supported President Ronald Reagan's reelection bid. While the party was meeting, a group of seventy-five to one hundred demonstrators marched through the city to protest the Reagan administration's policies. One of the demonstrators removed an American flag hanging in front of a bank building and gave it to Gregory Lee Johnson, one of the leaders of the march. As the march ended, Johnson unfurled the flag, doused it with kerosene, and set it on fire. As it burned, the protesters chanted, “America, the red, white, and blue, we spit on you.” Authorities arrested Johnson, charging him with violating the Texas flag desecration law. He was convicted and sentenced to a one-year prison term and a $2,000 fine. A state court of appeals affirmed, but the Texas Court of Criminal Appeals reversed that holding.

**ARGUMENTS:**

**For the petitioner, State of Texas:**

- The First Amendment is not absolute, and expressive conduct demands less constitutional protection than pure speech.
- The Texas flag desecration statute advances two substantial interests: (1) protection of the flag as an important symbol of nationhood and unity, and (2) prevention of a breach of the peace.
- The Texas law is a valid “time, place, and manner” restriction on demonstrations.

**For the respondent, Gregory Lee Johnson:**

- The Texas statute is a viewpoint-based restriction on political expression because the state seeks to protect one view—that the flag is a symbol of nationhood and national unity.
- Because the state law singles out conduct that will “seriously offend one or more persons,” the statute violates the First Amendment’s prohibition on content-based discrimination.
- Johnson peacefully burned the flag in an obvious act of political expression that merits First Amendment protection.

**Texas v. Johnson**

491 U.S. 397 (1989)


Vote: 5 (Blackmun, Brennan, Kennedy, Marshall, Scalia)
4 (O'Connor, Rehnquist, Stevens, White)

OPINION OF THE COURT: Brennan
CONCURRING OPINION: Kennedy
DISSenting OPINIONS: Rehnquist, Stevens

somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson’s burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State’s regulation is related to the suppression of free expression. If the State’s regulation is not related to expression, then the less stringent standard we announced in United States v. O’Brien for regulations of noncommunicative conduct controls. If it is, then we are outside of O’Brien’s test, and we must ask whether this interest justifies Johnson’s conviction under a more demanding standard. A third possibility is that the State’s asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

The First Amendment literally forbids the abridgement only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected “the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea,” we have acknowledged that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.”

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” Hence, we have recognized the expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam.

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, saluting the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment. That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, “the one visible manifestation of two hundred years of nationhood.”

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred.

Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. In these circumstances, Johnson’s burning of the flag was conduct “sufficiently imbued with elements of communication” to implicate the First Amendment.

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. “A law directed at communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.” It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.
Thus, although we have recognized that where “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,” we have limited the applicability of O’Brien’s relatively lenient standard to those cases in which “the governmental interest is unrelated to the suppression of free expression.” In stating, moreover, that O’Brien’s test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,” we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O’Brien’s less demanding rule.

In order to decide whether O’Brien’s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson’s conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O’Brien’s test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson’s conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson’s burning of the flag.

The State’s position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal “function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”

Nor does Johnson’s expressive conduct fall within that small class of “fighting words” that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the State’s interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent “imminent lawless action.”

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In Spence v. Washington, 1974, we acknowledged that the Government’s interest in preserving the flag’s special symbolic value “is directly related to expression in the context of activity” such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson’s burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation. These concerns blossom only when a person’s treatment of the flag communicates some message, and thus are related to the suppression of free expression” within the meaning of O’Brien. We are thus outside of O’Brien’s test altogether.

It remains to consider whether the State’s interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson’s conviction.

Johnson’s political expression was restricted because of the content of the message he conveyed. We must therefore subject the State’s asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.”

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag’s historic and symbolic role in our society, the State emphasizes the “special place” reserved for the flag in our Nation. The State’s argument is not that it has an interest simply in maintaining the flag as a symbol of something, no matter what it symbolizes; indeed, if that were the State’s position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson’s. Rather, the State’s claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on the idea that nationhood and national unity are the flag’s referents or that national unity actually

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exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

We have not recognized an exception to this principle even where our flag has been involved. In Street v. New York we held that a State may not criminally punish a person for uttering words critical of the flag, . . .

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag’s symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State’s argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here, . . .

Texas’ focus on the precise nature of Johnson’s expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. . . .

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment. . . .

The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . And, precisely because it is our flag that is involved, one’s response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag-burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration; for in doing so we dilute the freedom that this cherished emblem represents.

Johnson was convicted for engaging in expressive conduct. The State’s interest in preventing breaches of the peace does not support his conviction because Johnson’s conduct did not threaten to disturb the peace. Nor does the State’s interest in preserving the flag as a symbol of national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

Afirmed.

JUSTICE KENNEDY, concurring.

I write not to qualify the words JUSTICE BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. . . .

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O’CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that “a page of history is worth a volume of logic.” New York Trust Co. v. Eisner (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. . . .

The American flag . . . has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply
another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag. . . .

...[T]he public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a “die-in” to protest nuclear weapons. He shouted out various slogans during the march, including: “Reagan, Mondale which will it be? Either one means World War III”; “Ronald Reagan, killer of the hour, Perfect example of U.S. power”; and “red, white and blue, we spit on you, you stand for plunder, you will go under.” For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute. . . .

...The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—of any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson’s use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished. . . .

...Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment, rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable. . . .

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably, that value will be enhanced by the Court’s conclusion that our national commitment to free expression is so strong that even the United States, as ultimate guarantor of that freedom, is without power to prohibit the desecration of its unique symbol. But I am unpersuaded.

The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see Street v. New York (1969)—be employed. . . .

I respectfully dissent.

The Court’s decision in Johnson is intriguing for a number of reasons. Note, for example, the rather odd alignments: the conservative Antonin Scalia and the usually conservative Anthony Kennedy voted with the majority; John Paul Stevens, almost always found with the liberal wing of the Court, dissented.
Perhaps most important was the tremendous—and, to some, surprising—uproar created by the Court’s ruling. President George H. W. Bush immediately condemned it, and public opinion polls indicated that Americans generally favored a constitutional amendment overturning Johnson. But, after some politicking by civil liberties groups, senators, and representatives, Congress did not propose an amendment. Instead, it passed the Flag Protection Act of 1989, which penalized by a one-year jail sentence and a $1,000 fine anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States.”

Because the federal act differed from the Texas law at issue in Johnson—it banned flag desecration regardless of the motivation of the burner, whereas the Texas law did so only if a jury found the activity to be offensive—some thought it would meet approval in the Supreme Court. Others saw this difference as relatively insignificant, and they were correct. In United States v. Eichman (1990), the Court, using the same reasoning expressed in Johnson and by the same vote, struck down this law as a violation of the First Amendment (see Box 5-4).

The Preservation of Order

Preserving public order and protecting citizens from injury caused by violence are among the essential duties of government. The Preamble to the Constitution includes ensuring “domestic Tranquility” among the six basic purposes for which the new government was formed. On some occasions, free expression can threaten order. If order breaks down, results may include bodily injury, property destruction, the obstruction of the public’s free movement, and a burden on the government’s ability to carry out its duties. In any of these situations, a conflict arises between the nation’s commitment to freedom of expression and the government’s duty to maintain order. At what point is government constitutionally justified in repressing expression to stop or prevent violence?

The Court began to develop criteria to handle such expression in 1942 with Chaplinsky v. New Hampshire, but the majority of public order cases did not come to it until the 1960s and 1970s. As you read Justice Murphy’s opinion in Chaplinsky, try to identify the legal standard he articulates and remember it as we look at later Court decisions.

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BOX 5-4

Aftermath . . . Gregory Lee Johnson

Shortly after the Supreme Court decided that Gregory Lee Johnson’s burning of the American flag during the 1984 Republican National Convention was political expression protected by the First Amendment, Congress responded by passing the Flag Protection Act of 1989.

On October 30, two days after the new law took effect, a small group of demonstrators gathered on the steps of the Capitol in Washington to protest. Because the press had been informed that the protesters would burn flags, reporters, police, and curious passersby crowded the area. Suddenly four men separated themselves from the crowd and began to set fire to American flags.

The police reacted quickly—too quickly for one of the protesters. Gregory Lee Johnson was stopped before he could ignite his flag. Authorities arrested and prosecuted the other three demonstrators but ignored Johnson.

Represented by William Kunstler, an attorney well known for defending radical causes, the three protesters argued that the new flag desecration law was just as constitutionally flawed as the Texas statute struck down earlier. When the justices issued their opinion in United States v. Eichman, the protesters prevailed, defeating the government’s case presented by Solicitor General Kenneth Starr. (Starr later gained notoriety as the independent counsel whose investigation into the activities of President Bill Clinton led to Clinton’s impeachment by the House of Representatives.) In the end, it was Shawn Eichman’s name, not Johnson’s, that was attached to the Supreme Court’s decision. Johnson, who had hoped to win another place in legal history, sharply criticized the police and prosecutors, claiming that his failure to be prosecuted with the others was a “gross miscarriage of justice.”

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in these areas. Did Murphy’s approach continue to permeate future Court decisions, or did the Court revise it to fit changing times?

**Chaplinsky v. New Hampshire**

315 U.S. 568 (1942)


Vote: 9 (Black, Byrnes, Douglas, Frankfurter, Jackson, Murphy, Reed, Roberts, Stone)

0

**OPINION OF THE COURT: Murphy**

**FACTS:**

On April 6, 1940, Jehovah’s Witnesses member Walter Chaplinsky was selling religious pamphlets and literature, including *Watchtower* and *Consolation*, on a public street in New Hampshire. While he was announcing the sale of his pamphlets, a crowd of about fifty people began to gather. Several took offense at Chaplinsky’s comments about organized religion and “racketeer” priests and complained to the city marshal. The marshal warned Chaplinsky that the people were getting into an ugly mood, but Chaplinsky continued to express his religious views and distribute his literature. After one person tried to attack Chaplinsky, the marshal and three of his men intervened and forcibly began to take Chaplinsky to city hall. When a very agitated Chaplinsky demanded to know why they had arrested him and not those in the crowd, one of the officers replied, “Shut up, you damn bastard,” and Chaplinsky in turn called the officer a “damned fascist” and “a God damned racketeer.” For those words, the police should have arrested those who were taunting and assaulting him.

**ARGUMENTS:**

**For the appellant, Walter Chaplinsky:**

- The police unlawfully arrested Chaplinsky and violently removed him even though he was peacefully exercising his right to freedom of expression. The police should have arrested those who were taunting and assaulting him.
- Rather than physically resist his unlawful arrest, Chaplinsky chose to speak, boldly expressing his righteous indignation about the government’s wrongful conduct toward him.

- The fact that speech is likely to cause violence is no grounds for suppressing it. Here, in any event, there is no reason to believe that Chaplinsky’s words would lead to violence by the police officers to whom the words were directed.

**For the appellee, State of New Hampshire:**

- The challenged law is a reasonable regulation to promote public order.
- The statute does not violate the appellant’s right to the free exposition of his ideas, because the verbal conduct it prohibits bears no relationship to the process of attaining and disseminating truth.

**MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.**

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance are likely or “fighting” words—those which by their very utterance are likely to incite an immediate breach of the peace. It has been well observed that such utterances are not essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations.

On the authority of its earlier decisions, the state court declared that the state’s purpose was to preserve the public peace, no words being “forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.” It was further said: “The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are ‘fighting words’ when said
without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including ‘classical fighting words,’ words in current use less ‘classical’ but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.”

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. . . .

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations “damned racketeer” and “damned Fascist” are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Affirmed.

In unanimously affirming Chaplinsky’s conviction, the Court agreed with Murphy’s enunciation of the so-called fighting words doctrine: that the government may regulate words directed at another individual “which by their very utterance inflict injury or tend to incite an immediate breach of peace.”

This was not Chaplinsky’s first visit to the Supreme Court nor his first defeat before the justices. On July 8, 1939, Chaplinsky and Willis Cox were among a group of Jehovah’s Witnesses who were arrested and later convicted for parading without a permit in the city of Manchester. The Supreme Court, in Cox v. New Hampshire (1941), rejected their First Amendment claims.

Not all public order cases involve individuals shouting words that may prompt violent responses from the persons to whom they are directed. Sometimes a small group or even a single individual uses public property as a place of political protest. Occasionally, such expression occurs quite silently, such as in Cohen v. California (1971). Here, the justices examined the use of a courthouse as a forum for expression when the message was communicated in a way that many might find offensive. Here, as in Chaplinsky, an arrest was made based on fear of a violent response to the message expressed.

Cohen v. California

403 U.S. 15 (1971)
Vote: 5 (Brennan, Douglas, Harlan, Marshall, Stewart)
4 (Black, Blackmun, Burger, White)
OPINION OF THE COURT: Harlan
DISSENTING OPINION: Blackmun

FACTS:
In April 1968, at the height of the protests against the Vietnam War, Paul Cohen visited some friends in Los Angeles, his hometown. While they were discussing their opposition to the war, someone scrawled on Cohen’s jacket the words “Fuck the Draft” and “Stop the War.” The following morning, Cohen wore his jacket in the corridors of a Los Angeles County courthouse where men, women, and children were present, knowing it bore these messages.

Although Cohen took off the jacket before entering the courtroom, a police sergeant had observed it in the corridor. The officer asked the judge to cite Cohen for contempt of court. The judge refused, but the officer arrested Cohen, charging him with “willfully and unlawfully and maliciously disturbing the peace and quiet by engaging in tumultuous and offensive conduct.”

Given the nature of Cohen’s alleged offense, this case could have ended where it started, in a California trial court. No violence occurred, nor were large groups of people or spectators involved. But that was not to be. By the time of Cohen’s trial in September, his case had attracted the attention of the ACLU. Its Southern California affiliate decided that Cohen’s case presented a significant issue—that the message on his jacket represented a form of protected expression—and it offered to finance Cohen’s case.

Affirming Cohen’s municipal court conviction, the California Court of Appeal found that it was “reasonably foreseeable that such conduct might cause others to rise up to commit a violent act.” The California Supreme Court declined to review that decision, but Cohen’s
ACLU lawyers successfully petitioned the U.S. Supreme Court to consider the First Amendment issues at stake.\(^5\)

ARGUMENTS:

**For the appellant, Paul Robert Cohen:**
- There was no threat of violence from Cohen or from anyone who observed Cohen’s expression.
- Cohen’s expression was not obscene.
- The First Amendment protects offensive and nonoffensive speech equally.
- Profanity is a part of language in contemporary society and an indispensable ingredient in democratic dialogue.

**For the appellee, State of California:**
- The First Amendment is not absolute. It must be balanced against other public interests.
- Children, women, and men in the courthouse were forced to observe the offensive message on the jacket.
- Appellant’s form of protest was so inherently inflammatory as to come within the class of words that are likely to provoke the average person to retaliation and thereby cause a breach of the peace.
- A person may commit a breach of the peace by making statements that are likely to provoke violence and disturbance of good order, even if that is not the intended effect.

MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT.

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only “conduct” which the State sought to punish is the fact of communication. . . . Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. Yates v. United States.

Appellant’s conviction, then, rests squarely upon his exercise of the “freedom of speech” protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. No fair reading of the phrase “offensive conduct” can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen’s crudely defaced jacket.

\(^5\)In addition to its constitutional ramifications, Cohen provides a unique opportunity to view intraorganizational politics. As Richard Cortner reports, the Southern California affiliate of the ACLU always felt the “key issue . . . and the one that arguments before the Court should focus on was the free expression issue.” At the Supreme Court level, however, the ACLU’s Northern California affiliate “urged the Court not to decide the case on the freedom of expression issue.” The Southern California affiliate refused to give its consent to the filing of the brief, but the justices granted permission. See Richard C. Cortner, The Supreme Court and Civil Liberties Policy (Palo Alto, CA: Mayfield, 1975), 128–129.
This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called “fighting words,” those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not “directed to the person of the hearer.” *Cantwell v. Connecticut* (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction. *Feiner v. New York* (1951); *Terminiello v. Chicago* (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen’s distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant’s crude form of protest. Of course, the mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that “we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen’s jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one’s own home. Given the subtlety and complexity of the factors involved, if Cohen’s “speech” was otherwise entitled to constitutional protection, we do not think the fact that some unwilling “listeners” in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant’s conduct did in fact object to it, and where that portion of the statute upon which Cohen’s conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all “offensive conduct” that disturbs “any neighborhood or person.”

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as “offensive conduct,” one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an “undifferentiated fear or apprehension of disturbance which is not enough to overcome the right to freedom of expression.” We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable

**CHAPTER FIVE • FREEDOM OF SPEECH, ASSEMBLY, AND ASSOCIATION**

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level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below.

For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpresible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be

Reversed.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech. The California Court of Appeal appears so to have described it, and I cannot characterize it otherwise. Further, the case appears to me to be well within the sphere of Chaplinsky v. New Hampshire (1942), where Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court’s agonizing over First Amendment values seems misplaced and unnecessary.

The Court’s decision expanded our understanding of First Amendment protections and nullified Cohen’s jail sentence (see Box 5-5).
Advocates of free expression generally praise Robert Paul Cohen for challenging the government’s attempts to censor public discourse. But if Cohen was a civil liberties hero, he was a somewhat reluctant one.

On April 26, 1968, Cohen went to the Los Angeles courthouse to testify on behalf of a friend. He had no intention of expressing his political views. In an interview years later, he maintained that he did not even realize that the potentially offensive words were on his jacket until the morning before his courthouse visit. Cohen confessed that “I had a Ph.D. in partying in those days” and that a woman he met the night before stenciled the slogan on the back of the jacket.

Cohen laments the fact that misconceptions about him have emanated from the case. Contrary to the image others may have, he claims to have always been a very patriotic person and not one who uses a lot of profanity. When he entered the courtroom, he folded the jacket and kept it on his lap; he did not flaunt the words in front of others in the building.

The primary reason Cohen gives for allowing the ACLU to take the case to the nation’s highest court was not so much to champion freedom of speech rights, but because he did not want to serve a thirty-day sentence in the county jail.

On balance, Cohen supports the substance of the Court’s decision. He does not believe the government should have the authority to determine what words people are allowed to use. Still, he struggles with the fact that children were present and could see the slogans.

The Supreme Court remanded the case down to the trial level so that the charges could be officially dismissed. “I could tell the judge was upset with the Supreme Court’s ruling in my favor,” Cohen says. “I probably angered him even more when I asked for my jacket back.” The jacket was not returned.


Chaplinsky and Cohen involved individuals who expressed themselves in a way that caused local officials to be concerned about a breakdown in order. Public safety interests become even more acute when the expression takes the form of a mass demonstration rather than individual speech. In addition to the hostility the group’s message may provoke, the presence of a crowd makes it more likely that injuries or property damage will occur. Large crowds may interfere with free movement along streets, sidewalks, or other public areas. A demonstration that occurs near a government facility may place a burden on legitimate government activity. For these reasons, local police tend to watch such a gathering with great care. If the police, believing that a breakdown in order is about to occur, move to end the demonstration, the protesters may feel that their First Amendment rights are being violated. This scenario was replayed time after time during the civil rights and antiwar protest era and often recurs during political demonstrations today.

To help maintain public order, local governments may require permits to hold mass demonstrations, protests, and parades. Permits cannot be denied based on the content of the group’s message. Instead, the permit procedure must rest on legitimate time, place, and manner considerations. The permitting process gives local officials advance notice of mass gatherings, enabling them to ensure that adequate police protection is in place. It also allows a local government to make sure that public facilities are used properly, that unlawful activities are not planned, and that financially responsible parties are identified should damages occur during the event. Additionally, local governments may place certain restrictions on the conduct of public gatherings. Again, these restraints must be content neutral and narrowly tailored to serve a sufficiently significant government interest. For example, in Ward v. Rock Against Racism (1989), the justices upheld a New York regulation that required groups performing in the Central Park band shell to use city-supplied amplification equipment supervised by a city-authorized sound technician. The purpose of the regulation was to ensure that the volume of the concert music would not unreasonably disturb local residents. The Court concluded that this was a valid time, place, and manner restriction.

Although the 1960s are often seen as the heyday for protest activity, courts continue to face questions of how far the government may go in restricting the manner and place of protests. Today’s mass demonstration cases involve a wider variety of social and political issues than in the past. They are also more likely to present conflicts involving multiple rights and interests. The protests that have occurred at abortion clinics illustrate this phenomenon. These cases usually involve clashes between pro-life advocates who protest at women’s clinics and pro-choice groups that want the government to curtail the demonstrations. Two constitutional rights come into conflict: the demonstrators see the issue as freedom of speech; their opponents see it as needing to guarantee free access to legal abortion services without undue interference.

The decision in *McCullen v. Coakley* (2014) nicely illustrates both the issue and the Court’s reaction to it. As you read the facts and opinions in this case, notice how the Court addresses several of the freedom of speech principles we have already discussed. These include the significance of a public forum, content and viewpoint neutrality, and the application of appropriate constitutional tests. Compare this decision to the Court’s rulings on the anti-war and civil rights demonstrations. Is the Court applying the same standards it did in the earlier conflicts? Do you think, as Justice Scalia argues in his concurrence, that the justices’ views on abortion rights affect their positions on this First Amendment dispute?

*McCullen v. Coakley*

573 U.S. _____ (2014)

http://caselaw.findlaw.com/us-supreme-court/12-1168-nr2.html

Oral arguments are available at https://www.oyez.org/cases/2013/12-1168.

Vote: 9 (Alito, Breyer, Ginsburg, Kagan, Kennedy, Roberts, Scalia, Sotomayor, Thomas)

OPINION OF THE COURT: Roberts

CONCURRING OPINIONS: Scalia, Alito

FACTS:

In 2007, Massachusetts amended its Reproductive Health Care Facilities Act, which had been enacted in 2000 to deal with clashes between abortion opponents and advocates outside abortion clinics. The amended version of the act made it a crime to knowingly stand on a “public way or sidewalk” within thirty-five feet of an entrance or driveway to any “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” (The
original version of the law created six-foot no-approach zones within an eighteen-foot area.)

Exempted from the 2007 act were four classes of individuals, including “employees or agents of such facility acting within the scope of their employment.” Another provision of the act proscribed the knowing obstruction of access to an abortion clinic.

Eleanor McCullen, a seventy-six-year-old grandmother who engaged in pro-life sidewalk counseling of those entering abortion clinics, and other pro-life activists sued Massachusetts attorney general Martha Coakley, claiming the law violated the First Amendment and asking that the state be enjoined from enforcing it. The federal district court upheld the law, and the court of appeals affirmed.

ARGUMENTS:
For the petitioners, Eleanor McCullen, et al.:
• The act is not a permissible time, place, or manner restriction. Public sidewalks are quintessential public forums.
• The act is not content neutral because it creates speech exclusion zones only at abortion clinics and as a practical matter only affects speech about abortion.
• The act is not viewpoint neutral because it exempts employees or agents of an abortion clinic.
• The law is not narrowly tailored because it restricts core speech activities such as consensual conversations and leafletting, as well as limiting the distance between the speaker and her audience.

For the respondent, Massachusetts Attorney General Martha Coakley:
• The act is a lawful time, place, or manner restriction on conduct that compromises patient access and public safety.
• The law does not target speech but targets the location of congregated people who may create dangers to public safety and inhibit access to medical care.
• The law does not attack the petitioners’ message or favor any speaker or topic.
• The law is based on twenty years of experience protecting safety and public access. Earlier regulatory attempts have been unsuccessful.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more
aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call “sidewalk counseling,” which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: “Good morning, may I give you my literature? Is there anything I can do for you? I’m available if you have any questions.” If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontation methods such as shouting or brandishing signs, which in petitioners’ view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

By its very terms, the Massachusetts Act regulates access to “public way[s]” and “sidewalk[s].” Such areas occupy a “special position in terms of First Amendment protection” because of their historic role as sites for discussion and debate. United States v. Grace (1983). These places—which we have labeled “traditional public fora”—“have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Pleasant Grove City v. Summum (2009).

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,” FCC v. League of Women Voters of Cal. (1984), this aspect of traditional public fora is a virtue, not a vice.

Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is “very limited.” Grace. In particular, the guiding First Amendment principle that the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” applies with full force in a traditional public forum. Police Dept. of Chicago v. Mosley (1972). . . .

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”

While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test’s three requirements.

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. See United States v. Playboy Entertainment Group, Inc. (2000). . . .

We disagree. To begin, the Act does not draw content-based distinctions on its face. . . . The Act would be content based if it required “enforcement authorities” to “examine the content of the message that is conveyed to determine whether” a violation has occurred. League of Women Voters of Cal. But it does not. Whether petitioners violate the Act “depends” not “on what they say” but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become
content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” The question in such a case is whether the law is “justified without reference to the content of the regulated speech.” Renton v. Playtime Theatres, Inc. (1986).

Petitioners do not really dispute that the Commonwealth’s interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests “apply outside every building in the State that hosts any activity that might occasion protest or comment,” not just abortion clinics. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to “single out for regulation speech about one particular topic: abortion.”

We cannot infer such a purpose from the Act’s limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. At the same time, however, “States adopt laws to address the problems that confront them.” The First Amendment does not require States to regulate for problems that do not exist.” Burson v. Freeman. The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with "every building in the State that hosts any activity that might occasion protest or comment.” In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

Petitioners also argue that the Act is content based because it exempts four classes of individuals, one of which comprises “employees or agents of [a reproductive health care] facility acting within the scope of their employment.” This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination—an “egregious form of content discrimination,” Rosenberger v. Rector and Visitors of Univ. of Va. (1995). In particular, petitioners argue that the exemption allows clinic employees and agents—including the volunteers who “escort” patients arriving at the Boston clinic—to speak inside the buffer zones.

It is of course true that “an exemption from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people.” City of Ladue v. Gilleo (1994). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance.

Given the need for an exemption for clinic employees, the “scope of their employment” qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs.

Even though the Act is content neutral, it still must be “narrowly tailored to serve a significant governmental interest.” Ward v. Rock Against Racism (1989).

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not “burden substantially more speech than is necessary to further the government’s legitimate interests.” Ward. Such a regulation, unlike a content-based restriction of speech, “need not be the least restrictive or least intrusive means of” serving the government’s interests. But the government still “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”

As noted, respondents claim that the Act promotes “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government’s interests in “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services.” Schenck v. Pro-Choice Network of Western N.Y. (1997). The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners’ speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion...
of the adjacent public sidewalks, pushing petitioners well back from the clinics’ entrances and driveways. The zones thereby compromise petitioners’ ability to initiate the close, personal conversations that they view as essential to “sidewalk counseling.”

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear “untrustworthy” or “suspicious.” Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey. . . .

These burdens on petitioners’ speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, she also says that she reaches “far fewer people” than she did before the amendment . . . .

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it . . . . In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients . . . .

. . . When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

Respondents . . . emphasize that the Act does not prevent petitioners from engaging in various forms of “protest”—such as chanting slogans and displaying signs—outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm . . . . If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message . . . .

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests . . . .[T]he Act is truly exceptional: Respondents and their amici identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage . . . .

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances.

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, . . . [w]e have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction “regulates the activities, and perhaps the speech, of a group,” but only “because of the group’s past actions in the context of a specific dispute between real parties.” Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech . . . .

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

Respondents have but one reply: “We have tried other approaches, but they do not work.” Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth’s allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. . . . According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.
We cannot accept that contention. Although respondents claim that Massachusetts “tried other laws already on the books,” they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth “tried injunctions,” the last injunctions they cite date to the 1990s. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective. . . .

Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked. Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

Today’s opinion carries forward this Court’s practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. See, e.g., Hill v. Colorado (2000); Madsen v. Women’s Health Center, Inc. (1994).

The second half of the Court’s analysis today, invalidating the law at issue because of inadequate “tailoring,” is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court’s analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. . . .

[Petitioners maintain that the Act targets abortion-related—for practical purposes, abortion-opposing—speech because it applies outside abortion clinics only (rather than outside other buildings as well).

Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, they hold a “special position in terms of First Amendment protection.” Moreover, “the public spaces outside of [abortion-providing] facilities . . . have become, by necessity and by virtue of this Court’s decisions, a forum of last resort for those who oppose abortion.” It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not. . . .

The structure of the Act also indicates that it rests on content-based concerns. The goals of “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways,” are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for “[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” As the majority recognizes, that provision is easy to enforce. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion. . . .

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts “employees or agents” of an abortion clinic “acting within the scope of their employment.”

It goes without saying that “[g]ranting waivers to favored speakers (or . . . denying them to disfavored speakers) would of course be unconstitutional.” Thomas v. Chicago Park Dist. (2002). . . .
Is there any serious doubt that abortion-clinic employees or agents “acting within the scope of their employment” near clinic entrances may—indeed, often will—speak in favor of abortion (“You are doing the right thing”)? Or speak in opposition to the message of abortion opponents—saying, for example, that “this is a safe facility” to rebut the statement that it is not? The Court’s contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic employee sent out to “escort” prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor’s pleas. . . .

There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. Indeed, . . . the trial record includes testimony that escorts at the Boston clinic “expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways,” including by calling them “crazy.” What a surprise! . . .

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent “the least restrictive means” of furthering “a compelling Government interest.” United States v. Playboy Entertainment Group, Inc. (2000). Respondents do not even attempt to argue that subsection (b) survives this test. “Suffice it to say that if protecting people from unwelcome communications”—the actual purpose of the provision—“is a compelling state interest, the First Amendment is a dead letter.” . . .

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to “protect” prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved. . . . I concur only in the judgment that the statute is unconstitutional under the First Amendment.

Offensive and Hateful Speech

The cases we have discussed so far demonstrate a great diversity in the content and method of communication. Individuals in some of these cases have used conventional forms of protest, such as speeches, parades, and published documents; others have used unconventional methods that are offensive to many, such as Paul Cohen’s wearing a jacket with crude words written on it or Gregory Johnson’s burning of the American flag. Their expressions have included a wide array of philosophies and causes—communism, socialism, civil rights, religious beliefs, and opposition to war or abortion. In spite of this diversity, these cases share some common elements. Each has involved an individual or group communicating a political or social message, usually expressing dissatisfaction with certain government policies. This speech is the traditional form of political expression that the framers sought to protect when they approved the First Amendment.

Since the mid-1970s, another form of communication has come before the Court, one that differs markedly from the traditional. Expression based on hatred goes well beyond offending the standards of appropriateness or good taste. It arises from hostile, discriminatory, and prejudicial attitudes toward another person’s innate characteristics: sex, race, ethnicity, religion, or sexual orientation. When directed at a member of a targeted group, such expression is demeaning and hurtful. Hate speech tends to be devoid of traditional commentary on political issues or on the need for changes in public policy. Instead, its central theme is hostility toward individuals belonging to the target group.

Over the past several decades, in response to an increase in hate speech incidents, many state and local governments, as well as colleges and universities, have passed ordinances making hate speech punishable. Even though most Americans consider hate-based expression reprehensible, a deep division of opinion exists over whether it can be constitutionally banned. Individuals concerned with minority rights and elimination of bigotry have argued that laws making hate speech illegal are both necessary and constitutionally permissible. Free speech advocates, however, contend that such laws directly contradict the First Amendment. May hate speech be banned, or does the First Amendment protect it? Who defines what constitutes hateful expression? If regulation of such speech is permissible, under what conditions is it permissible? Do such hate speech designations apply to all speakers equally? And what standard should control when it is regulated?
In responding to these controversies, the Supreme Court has generally remained true to its core freedom of expression principles. The justices emphasized, for example, that the government cannot suppress expression simply because of a fear that a breakdown in order might result. National Socialist Party v. Skokie (1977) is illustrative. In this case, a township with a high percentage of Jewish residents attempted to block a planned march by members of the Nazi Party dressed in full regalia. The party claimed that Skokie’s actions violated the First Amendment, and the Supreme Court agreed. In spite of the hateful nature of the Nazis’ intended expression, denying the party the right to march was a form of censorship that the Constitution does not permit. The town could legitimately take action if the parade caused a breakdown in order, but it could not stop the event in advance.

Additionally, the Supreme Court has insisted that laws and local ordinances proscribing certain forms of hateful expression be narrowly drafted, avoiding vagueness and not being overly broad. Such laws also must not regulate according to the content of the expression or the viewpoint expressed. In R.A.V. v. City of St. Paul (1992), for example, the Court struck down a local regulation that banned offensive expressions using symbols such as swastikas and burning crosses. The majority found the law defective because it was content based and discriminated on the basis of the viewpoint expressed.

At the same time, the justices have affirmed the right of governments to impose more severe sentences if a crime is motivated by discriminatory hatred than if the offense is prompted by other factors. In Wisconsin v. Mitchell (1993), the Court upheld a four-year prison sentence on a man charged with aggravated battery because his victim was selected exclusively on the basis of racial hatred. The crime, if motivated by factors other than race, would have carried a maximum penalty of two years. The defendant unsuccessfully argued that he was being penalized for his beliefs and his racially based comments in violation of the First Amendment.

More recently, in the case of Snyder v. Phelps, the justices considered the right of demonstrators to express hateful and offensive messages while engaged in public picketing. While reading Chief Justice John Roberts’s opinion for the Court, pay close attention to his review of many of the topics we have discussed in this chapter—the importance of political expression, the Constitution’s treatment of offensive and hateful speech, and the use of traditional public forums. Do you find his argument more compelling than Justice Samuel Alito’s dissenting opinion, which would allow the government to protect innocent people from the severe emotional distress that may be caused by exposure to such hateful communications?

Snyder v. Phelps
562 U.S. 443 (2011)
Oral arguments are available at https://www.courts.gov/case/2010/09-751
Vote: 8 (Breyer, Ginsburg, Kagan, Kennedy, Roberts, Scalia, Sotomayor, Thomas)
1 (Alito)

OPINION OF THE COURT: Roberts
CONCURRING OPINION: Breyer
DISSENTING OPINION: Alito

FACTS:
Marine lance corporal Matthew Snyder of Westminster, Maryland, died on March 3, 2006, while serving in Iraq. His funeral, which took place at his family’s church, St. John’s Catholic Church in Westminster, was the occasion for a protest staged by the members of Westboro Baptist Church of Topeka, Kansas.

Frank W. Phelps Sr. founded Westboro Baptist Church in 1955 and served as its only pastor until his death in 2014. He practiced law, specializing in criminal defense and the rights of minorities, until he was disbarred for professional misconduct in 1979, after which he focused his efforts on the church. Eleven of his thirteen children are also lawyers. Phelps unsuccessfully ran for political office several times, including in 1992 when he placed second in the race for the Democratic nomination to represent Kansas in the U.S. Senate, capturing 31 percent of the primary vote. The church, which otherwise subscribes to fundamentalist Protestant Christianity, teaches that God hates homosexuality and punishes the United States and its military for being tolerant of gays. The church often expresses its opposition to the Catholic Church and to what its members see as the general moral decline of the nation. Over the years they have engaged in over sixty thousand pickets in almost one thousand cities; over seven hundred of these protests have been at military funerals. As a means of expressing their views, the church maintains a website, www.godhatesfags.com.

The church decided to picket Matthew Snyder’s funeral and notified local authorities of its intent to do so. The protesters (Phelps and six of his relatives) complied with all local ordinances and police directions. The picketing took place one thousand feet from the church entrance in a fenced-in area on public land. None of protesters approached the mourners. There was no obstruction of
those attending the funeral. The protesters held homemade signs indicating their opposition to the military, homosexuals, and the Catholic Church (for example, “God Hates the USA,” “Pope in Hell,” “Fag Troops,” “God Hates You,” “Priests Rape Boys,” “Thank God for IEDs,” “God Hates Fags,” “Thank You God for Dead Soldiers”). Church members sang hymns and recited Bible verses during their thirty-minute demonstration. (Later the church placed additional materials related to the funeral on its website, but that action is not relevant to this particular appeal.) Albert Snyder, Matthew’s father, did not observe the demonstrators at the funeral, but he did see a television news program that night showing the protest.

In June 2006, Albert Snyder filed a civil lawsuit against Phelps and Westboro Baptist Church claiming, among other things, intentional infliction of emotional distress, an unlawful act under Maryland law. Snyder claimed that he received severe and lasting emotional injury as a result of the church’s actions, making him often tearful and angry and causing him to vomit. He also alleged that he could no longer think of his son without visualizing the protest signs. According to his medical experts, exposure to the protest worsened Snyder’s diabetes and depression. One of Phelps’s daughters, Margie J. Phelps, represented her father and the church in this legal dispute. She argued that the protesters’ words were expressions of opinion on public issues and hyperbole rather than factual statements and thus were protected by the First Amendment.

A federal district court jury ruled in favor of Snyder and awarded him $2.9 million in compensatory damages and $8 million in punitive damages. The Fourth Circuit Court of Appeals, however, reversed, holding that the protest consisted of expressions of opinion protected by the First Amendment, which therefore could not be the basis for civil liability. Snyder sought Supreme Court review.

ARGUMENTS:

For the petitioner, Albert Snyder:

- Westboro’s speech had no rational connection to matters of public concern. Snyder did nothing to attach himself to any public event or controversy.
- The Court has never extended absolute protection to rhetorical hyperbole that cannot reasonably be interpreted as stating actual facts.
• A survivor has the right to privacy in protecting the memory of the dead.

• Westboro’s expression restricted Snyder’s ability to enjoy his First Amendment right to free exercise of religion and peaceful assembly.

For the respondents, Fred Phelps Sr., Westboro Baptist Church, et al.:

• Westboro’s expression concerned public issues. The language used was loose, figurative, and hyperbolic, which no reasonable person would interpret as stating actual facts.

• Snyder made himself a limited-purpose public figure by speaking to the press about his son.

• Westboro’s expression occurred well outside any zone of privacy that might reasonably be accorded to a funeral.

• Westboro’s speech in no way curtailed the right of Snyder and others to engage in the religious rituals associated with the funeral.

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

To succeed on a claim for intentional infliction of emotional distress in Maryland, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress. The Free Speech Clause of the First Amendment—“Congress shall make no law . . . abridging the freedom of speech”—can serve as a defense. . . . See, e.g., Hustler Magazine, Inc. v. Falwell (1988).


“[N]ot all speech is of equal First Amendment importance,” however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous. That is because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: “[T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas”; and the “threat of liability” does not pose the risk of “a reaction of self-censorship” on matters of public import.

. . . Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” Connick, or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” San Diego v. Roe (2004). The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” Rankin v. McPherson (1987). . . .

Deciding whether speech is of public or private concern requires us to examine the content, form, and context of that speech, as revealed by the whole record. Dun & Bradstreet, Connick. . . . In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” The placards read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Don’t Pray for the USA,” “Thank God for IEDs,” “Fag Troops,” “Semper Fi Fags,” “God Hates Fags,” “Maryland Taliban,” “Fags Doom Nations,” “Not Blessed Just Cursed,” “Thank God for Dead Soldiers,” “Pope in Hell,” “Priests Rape Boys,” “You’re Going to Hell,” and “God Hates You.” While these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed . . . to reach as broad a public audience as possible. And even if a few of the signs—such as “You’re Going to Hell” and “God Hates You”—were viewed as containing messages related to
Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.

Apart from the content of Westboro’s signs, Snyder contends that the “context” of the speech—its connection with his son’s funeral—makes the speech a matter of private rather than public concern. The fact that Westboro spoke in connection with a funeral, however, cannot by itself transform the nature of Westboro’s speech. Westboro’s signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Its speech is “fairly characterized as constituting speech on a matter of public concern,” and the funeral setting does not alter that conclusion. . . .

Westboro’s choice to convey its views in conjunction with Matthew Snyder’s funeral made the expression of those views particularly hurtful to many, especially to Matthew’s father. The record makes clear that the applicable legal term—“emotional distress”—fails to capture fully the anguish Westboro’s choice added to Mr. Snyder’s already incalculable grief. But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” United States v. Grace (1983). “[W]e have repeatedly referred to public streets as the archetype of a traditional public forum,” noting that “[t]ime out of mind public streets and sidewalks have been used for public assembly and debate.” Frisby v. Schultz (1988).

That said, “[e]ven protected speech is not equally permissible in all places and at all times.” Westboro’s choice of where and when to conduct its picketing is not beyond the Government’s regulatory reach—it is “subject to reasonable time, place, or manner restrictions” that are consistent with the standards announced in this Court’s precedents. . . .

[T]he church members had the right to be where they were. Westboro alerted local authorities to its funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence.

The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself. A group of parishioners standing at the very spot where Westboro stood, holding signs that said “God Bless America” and “God Loves You,” would not have been subjected to liability. It was what Westboro said that exposed it to tort damages.

Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to “special protection” under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” Texas v. Johnson (1989). Indeed, “the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful.” Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. (1995).

The jury here was instructed that it could hold Westboro liable for intentional infliction of emotional distress based on a finding that Westboro’s picketing was “outrageous.” “Outrageousness,” however, is a highly malleable standard with “an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors’ tastes or views, or perhaps on the basis of their dislike of a particular expression.” Hustler. In a case such as this, a jury is “unlikely to be neutral with respect to the content of [the] speech,” posing “a real danger of becoming an instrument for the suppression of . . . ‘vehement, caustic, and sometimes unpleasan[t]’” expression. Bose Corp. Such a risk is unacceptable; “in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” Boos v. Barry (1988). What Westboro said, in the whole context of how and where it chose to say it, is entitled to “special protection” under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous. . . .

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro’s funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder’s funeral, but did not itself disrupt that funeral, and Westboro’s choice to conduct its picketing at that time and place did not alter the nature of its speech.
Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—infect great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

JUSTICE ALITO, dissenting.

Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.

Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew’s funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury.

Respondents and other members of their church have strong opinions on certain moral, religious, and political issues, and the First Amendment ensures that they have almost limitless opportunities to express their views. They may write and distribute books, articles, and other texts; they may create and disseminate video and audio recordings; they may circulate petitions; they may speak to individuals and groups in public forums and in any private venue that wishes to accommodate them; they may picket peacefully in countless locations; they may appear on television and speak on the radio; they may post messages on the Internet and send out e-mails. And they may express their views in terms that are “uninhibited,” “vehement,” and “caustic.” New York Times Co. v. Sullivan (1964).

It does not follow, however, that they may intentionally inflict severe emotional injury on private persons at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate.

...[T]hey maintained that the First Amendment gave them a license to engage in such conduct. They are wrong...

This Court has recognized that words may “by their very utterance inflict injury” and that the First Amendment does not shield utterances that form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Chaplinsky v. New Hampshire (1942). When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.

In this case, respondents brutally attacked Matthew Snyder, and this attack, which was almost certain to inflict injury, was central to respondents’ well-practiced strategy for attracting public attention.

On the morning of Matthew Snyder’s funeral, respondents could have chosen to stage their protest at countless locations. They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country. They could have returned to the Maryland State House or the United States Naval Academy, where they had been the day before. They could have selected any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.) They could have staged their protest in a public park. (There are more than 20,000 public parks in this country.) They could have chosen any Catholic church where no funeral was taking place. (There are nearly 19,000 Catholic churches in the United States.) But of course, a small group picketing at any of these locations would have probably gone unnoticed.

The Westboro Baptist Church, however, has devised a strategy that remedies this problem. As the Court notes, church members have protested at nearly 600 military funerals. They have also picketed the funerals of police officers, firefighters, and the victims of natural disasters, accidents, and shocking crimes. And in advance of these protests, they issue press releases to ensure that their protests will attract public attention.

This strategy works because it is expected that respondents’ verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when
Matthew was “in Hell—sine die.” “Not Blessed Just Cursed,” conveyed the message that God had caused Matthew's death in retribution for his sins. Others, stating “You're Going to Hell” and “Thank God for Dead Soldiers” reiterated the promise in their press release. Signs stating “God Hates You” and “Not Blessed Just Cursed,” conveyed the message that Matthew was “in Hell—sine die.” This announcement guaranteed that Matthew’s funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.

On the day of the funeral, respondents, true to their word, displayed placards that conveyed the message promised in their press release. Signs stating “God Hates You” and “Thank God for Dead Soldiers” reiterated the message that God had caused Matthew’s death in retribution for his sins. Others, stating “You’re Going to Hell” and “Not Blessed Just Cursed,” conveyed the message that Matthew was “in Hell—sine die.”

Moreover, since a church funeral is an event that naturally brings to mind thoughts about the afterlife, some of respondents’ signs—e.g., “God Hates You,” “Not Blessed Just Cursed,” and “You’re Going to Hell”—would have likely been interpreted as referring to God’s judgment of the deceased.

Other signs would most naturally have been understood as suggesting—falsely—that Matthew was gay. Homosexuality was the theme of many of the signs. There were signs reading “God Hates Fags,” “Semper Fi Fags,” “Fags Doom Nations,” and “Fag Troops.” Another placard depicted two men engaging in anal intercourse.

In light of this evidence, it is abundantly clear that respondents, going far beyond commentary on matters of public concern, specifically attacked Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military. Both Matthew and petitioner were private figures, and this attack was not speech on a matter of public concern. While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.

Respondents’ outrageous conduct caused petitioner great injury, and the Court now compounds that injury by depriving petitioner of a judgment that acknowledges the wrong he suffered.

In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner. Therefore respectfully dissent.

Expressing Falsehoods

Does the First Amendment protect lies? May the government penalize an individual who knowingly expresses falsehoods? Under some circumstances the answer to these questions is clear. Making false statements under oath constitutes the crime of perjury. Lying on a tax return may lead to a conviction for tax evasion. Making false claims in order to profit financially constitutes fraud. Purposefully misleading police might result in obstruction of justice charges. Articulating falsehoods that damage a person’s reputation or financial well-being may constitute libel.

But what about lying exclusively for the purpose of personal aggrandizement with no traceable link to hurting anyone or gaining any reward? Such expression may be of little constitutional value, but does the government have the authority to punish it? The Supreme Court confronted this issue in United States v. Alvarez.

United States v. Alvarez

567 U.S. 709 (2012)
Vote: 6 (Breyer, Ginsburg, Kagan, Kennedy, Roberts, Sotomayor) 3 (Alito, Scalia, Thomas)

OPINION ANNOUNCING THE JUDGMENT
OF THE COURT: Kennedy

CONCURRING OPINION: Breyer

DISSENTING OPINION: Alito

FACTS:

In 2007, Xavier Alvarez was elected to the board of directors of the Three Valleys Water District, located outside Los Angeles. At his first board meeting, Alvarez introduced himself for the record as follows: “I’m a retired Marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor.
I got wounded many times by the same guy. I'm still around.” Other than “I'm still around,” the statement was false. Alvarez never served in the armed forces.

Alvarez had a long history of lying. His past misrepresentations included the following: being awarded the Congressional Medal of Honor during the Iranian hostage crisis for rescuing the American ambassador and being wounded when he went back to save the American flag, being shot down while piloting a rescue helicopter in Vietnam, playing hockey for the Detroit Red Wings, being fired as a police officer for using excessive force against bad guys who deserved it, and being married to a Mexican starlet.

Responding to complaints, the FBI obtained a recording of the July 2007 water district board meeting. Alvarez was subsequently indicted for violating the federal Stolen Valor Act. He became the first person prosecuted for violating this 2006 statute. The act provides:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under the title, imprisoned not more than six months, or both.

The law does not require the false statement to be believed or cause any harm, nor does it require that the liar receive any gain from the falsehood. The law does not make allowances for any circumstances under which the falsehood would be permissible. In addition, penalties are enhanced under the law if the false statements concern the Congressional Medal of Honor.

Alvarez was convicted in federal district court over his objection that the law violated the First Amendment. The court sentenced him to probation, a $5,000 fine, and community service. Alvarez appealed to the Ninth Circuit Court of Appeals, which, by divided vote, reversed the conviction and declared the Stolen Valor Act unconstitutional. The United States requested Supreme Court review.

ARGUMENTS:

For the petitioner, United States:
• The law regulates only a discrete and narrow category of expression.

For the respondent, Xavier Alvarez:
• Content-based restrictions on speech are subject to strict scrutiny, and the Stolen Valor Act does not meet that standard.
• The government's position would create a new standard, completely unmoored from precedent, that would uphold the law if the government is advancing an “important” (rather than “compelling”) interest and if the law leaves “breathing room” for fully protected speech.
• The law is unconstitutionally overbroad.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the "supreme and noble duty of contributing to the defense of the rights and honor of the nation" have acted with extraordinary honor. And it should be uncontested

CHAPTER FIVE • FREEDOM OF SPEECH, ASSEMBLY, AND ASSOCIATION

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that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought. . . .

Respondent challenges the statute as a content-based suppression of pure speech, speech not falling within any of the few categories of expression where content-based regulation is permissible. The Government defends the statute as necessary to preserve the integrity and purpose of the Medal, an integrity and purpose it contends are compromised and frustrated by the false statements the statute prohibits. It argues that false statements “have no First Amendment value in themselves,” and thus “are protected only to the extent needed to avoid chilling fully protected speech.” Although the statute covers respondent’s speech, the Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military. The Government’s arguments cannot suffice to save the statute.

“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Ashcroft v. American Civil Liberties Union (2002). As a result, the Constitution “demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.” Ashcroft v. American Civil Liberties Union (2004).

. . . [C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few “‘historic and traditional categories [of expression] long familiar to the bar.’” Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain. These categories have a historical foundation in the Court’s free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee. . . .

Although the First Amendment stands against any “freewheeling authority to declare new categories of speech outside the scope of the First Amendment,” the Court has acknowledged that perhaps there exist “some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law.” Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription,” Brown v. Entertainment Merchants Assn. (2011). The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis. . . .

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. . . . [T]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. . . . Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented
in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom. . . .

The Government is correct when it states military medals "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service," and also "fost[e] morale, mission accomplishment and esprit de corps among service members." . . . In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.

These interests are related to the integrity of the military honors system in general, and the Congressional Medal of Honor in particular. Although millions have served with brave resolve, the Medal, which is the highest military award for valor against an enemy force, has been given just 3,476 times. . . .

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be "actually necessary" to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. . . .

. . . The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. . . .

. . . The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements "Alvarez was perceived as a phony." Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants. Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right.

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. The theory of our Constitution is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates. . . .

It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal. The same can be said for the Government's interest. The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication. . . .

The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring in the judgment.

I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. Rather, I base that conclusion upon the fact that the statute works First
Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.

In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

The statute before us lacks . . . limiting features. . . . [It] ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm. As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. Further, given the potential haziness of individual memory along with the large number of military awards covered (ranging from medals for rifle marksmanship to the Congressional Medal of Honor), there remains a risk [that] a speaker might still be worried about being prosecuted for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example, to bar stool bragadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm.

Like both the plurality and the dissent, I believe the statute nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country. The statute serves this interest by seeking to preserve intact the country’s recognition of that sacrifice in the form of military honors. To permit those who have not earned those honors to claim otherwise dilutes the value of the awards. Indeed, the Nation cannot fully honor those who have sacrificed so much for their country’s honor unless those who claim to have received its military awards tell the truth. Thus, the statute risks harming protected interests but only in order to achieve a substantial countervailing objective.

We must therefore ask whether it is possible substantially to achieve the Government’s objective in less burdensome ways. In my view, the answer to this question is “yes.” . . .

The Government has provided no convincing explanation as to why a more finely tailored statute would not work. In my own view, such a statute could significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective. That being so, I find the statute as presently drafted works disproportionately constitutional harm. It consequently fails intermediate scrutiny, and so violates the First Amendment.

For these reasons, I concur in the Court’s judgment.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country’s system of military honors and inflicting real harm on actual medal recipients and their families.

Building on earlier efforts to protect the military awards system, Congress responded to this problem by crafting a narrow statute that presents no threat to the freedom of speech. The statute reaches only knowingly false statements about hard facts directly within a speaker’s personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.

By holding that the First Amendment nevertheless shields these lies, the Court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest. I would adhere to that principle and would thus uphold the constitutionality of this valuable law.

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restrictive means possible to achieve that interest. The concurring justices, Stephen Breyer and Elena Kagan, prefer to inquire whether the law does harm to other First Amendment liberties and whether the statute is sufficiently finely tailored. In dissent, Justice Alito concludes that the law was a narrowly tailored government effort to achieve a compelling interest and therefore valid.

Congress responded quickly to the Alvarez ruling by crafting a revised version of the Stolen Valor Act that took into account the Supreme Court’s objections to the original law. The new statute made it unlawful to make fraudulent claims of receiving a military award for the purpose of obtaining tangible benefits, such as money or property. On June 3, 2013, less than one year after Alvarez, President Barack Obama signed the revised statute into law.

Student Speech

Thus far we have examined questions about the content of expression and the context in which words are uttered. Also of importance is the party who is engaging in the expression. As we will see, the application of First Amendment speech guarantees may vary depending on the nature of the speaker. We will first turn our attention to the rights of students, followed by a discussion of corporate and government expression.

Considerable controversy has arisen over freedom of speech in the public schools. Do the schools constitute a special setting that permits an elevated degree of speech regulation? Do minors have the same expression rights as adults? The debate over these questions began with Tinker v. Des Moines Independent Community School District in 1969.

Tinker v. Des Moines Independent Community School District

393 U.S. 503 (1969)


Oral arguments are available at https://www.oyez.org/cases/1968/21

Vote: 7 (Brennan, Douglas, Fortas, Marshall, Stewart, Warren, White)

2 (Black, Harlan)

OPINION OF THE COURT: Fortas

CONCURRING OPINIONS: Stewart, White

DISSenting OPINIONS: Black, Harlan

FACTS:

In December 1965 a group of adults and secondary school students in Des Moines, Iowa, devised two strategies to demonstrate their opposition to the Vietnam War: they would fast on December 16 and New Year’s Day and would wear black armbands every day in between.

Principals of the students’ schools learned of the plan and feared the demonstration would be disruptive. As a consequence, they announced that students wearing the armbands to school would be suspended. Of the eighteen thousand children in the school district, all but five complied with the policy. Among those five were John Tinker, Mary Beth Tinker, and Christopher Eckhardt, whose parents allowed them to wear black armbands to school. The three students had a history of participating in other civil rights and antiwar protests. All three were suspended. ACLU attorneys represented the students in their appeal to the Supreme Court.

ARGUMENTS:

For the petitioners, John and Mary Beth Tinker and Christopher Eckhardt:

• The First Amendment protects the right of public school students to free speech in their schools and classrooms.

• The prohibition against wearing the armbands was an unconstitutional prior restraint on freedom of speech.

• Wearing the armbands caused no disturbance or disruption of the school day.

For the respondent, Des Moines Independent Community School District:

• School officials should be given wide discretion to carry out their responsibility to maintain a scholarly, disciplined atmosphere in the classroom. The school policy at issue here was reasonably calculated to promote that goal.

• Des Moines school officials properly allowed full classroom discussion of public issues, such as the Vietnam War, but demonstrations are inappropriate inside the school.

• Disturbances at school cannot be measured by the same standards used for adults in other environments.

MR. JUSTICE FORTAS DELIVERED THE OPINION OF THE COURT.

. . . [T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to “pure speech” which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

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First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.

In *West Virginia State Board of Education v. Barnette*, this Court held that under the First Amendment, the student in public school may not be compelled to salute the flag. . . .

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to “pure speech.”

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

. . . [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor
of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained. . . .

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation’s involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. . . .

. . . The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student’s rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without “materially and substantially interfering with the requirements of appropriate discipline in the operation of the school” and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression. . . .

_Reversed and remanded._

MR. JUSTICE BLACK, dissenting.

As I read the Court’s opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is “symbolic speech” which is “akin to ‘pure speech’” and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise “symbolic speech” as long as normal school functions are not “unreasonably” disrupted. Finally, the Court arrogates to itself, rather than to the State’s elected officials charged with running the schools, the decision as to which school disciplinary regulations are “reasonable.”
Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—“symbolic” or “pure”—and whether the courts will allocate to themselves the function of deciding how the pupils’ school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. . . .

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically “wrecked” chiefly by disputes with Mary Beth Tinker, who wore her armband for her “demonstration.” . . .

I deny . . . that it has been the “unmistakable holding of this Court for almost 50 years” that “students” and “teachers” take with them into the “schoolhouse gate” constitutional rights to “freedom of speech or expression.” . . . The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or into the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. . . .

. . . Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court’s holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. . . . Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. . . . This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. . . . I, for one, am not fully persuaded that school pupils are wise enough, even with this Court’s expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

Justice Abe Fortas’s majority opinion is a strong endorsement of constitutional protection for expression that takes place in the classroom. Teachers and students, he declared, do not shed their constitutional rights at the schoolhouse gate. As long as the speech does not disrupt the educational process, government has no authority to proscribe it.

In the years since Tinker, the Court has pulled back somewhat from its strong protection of student expression. In Bethel School District No. 403 v. Fraser (1986), for example, the justices upheld the action of Washington state education officials who disciplined high school senior Matthew Fraser for delivering a student assembly speech that violated a policy against “the use of obscene, profane language or gestures.” Although this decision may appear to be in direct conflict with Tinker, it is important to note that Fraser, unlike the Tinker protesters, was not being punished for the political content of his expression.

Two decades later, the Court returned to the public school expression issue in Morse v. Frederick (2007). As you read the Morse decision, notice the wide array of views expressed by the justices. Justice Stevens’s dissenting opinion strongly supports the Tinker precedent; he would protect almost all student expression. At the other extreme, Justice Clarence Thomas believes that students have no
constitutionally protected expression rights. He thinks *Tinker* should be overruled. The majority of the justices, however, take more moderate positions.

**Morse v. Frederick**

551 U.S. 393 (2007)


Oral arguments are available at https://www.oyez.org/cases/2006/06-278.

Vote: 5 (Alito, Kennedy, Roberts, Scalia, Thomas)

4 (Breyer, Ginsburg, Souter, Stephens)

**OPINION OF THE COURT:** Roberts

**CONCURRING OPINION:** Alito, Thomas

**OPINION CONCURRING IN JUDGMENT IN PART AND DISSENTING IN PART:** Breyer

**DISSENTING OPINION:** Stevens

**FACTS:**

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the Winter Games in Salt Lake City. The event was scheduled to pass along a street in front of Juneau-Douglas High School (JDHS). Principal Deborah Morse decided to have the school’s staff and students observe the event as part of an approved school activity. Students were allowed to leave class and watch the relay from either side of the street. The school’s cheerleaders and band performed during the event.

Joseph Frederick, a senior at the high school, joined some friends across the street from the school. As the torchbearers and television camera crews passed by, Frederick and his friends unfurled a fourteen-foot banner bearing the words “BONG HITS 4 JESUS” in large letters. Morse immediately crossed the street and ordered the students to lower the banner. All complied except Frederick. Morse suspended Frederick for ten days on the grounds that he violated school policy pertaining to the advocacy of illegal drugs.

The school superintendent upheld the suspension, holding that it was an appropriate enforcement of school policy at a school-sponsored event. The message portrayed on the banner was not political expression and could be reasonably interpreted as supportive of illegal drug use. Frederick sued in federal district court for unspecified monetary damages, claiming that his First Amendment rights had been violated. The district judge held that “Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity.” The Court of Appeals for the Ninth Circuit, however, reversed on the grounds that student speech cannot be restricted without a showing that it poses a substantial risk of disruption. The school system requested Supreme Court review.

**ARGUMENTS:**

*For the petitioners, Deborah Morse and the Juneau School Board:*

- *Tinker v. Des Moines* and *Bethel School District No. 403 v. Fraser* allow regulation of student speech that disrupts or undermines the school’s educational mission.
Discouraging use of illegal substances is part of the school’s mission.

Frederick’s pro-drug banner interfered with decorum by radically changing the focus of the school activity.

Principal Morse properly disassociated the school from Frederick’s pro-drug banner.

For the respondent, Joseph Frederick:

- Frederick’s banner was displayed off school property. The Olympic Torch event was not school sponsored.
- Schools cannot punish nondisruptive student speech just because they disagree with the ideas expressed.
- The record does not show that Frederick’s banner caused substantial disruption of the educational mission as required in Tinker, nor was the banner offensive within the meaning of Fraser.

At the outset, we reject Frederick’s argument that this is not a school speech case—as has every other authority to address the question. . . . [W]e agree with the superintendent that Frederick cannot “stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.” . . .

The message on Frederick’s banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed “that the words were just nonsense meant to attract television cameras.” But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one. . . .

We agree with Morse . . .

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is “meaningless and funny.” . . . Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick’s “credible and uncontradicted explanation for the message—he just wanted to get on television.” But that is a description of Frederick’s motive for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students. . . . [T]his is plainly not a case about political debate over the criminalization of drug use or possession.

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may. . . .

Tinker [v. Des Moines Independent Community School District (1969)] held that student expression may not be suppressed unless school officials reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school.” The essential facts of Tinker are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their “disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.” Political speech, of course, is “at the core of what the First Amendment is designed to protect.” Virginia v. Black (2003). The only interest the Court discerned underlying the school’s actions was the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” or “an urgent wish to avoid the controversy which might result from the expression.” Tinker. That interest was not enough to justify banning “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.”

This Court’s next student speech case was [Bethel School District No. 403 v. Fraser (1986)]. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called “an elaborate, graphic, and explicit sexual metaphor.” . . . This Court [held] that the “School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.” . . .

. . . For present purposes, it is enough to distill from Fraser two basic principles. First, Fraser’s holding demonstrates that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser’s First Amendment rights were circumscribed “in light of
the special characteristics of the school environment.” Second, Fraser established that the mode of analysis set forth in Tinker is not absolute. Whatever approach Fraser employed, it certainly did not conduct the “substantial disruption” analysis prescribed by Tinker. . . .

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ . . . the nature of those rights is what is appropriate for children in school.” Vershioha School Dist. 47J v. Acton (1995). In particular, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” New Jersey v. T. L. O. (1985) . . .

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an “important—indeed, perhaps compelling” interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people. . . .

Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs. . . .

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps “the single most important factor leading schoolchildren to take drugs,” and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The “special characteristics of the school environment” and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. . . .

Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly “offensive” as that term is used in Fraser. We think this stretches Fraser too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use. . . .

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in Tinker v. Des Moines Independent Community School Dist. (1969), is without basis in the Constitution. . . .

. . . In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. . . .

. . . [W]hen States developed public education systems in the early 1800’s, no one doubted the government’s ability to educate and discipline children as private schools did. Like their private counterparts, early public schools were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled “a core of common values” in students and taught them self-control.

Teachers instilled these values not only by presenting ideas but also through strict discipline. Schools punished students for behavior the school considered disrespectful or wrong. Rules of etiquette were enforced, and courteous behavior was demanded. To meet their educational objectives, schools required absolute obedience.

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order. . . .
Tinker effected a sea change in students’ speech rights, extending them well beyond traditional bounds. . . . Accordingly, unless a student’s speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable.

Justice Black dissented, criticizing the Court for “subject[ing] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.” He emphasized the instructive purpose of schools: “[T]axpayers send children to school on the premise that at their age they need to learn, not teach.” In his view, the Court’s decision “surrender[ed] control of the American public school system to public school students.” . . . .

. . . I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, Tinker substituted judicial oversight of the day-to-day affairs of public schools. The Tinker Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. . . .

Justice Black may not have been “a prophet or the son of a prophet,” but his dissent in Tinker has proved prophetic. In the name of the First Amendment, Tinker has undermined the traditional authority of teachers to maintain order in public schools. “Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools.” We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either “gibberish” or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to “surrender control of the American public school system to public school students.”

I join the Court’s opinion because it erodes Tinker’s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the Tinker standard. I think the better approach is to dispense with Tinker altogether, and given the opportunity, I would do so.

JUSTICE ALITO, with whom
JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.”

JUSTICE STEVENS, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

I would hold . . . that the school’s interest in protecting its students from exposure to speech “reasonably regarded as promoting illegal drug use” cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs. The First Amendment demands more, indeed, much more . . . .

Two cardinal First Amendment principles animate . . . the Court’s opinion in Tinker [v. Des Moines Independent Community School Dist. (1969)]. . . . First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification. . . .

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.

However necessary it may be to modify those principles in the school setting, Tinker affirmed their continuing vitality. . . .

Yet today the Court fashions a test that trivializes the two cardinal principles upon which Tinker rests. The Court’s test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner. . . . [T]he Court’s holding in this case strikes at “the heart of the First Amendment” because it upholds a punishment meted out on the basis of a listener’s disagreement with her understanding (or, more likely, misunderstanding) of the speaker’s viewpoint. “If there is a bedrock principle
underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson* (1989). . . .

There is absolutely no evidence that Frederick’s banner’s reference to drug paraphernalia “willful[ly]” infringed on anyone’s rights or interfered with any of the school’s educational programs. . . . Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick’s supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana. . . .

I respectfully dissent.

Corporate and Commercial Speech

Although business activities are generally subject to regulation under the government’s authority over commerce, constitutional questions may arise when corporations engage in expressive behavior. Most business messages promote a corporation’s own economic interests, but they also may advance more general policy preferences. Consequently, conflicts between the government’s power over commerce and corporate claims of First Amendment protection are not uncommon.

As a result, the Supreme Court has accepted a number of disputes asking the justices to define the extent to which the First Amendment protects a corporation’s right to express its views. Two fundamental questions underlie this issue. First, do corporations have the same freedom of speech rights as individuals? And second, does the First Amendment protect a person’s right to speak or, rather, does it protect speech itself? The 1978 case of *First National Bank of Boston v. Bellotti* presents one of the Court’s most direct answers to these questions.

The General Laws of Massachusetts (chapter 55, section 8) made it a crime for any banking or business corporation to make contributions or expenditures for the purpose of influencing the vote on any question submitted to the voters, other than one “materially affecting” the business of the corporation. In 1976, Massachusetts proposed a constitutional amendment authorizing the state to tax individual incomes. The state’s voters were to approve or reject this measure at the polls in November of that year. The First National Bank of Boston and four other corporations planned to spend funds to publicize their opposition to the proposal. Francis X. Bellotti, the state attorney general, made it known that he intended to enforce the ban against such corporate advocacy. In response, the corporations filed suit claiming, among other things, that the Massachusetts statute violated the First Amendment. The Supreme Judicial Court of Massachusetts upheld the law.

**FACTS:**

For the appellants, *First National Bank of Boston, et al.***:

- Business corporations have First Amendment rights.
- The expression in question concerns basic economic and political policies that a corporation has the right to discuss and the public has a right to hear.
- Neither precedent nor logic supports the proposition that corporate expression of ideas may be forbidden by criminal law unless the message is proven to be of concern to the material interests of the corporation.
- The law serves no compelling interest and is not the least restrictive means to carry out whatever policy values might be served.

**For the appellee, Francis X. Bellotti, Massachusetts Attorney General:**

- Corporations (aside from the press or other communications entities) do not have First Amendment rights.
- Corporations are artificial entities. They do not enjoy all the rights of natural persons.
- The law in question advances significant government interests, including the freeing of elections from undue corporate influence and protecting shareholders from being compelled to furnish contributions for the propagation of political opinions in which they do not believe.
The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether section 8 abridges expression that the First Amendment was meant to protect. We hold that it does.

The speech proposed by appellants is at the heart of the First Amendment’s protection. “The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.” Thornhill v. Alabama (1940).

The referendum issue that appellants wish to address falls squarely within this description. In appellants’ view, the enactment of a graduated personal income tax, as proposed to be authorized by constitutional amendment, would have a seriously adverse effect on the economy of the State. The importance of the referendum issue to the people and government of Massachusetts is not disputed. Its merits, however, are the subject of sharp disagreement.

As the Court said in Mills v. Alabama (1936), “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.” If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

The court below nevertheless held that corporate speech is protected by the First Amendment only when it pertains directly to the corporation’s business interests. . . . The question in this case, simply put, is whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection. . . .

Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, and the Court has not identified a separate source for the right when it has been asserted by corporations. In Grosjean v. American Press Co. (1936), the Court rejected the very reasoning adopted by the Supreme Judicial Court and did not rely on the corporation’s property rights under the Fourteenth Amendment in sustaining its freedom of speech. . . .

We . . . find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The “materially affecting” requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

Section 8 permits a corporation to communicate to the public its views on certain referendum subjects—those materially affecting its business—but not others. It also singles out one kind of ballot question—individual taxation—as a subject about which corporations may never make their ideas public. The legislature has drawn the line between permissible and impermissible speech according to whether there is a sufficient nexus, as defined by the legislature, between the issue presented to the voters and the business interests of the speaker.

In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. Police Dept. of Chicago v. Mosley (1972). If a legislature may direct business corporations to “stick to business,” it also may limit other corporations—religious, charitable, or civic—to their respective “business” when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the legislature’s suppression of speech suggests an attempt to give one side of a debatable public question an
advantage in expressing its views to the people, the First Amendment is plainly offended. Yet the State contends that its action is necessitated by governmental interests of the highest order. We next consider these asserted interests. . . .

Preserving the integrity of the electoral process, preventing corruption, and "sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" are interests of the highest importance. Preservation of the individual citizen's confidence in government is equally important.

Appellee advances a number of arguments in support of his view that these interests are endangered by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. . . . But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts or that there has been any threat to the confidence of the citizenry in government.

. . . Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. The Constitution "protects expression which is eloquent no less than that which is unconvincing." Kingsley Int'l Pictures Corp. v. Regents [1959]. We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." Buckley v. Valeo [1976]. Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment. In sum, "[a] restriction so destructive of the right of public discussion [as section 8], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment."

Finally, appellee argues that section 8 protects corporate shareholders, an interest that is both legitimate and traditionally within the province of state law. The statute is said to serve this interest by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree. This purpose is belied, however, by the provisions of the statute, which are both underinclusive and overinclusive.

The underinclusiveness of the statute is self-evident. Corporate expenditures with respect to a referendum are prohibited, while corporate activity with respect to the passage or defeat of legislation is permitted even though corporations may engage in lobbying more often than they take positions on ballot questions submitted to the voters. Nor does section 8 prohibit a corporation from expressing its views, by the expenditure of corporate funds, on any public issue until it becomes the subject of a referendum, though the displeasure of disapproving shareholders is unlikely to be any less. . . .

The overinclusiveness of the statute is demonstrated by the fact that section 8 would prohibit a corporation from supporting or opposing a referendum proposal even if its shareholders unanimously authorized the contribution or expenditure. Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. . . .

Assuming, arguendo, that protection of shareholders is a "compelling" interest under the circumstances of this case, we find "no substantially relevant correlation between the governmental interest asserted and the State's effort" to prohibit appellants from speaking.

Because that portion of section 8 challenged by appellants prohibits protected speech in a manner unjustified by a compelling state interest, it must be invalidated. The judgment of the Supreme Judicial Court is

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

There is now little doubt that corporate communications come within the scope of the First Amendment. This, however, is merely the starting point of analysis. . . . Indeed, what some have considered to be the principal function
of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." They do not represent a manifestation of individual freedom or choice. . . . Shareholders in such entities do not share a common set of political or social views, and they certainly have not invested their money for the purpose of advancing political or social causes or in an enterprise engaged in the business of disseminating news and opinion. . . .

Of course, it may be assumed that corporate investors are united by a desire to make money, for the value of their investment to increase. Since even communications which have no purpose other than that of enriching the communicator have some First Amendment protection, activities such as advertising and other communications integrally related to the operation of the corporation's business may be viewed as a means of furthering the desires of individual shareholders. This unanimity of purpose breaks down, however, when corporations make expenditures or undertake activities designed to influence the opinion or votes of the general public on political and social issues that have no material connection with or effect upon their business, property, or assets. Although it is arguable that corporations make such expenditures because their managers believe that it is in the corporations' economic interest to do so, there is no basis whatsoever for concluding that these views are expressive of the heterogeneous beliefs of their shareholders whose convictions on many political issues are undoubtedly shaped by considerations other than a desire to endorse any electoral or ideological cause which would tend to increase the value of a particular corporate investment. This is particularly true where, as in this case, whatever the belief of the corporate managers may be, they have not been able to demonstrate that the issue involved has any material connection with the corporate business. Thus when a profitmaking corporation contributes to a political candidate this does not further the self-expression or self-fulfillment of its shareholders in the way that expenditures from them as individuals would.

The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas. Any communication of ideas, and consequently any expenditure of funds which makes the communication of ideas possible, it can be argued, furthers the purposes of the First Amendment. This proposition does not establish, however, that the right of the general public to receive communications financed by means of corporate expenditures is of the same dimension as that to hear other forms of expression. . . .

. . . Corporations are artificial entities created by law for the purpose of furthering certain economic goals. In order to facilitate the achievement of such ends, special rules relating to such matters as limited liability, perpetual life, and the accumulation, distribution, and taxation of assets are normally applied to them. States have provided corporations with such attributes in order to increase their economic viability and thus strengthen the economy generally. It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amounts of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process. . . . I would hold that, apart from corporate activities . . . which are integrally related to corporate business operations, a State may prohibit corporate expenditures for political or ideological purposes. There can be no doubt that corporate expenditures in connection with referenda immaterial to corporate business affairs fall clearly into the category of corporate activities which may be barred. The electoral process, of course, is the essence of our democracy. It is an arena in which the public interest in preventing corporate domination and the coerced support by shareholders of causes with which they disagree is at its strongest and any claim that corporate expenditures are integral to the economic functioning of the corporation is at its weakest.

I would affirm the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts.

MR. JUSTICE REHNQUIST, dissenting.

The question presented today, whether business corporations have a constitutionally protected liberty to engage in political activities, has never been squarely addressed by any previous decision of this Court. However, the General Court of the Commonwealth of Massachusetts, the Congress of the United States, and the legislatures of 30 other States of this Republic have considered the matter, and have concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible. The judgment of such a broad consensus of governmental bodies expressed
over a period of many decades is entitled to considerable deference from this Court.

Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." Dartmouth College v. Woodward (1819).

The appellants herein either were created by the Commonwealth or were admitted into the Commonwealth only for the limited purposes described in their charters and regulated by state law. Since it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons, United States v. White (1944) (corporations do not enjoy the privilege against self-incrimination), our inquiry must seek to determine which constitutional protections are "incidental to its very existence." . . .

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth permitted these corporations to be organized or admitted within its boundaries. Nor can I disagree with the Supreme Judicial Court's factual finding that no such effect has been shown by these appellants. Because the statute as construed provides at least as much protection as the Fourteenth Amendment requires, I believe it is constitutionally valid. . . .

I would affirm the judgment of the Supreme Judicial Court.

The Court's 5–4 division in this case shows a deep division over the meaning of the First Amendment. The majority holds that the primary purpose of the First Amendment is to protect speech itself regardless of the speaker. To these justices the value of the First Amendment goes well beyond the expressive rights of the speaker to extend to a general societal interest in the widespread expression of ideas. The dissenter hold a much different view. The freedom of speech is a personal right, and corporations are artificial entities, not natural persons. As a consequence, they argue, a corporation has First Amendment protection only to express its views on issues directly related to it. Beyond that limited sphere, government has the right to regulate.

The justices reinforced corporate expression rights two years later in Consolidated Edison v. Public Service Commission (1980), when, again through an opinion by Justice Powell, they invalidated a state regulation prohibiting a public utility from inserting political message inserts along with its monthly bills. Once again, the Court held that the value of speech in informing the public does not depend on the identity of its source—"be it a corporation, association, union or individual."

The Court has also extended the scope of protected corporate speech to certain business activities. Take, for example, the ruling of the justices in Sorrell v. IMS Health (2011). Here, a state attempted to regulate a common practice in the pharmaceutical industry in which pharmacies collect information on the prescribing behavior of individual physicians and sell that information to data-mining companies. These companies in turn prepare prescriber behavior reports for lease to pharmaceutical manufacturers. The manufacturers then use that information to structure sales approaches to physicians.

In 2007, Vermont passed the Prescription Confidentiality Law, which essentially outlawed this practice by prohibiting the sale, disclosure, or use for marketing purposes of pharmacy records that reveal the prescribing practices of individual doctors. A group of data-mining companies and drug manufacturers challenged the law on First Amendment grounds. The Court struck down the statute, finding it to be a content-based restriction on speech because it penalized the communication of prescriber-identified information for marketing purposes while allowing anyone to use such information for any other purpose. The justices did not find the state's interest in passing the law (privacy and public health concerns) to be sufficiently substantial to meet heightened scrutiny standards.

Of course, much of corporate expression does not involve general public policy issues or business activity communications. Rather, it takes the form of advertising to promote the sale of a company's products and services.

As consumers of all sorts of goods and services, we are constantly bombarded with commercial speech advertisements. Open a newspaper, turn on a television or radio, or log on to the Internet and you are bound to find hundreds of ads aimed at communicating all kinds of messages. Although we see ads every day, we probably do not think about them in terms of the First Amendment. Does the First Amendment apply to this form of expression? If so, does it deserve the same constitutional protection as more traditional, equally commonplace, forms of speech?
Historically, courts have viewed commercial expression as more closely related to commerce than to speech. Government has an interest in regulating fraudulent or deceptive messages that may be found in advertisements. In addition, the subject matter of commercial expression is substantially different from the political and social speech at the heart of First Amendment protections. For these reasons, the courts have allowed more extensive government regulation of commercial expression than of other forms of speech. This principle was articulated in *Valentine v. Chrestensen* (1942), in which the Court upheld a law banning the distribution of handbills that advertised commercial goods and services. The Court concluded that the First Amendment does not protect “purely commercial advertising.”

In the mid-1970s, however, the justices handed down four decisions that indicated a reconsideration of the constitutional status of commercial expression. The cases involved the advertising of abortion services, pharmaceutical prices, real estate, and legal fees.

The first of these decisions was *Bigelow v. Virginia* (1975). The dispute began when Jeffrey C. Bigelow, the managing editor of the *Virginia Weekly*, a Charlottesville newspaper focusing on the University of Virginia community, approved for publication an advertisement promoting a service that made arrangements for women in Virginia (where abortions were illegal) to obtain abortions in New York (where abortions were permitted). The state of Virginia charged Bigelow with violating an 1878 state law that said, “If any person, by publication, lecture, [or] advertisement . . . encourage[s] or prompt[s] the procuring of [an] abortion . . . he shall be guilty of a misdemeanor.” Bigelow was the first person ever accused and subsequently convicted of violating the law, despite its nearly hundred-year-old history.

The U.S. Supreme Court reversed Bigelow’s conviction. For a majority of seven, Justice Harry Blackmun explained, “The fact that the particular advertisement . . . had commercial aspects . . . did not negate all First Amendment guarantees . . . . The existence of ‘commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.’” Bigelow was advertising a legal service. There was no evidence that the advertisement was deceptive or fraudulent. The ad provided information about a service that existed in another state. If the state could restrict advertisements about such activities, it would violate the spirit of the First Amendment, which favors the widespread dissemination of information and opinion.

Although the justices ruled that Virginia could not apply its law to Bigelow’s advertisement, they failed to provide a more complete response to the question of First Amendment protection of commercial speech. Blackmun noted that the First Amendment protected commercial expression to “some degree,” but the justices refused to decide “the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.”

It did not take long for the Court to address some of the questions left unanswered in *Bigelow*. Its first opportunity came the very next year in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976). This litigation centered on a constitutional challenge to a Virginia regulation making it unlawful for a pharmacy to advertise the prices of its prescription medications. A pharmacist who violated the rule risked being cited for unprofessional conduct and possible monetary fines or license suspension. The state justified its regulation as protecting the public from deceptive advertising and maintaining the professionalism of the state’s pharmacists. Further, it argued that advertising prices is pure commercial expression that (unlike Bigelow’s advertisement) carries no political or social information. Such advertising, the state claimed, deserves no First Amendment protection and is fully subject to state regulation.

The Court struck down the Virginia regulation as inconsistent with the First Amendment. Again speaking for the Court, Justice Blackmun explained that the purely economic content of the advertisement does not disqualify it from First Amendment protection. The public has the right to receive truthful information about lawful products and services. Likewise, the pharmacist has the right to communicate that information. The state could achieve its legitimate goals of promoting professionalism and protecting the public from misleading advertising by methods less severe than banning commercial expression altogether.

A third important commercial advertising case of the mid-1970s was *Linmark Associates v. Township of Willingboro* (1977). Here, the Court dealt with posted signs, not printed ads, but, more important, it addressed expression that had a social, rather than purely economic, objective. In the early 1970s, the town of Willingboro, New Jersey, experienced a demographic shift characterized by a declining white population and an increase in African American residents. Fearing that the presence of “For Sale” yard signs would give current and potential homeowners the impression that the community was undergoing considerable “white flight” that could touch off rounds of panic selling, the town in 1974 passed an ordinance banning such signs. The goal of the legislation was to support a stable, racially integrated community.

Could a city, motivated by good intentions, ban such commercial advertisements? The dispute pitted against each other two powerful organizations that were usually allies. The American Civil Liberties Union (ACLU)
opposed the advertising ban as a violation of the First Amendment; the NAACP Legal Defense Fund (LDF) supported the town’s position.

Writing for a unanimous Court, Justice Thurgood Marshall, a former LDF attorney, agreed with the ACLU and struck down the town’s ordinance. He acknowledged that although it had important objectives, in the final analysis the ordinance was no different from the law at issue in *Virginia Pharmacy*: it prevented “residents from obtaining certain information” without providing sufficient justification. As Marshall asserted, “If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on it, so long as a plausible claim can be made that disclosure would cause recipients of the information to act ‘irrationally.’”

The final 1977 dispute required the justices to examine their own profession. Challenged in *Bates v. State Bar of Arizona* was a state regulation, common across the country, that prohibited lawyer advertising.

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**Bates v. State Bar of Arizona**

433 U.S. 350 (1977)


Oral arguments are available at https://www.oyez.org/cases/1976/76-316.

Vote: 5 (Blackmun, Brennan, Marshall, Stevens, White)

4 (Burger, Powell, Rehnquist, Stewart)

**OPINION OF THE COURT:** Blackmun

**OPINIONS DISSENTING IN PART AND CONCURRING IN PART:** Burger, Powell, Rehnquist

**FACTS:**

John Bates and Van O’Steen graduated from Arizona State University College of Law in 1972 and took jobs at a state legal aid society. After two years they developed what was then a unique idea—they would open a legal clinic to provide “legal services at modest fees to persons of moderate income who did not qualify for government aid.” In March 1974 they opened their clinic in Phoenix, but two years later they were barely surviving. The pair decided to take a risky step; they placed an ad in an Arizona newspaper.

Why was their ad risky? Today, attorney advertisements are commonplace. From the 1910s through the 1970s, however, most state bar associations explicitly prohibited such activity. Arizona’s rules contained this provision: “A lawyer shall not publicize himself . . . as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity.” So, after Bates and O’Steen published the advertisement, the state bar association initiated proceedings against them. They were found guilty and given the rather mild sentence of a one-week suspension from legal practice. Nevertheless, with the help of the ACLU, they decided to appeal the judgment, claiming that the ban constituted a violation of their First Amendment guarantee under the Court’s decision in *Virginia Pharmacy*.

**ARGUMENTS:**

*For the appellants, John Bates and Van O’Steen:*

- The appellants’ advertisement is protected expression. The ban on it amounts to content discrimination in violation of the First Amendment.
• The appellants’ expression is supported by the consumers’ constitutional right to legal representation.

• The disciplinary ban on advertising serves no important state interests.

For the appellee, State Bar of Arizona:

• Since commercial advertising enjoys the lowest level of free speech protection, the ban against advertising legal services is constitutional.

• There has long been a professional tradition forbidding such advertising.

• Advertising legal services tends to encourage unnecessary litigation.

• The ban protects against fraud and deception and preserves the pride and dignity of the profession.

• Because legal skills vary from attorney to attorney, the advertising of fees for legal services is inevitably misleading.

Last Term, in *Virginia Pharmacy Board v. Virginia Consumer Council* (1976), the Court considered the validity under the First Amendment of a Virginia statute declaring that a pharmacist was guilty of “unprofessional conduct” if he advertised prescription drug prices. . . . We held that commercial speech of that kind was entitled to the protection of the First Amendment. . . .

The heart of the dispute before us today is whether lawyers also may constitutionally advertise the prices at which certain routine services will be performed. Numerous justifications are proffered for the restriction of such price advertising. We consider each in turn:

1. The Adverse Effect on Professionalism. Appellee places particular emphasis on the adverse effects that it feels price advertising will have on the legal profession. The key to professionalism, it is argued, is the sense of pride that involvement in the discipline generates. It is claimed that price advertising will bring about commercialization, which will undermine the attorney’s sense of dignity and self-worth. The hustle of the marketplace will adversely affect the profession’s service orientation, and irreparably damage the delicate balance between the lawyer’s need to earn and his obligation selflessly to serve. Advertising is also said to erode the client’s trust in his attorney: Once the client perceives that the lawyer is motivated by profit, his confidence that the attorney is acting out of a commitment to the client’s welfare is jeopardized. And advertising is said to tarnish the dignified public image of the profession.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit. But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. And rare is the client, moreover, even one of the modest means, who enlists the aid of an attorney with the expectation that his services will be rendered free of charge. In fact, the American Bar Association advises that an attorney should reach “a clear agreement with his client as to the basis of the fee charges to be made,” and that this is to be done “[a]s soon as feasible after a lawyer has been employed.” If the commercial basis of the relationship is to be promptly disclosed on ethical grounds, once the client is in the office, it seems inconsistent to condemn the candid revelation of the same information before he arrives at that office.

Moreover, the assertion that advertising will diminish the attorney’s reputation in the community is open to question. Bankers and engineers advertise, and yet these professions are not regarded as undignified. In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession’s failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney. . . . It appears that the ban on advertising originated as a rule of etiquette and not as a rule of ethics. Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked
down on “trade” as unseemly. Eventually, the attitude toward advertising fostered by this view evolved into an aspect of the ethics of the profession. But habit and tradition are not in themselves an adequate answer to a constitutional challenge. In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind. Since the belief that lawyers are somehow “above” trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.

2. The Inherently Misleading Nature of Attorney Advertising. It is argued that advertising of legal services inevitably will be misleading (a) because such services are so individualized with regard to content and quality as to prevent informed comparison on the basis of an advertisement, (b) because the consumer of legal services is unable to determine in advance just what services he needs, and (c) because advertising by attorneys will highlight irrelevant factors and fail to show the relevant factor of skill.

We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading. Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, the change of name, and the like—the very services advertised by appellants. Although the precise service demanded in each task may vary slightly, and although legal services are not fungible, these facts do not make advertising misleading so long as the attorney does the necessary work at the advertised price. . . .

The second component of the argument—that advertising ignores the diagnostic role—fares little better. It is unlikely that many people go to an attorney merely to ascertain if they have a clean bill of legal health. Rather, attorneys are likely to be employed to perform specific tasks. Although the client may not know the detail involved in performing the task, he no doubt is able to identify the service he desires at the level of generality to which advertising lends itself.

The third component is not without merit: Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance. See Virginia Pharmacy Board v. Virginia Consumer Council. Although, of course, the bar retains the power to correct omissions that have the effect of presenting an inaccurate picture, the preferred remedy is more disclosure, rather than less. If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar’s role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

3. The Adverse Effect on the Administration of Justice. Advertising is said to have the undesirable effect of stirring up litigation. The judicial machinery is designed to serve those who feel sufficiently aggrieved to bring forward their claims. Advertising, it is argued, serves to encourage the assertion of legal rights in the courts, thereby undesirably unsettling societal repose. There is even a suggestion of barratry.

But advertising by attorneys is not an unmitigated source of harm to the administration of justice. It may offer great benefits. Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. . . .

4. The Undesirable Economic Effects of Advertising. It is claimed that advertising will increase the overhead costs of the profession, and that these costs then will be passed along to consumers in the form of increased fees. Moreover, it is claimed that the additional cost of practice will create a substantial entry barrier, deterring or preventing young attorneys from penetrating the market and entrenching the position of the bar’s established members.
These two arguments seem dubious at best. Neither distinguishes lawyers from others, and neither appears relevant to the First Amendment. The ban on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent attorneys are isolated from competition, and the incentive to price competitively is reduced. Although it is true that the effect of advertising on the price of services has not been demonstrated, there is revealing evidence with regard to products: where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising. It is entirely possible that advertising will serve to reduce, not advance, the cost of legal services to the consumer.

The entry-barrier argument is equally unpersuasive. In the absence of advertising, an attorney must rely on his contacts with the community to generate a flow of business. In view of the time necessary to develop such contacts, the ban in fact serves to perpetuate the market position of established attorneys. Consideration of entry-barrier problems would urge that advertising be allowed so as to aid the new competitor in penetrating the market.

5. The Adverse Effect of Advertising on the Quality of Service. It is argued that the attorney may advertise a given “package” of service at a set price, and will be inclined to provide, by indiscriminate use, the standard package regardless of whether it fits the client’s needs.

Restraints on advertising, however, are an ineffective way of deterring shoddy work. An attorney who is inclined to cut quality will do so regardless of the rule on advertising. And the advertisement of a standardized fee does not necessarily mean that the services offered are undesirably standardized. Indeed, the assertion that an attorney who advertises a standard fee will cut quality is substantially undermined by the fixed-fee schedule of appellee’s own prepaid Legal Services Program. Even if advertising leads to the creation of “legal clinics” like that of appellants’—clinics that emphasize standardized procedures for routine problems—it is possible that such clinics will improve service by reducing the likelihood of error.

6. The Difficulties of Enforcement. Finally, it is argued that the wholesale restriction is justified by the problems of enforcement if any other course is taken. Because the public lacks sophistication in legal matters, it may be particularly susceptible to misleading or deceptive advertising by lawyers. After-the-fact action by the consumer lured by such advertising may not provide a realistic restraint because of the inability of the layman to assess whether the service he has received meets professional standards. Thus, the vigilance of a regulatory agency will be required. But because of the numerous purveyors of services, the overseeing of advertising will be burdensome.

It is at least somewhat incongruous for the opponents of advertising to extol the virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have. They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter’s interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.

In sum, we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of all advertising by attorneys. . . .

In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

Advertising that is false, deceptive, or misleading of course is subject to restraint. Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech. And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. In fact, because the public lacks sophistication concerning
legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. . . . In sum, we recognize that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising. Advertising concerning transactions that are themselves illegal obviously may be suppressed. And the special problems of advertising on the electronic broadcast media will warrant special consideration.

The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

The judgment of the Supreme Court of Arizona is therefore affirmed in part and reversed in part.

It is so ordered.

MR. JUSTICE REHNQUIST, dissenting in part.

I continue to believe that the First Amendment speech provision, long regarded by this Court as a sanctuary for expressions of public importance or intellectual interest, is demeaned by invocation to protect advertisements of goods and services. I would hold quite simply that the appellants' advertisement, however truthful or reasonable it may be, is not the sort of expression that the Amendment was adopted to protect.

. . . [T]he Court's opinion offers very little guidance as to the extent or nature of permissible state regulation of professions such as law and medicine. . . . [O]nce the court took the first step down the "slippery slope" in Virginia Pharmacy Board, the possibility of understandable and workable differentiations between protected speech and unprotected speech in the field of advertising largely evaporated. Once the exception of commercial speech from the protection of the First Amendment which had been established by Valentine v. Chrestensen was abandoned, the shift to case-by-case adjudication of First Amendment claims of advertisers was a predictable consequence.

. . . The Valentine distinction was constitutionally sound and practically workable, and I am still unwilling to take even one step down the "slippery slope" away from it.

In Bates the Court provided one of its clearest statements on the issue of advertising. While refuting the bar association's arguments, Justice Blackmun also listed the conditions under which attorneys may or may not advertise; for example, he stressed that Bates and O'Steen's advertisement simply legal services that any attorney could perform. Many have surmised from this distinction that bar associations probably could limit advertisements for complex legal work. Although the Court's decision bars any blanket banning of legal advertising, a state remains free to impose reasonable regulations to counter fraud, deception, and other matters of legitimate government concern.

In the years following Bates, the judiciary has wrestled with questions of how much regulation of legal advertising is constitutionally permissible and under what circumstances. Many lawyers and law firms have taken advantage of the ruling to advertise their services and fees. State bar associations have required only that the advertisements be truthful and not degrade the profession. Despite widespread advertising of legal services, studies have shown that a majority of the nation's attorneys oppose advertising and feel that it detracts from the dignity of the profession.

The years 1975 through 1977 were important for commercial speech. The Court's decisions in Bigelow, Virginia Pharmacy, Linmark Associates, and Bates signaled a major change by elevating the degree of constitutional protection enjoyed by commercial expression. In the years that followed, the justices continued in that policy direction.

Yet in spite of these decisions, the rules regarding government regulation of advertising remained incomplete. Justice William H. Rehnquist brought attention to this problem in his Bates dissent when he noted that the "Court's opinion offers very little guidance as to the extent or nature of permissible state regulation. . . ." Although the justices generally agreed that advertising merited lower levels of First Amendment protection than political and

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See, for example, Obralik v. Ohio State Bar (1978) and In re Primus (1978).

social speech, confusion remained over the appropriate test to use in commercial expression cases. The justices remedied this situation in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* (1980), a dispute over an energy conservation law prohibiting utility companies from advertising to promote the sale of their products.

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**Central Hudson Gas and Electric Corporation v. Public Service Commission of New York**

447 U.S. 557 (1980)


Vote: 8 (Burger, Brennan, Marshall, Powell, Stevens, Stewart, White)

1 (Rehnquist)

**OPINION OF THE COURT:** Powell

**CONCURRING OPINIONS:** Blackmun, Brennan, Stevens

**DISSENTING OPINION:** Rehnquist

**FACTS:**

Facing an energy shortage during the winter of 1973 and 1974, the New York Public Service Commission ordered state public utility companies to stop all advertising that promoted the use of electricity. Three years later, when the shortage had eased, the commission extended the ban, declaring all advertising promoting the use of electricity to be contrary to national conservation policy. Central Hudson Gas and Electric Corporation challenged the regulation in state court. The New York Court of Appeals, upholding lower court rulings, concluded that government interests outweighed the limited constitutional value of the commercial speech at issue. Central Hudson appealed to the Supreme Court.

**ARGUMENTS:**

**For the appellant, Central Hudson Gas & Electric Corporation:**

- This kind of advertising was found to be protected speech in decisions such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* and *Bates v. State Bar of Arizona*. Those decisions should control this case.
- The state regulations are overbroad and vague.
- Central Hudson is being discriminated against because its nonutility competitors are not subject to the commission’s advertising ban.

**For the appellee, Public Service Commission of New York:**

- Although protection for commercial speech has expanded, advertising remains subject to much greater regulation than noncommercial expression.
- The ban on promotional advertising advances the state’s important interest in conserving energy.
- The commission’s regulations are clear, precise, and confined to the state interests sought to be achieved.
- The commission has jurisdiction only over electric utilities. Therefore, it has no authority to extend its advertising ban to Central Hudson’s nonutility competitors.

**MR. JUSTICE POWELL DELIVERED THE OPINION OF THE COURT.**

The case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility. . . .

The Commission’s order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the “highly paternalistic” view that government has complete power to suppress or regulate commercial speech. . . . Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

Nevertheless, our decisions have recognized “the ‘commonsense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.
The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity. . . .

In commercial speech cases, . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

We now apply this four-step analysis for commercial speech to the Commission’s arguments in support of its ban on promotional advertising.

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. . . . The Commission offers [energy conservation as a major state interest justifying] the ban on promotional advertising. . . . Any increase in demand for electricity—during peak or off-peak periods—means greater consumption of energy. The Commission argues, and the New York court agreed, that the State’s interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country’s dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial. . . .

Next, we focus on the relationship between the State’s interests and the advertising ban. . . .

. . . The State’s interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission’s order.

We come finally to the critical inquiry in this case: whether the Commission’s complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State’s interest in energy conservation. The Commission’s order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State’s interests. . . .

The Commission’s order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility’s advertising endanger conservation or mislead the public. To the extent that the Commission’s order suppresses speech that in no way impairs the State’s interest in energy conservation, the Commission’s order violates the First and Fourteenth Amendments, and must be invalidated.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant’s commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson’s advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson’s advertising. . . .

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

MR. JUSTICE REHNQUIST, dissenting.

The Court’s analysis, in my view, is wrong in several respects. Initially, I disagree with the Court’s conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation, and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court, in
reaching its decision, improperly substitutes its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted. With regard to this latter point, the Court adopts as its final part of a four-part test a “no more extensive than necessary” analysis that will unduly impair a state legislature’s ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

The Central Hudson decision provided a welcome explanation of how the Court approaches commercial expression cases. If the commercial expression concerns a lawful activity and is not misleading, it merits First Amendment protection. The state may still regulate that expression, however, if the regulation serves a substantial government interest, directly advances that interest, and is no more extensive than necessary to achieve it. The Court has applied the Central Hudson test in subsequent cases with considerable success.⁹

The Court’s rulings in these cases, however, did not end the controversy over a corporation’s right to express itself. As we will see in later sections of this book, the fight over these issues erupted again and with considerably more intensity in the campaign finance cases of the past two decades.

Government Speech

The Supreme Court has recognized the distinction between government regulating private speech and government speaking on its own behalf. When government regulates speech, it must abide by the restraints imposed by the First Amendment. Among these limitations, as we have seen, are restrictions on regulating speech based on content or viewpoint. But when government speaks, it may in fact present only one point of view, thus discriminating against others. For example, if the U.S. Department of the Interior engages in a publicity campaign to “Stop Forest Fires,” it is supporting a particular viewpoint and is not constitutionally required to promote the opposite view as well.

In Pleasant Grove City v. Summum (2009), the Court applied this doctrine to a claim by a religious sect that a municipality violated the First Amendment by refusing it permission to erect in the city park a monument donated by the organization. The monument in question displayed the “Seven Aphorisms” that formed the basis of the group’s beliefs. Already erected in the park were fifteen other monuments donated by private organizations exhibiting content ranging from the Ten Commandments to a September 11 memorial. According to the organization’s argument, the city’s rejection constituted a form of viewpoint discrimination and denied the group access to a public forum open to other organizations.

The Court held in favor of the city. The justices concluded that the city’s decision to place or not to place a monument on the public land it administered was best classified as government speech. The city was free to determine what expressive messages it wanted to display in its park. Already having a variety of monuments on park land did not mean that the city had created a public forum requiring it to allow any and all other monuments to be placed there as well.

The government speech doctrine is well established, but it is often difficult to draw a clear distinction between private speech and government speech. In the two cases that follow, one involving state license plates and the other, commercial trademarks, the justices struggle with just this problem and reach different conclusions.

Walker v. Texas Division, Sons of Confederate Veterans


http://caselaw.findlaw.com/us-supreme-court/14-144.html

Oral arguments are available at https://www.oyez.org/cases/2014/14-144.

Vote: 5 (Breyer, Ginsburg, Kagan, Sotomayor, Thomas)

4 (Alito, Kennedy, Roberts, Scalia)

OPINION OF THE COURT: Breyer

Dissenting Opinion: Alito

FACTS:

All vehicle license plates in the state of Texas are required to display identifying numbers and letters along with the state name, but automobile owners have a choice between a generic state license plate and a specialty plate. Individuals, organizations, and businesses that want the state to issue a particular specialty plate must submit to the state Department of Motor Vehicles a proposed design that contains a slogan, graphic, or both. If the department approves the proposal, it will make the design available for all licensed vehicles. Specialty plates are sold at a premium to the generic plates, thus producing income for the state. At the time of this dispute, more than 350 designs had been approved.


http://caselaw.findlaw.com/us-supreme-court/14-144.html

Oral arguments are available at https://www.oyez.org/cases/2014/14-144.

Vote: 4 (Alito, Breyer, Ginsburg, Kagan)

5 (Sotomayor, Thomas, Roberts, Scalia, Kennedy)

OPINION OF THE COURT: Alito

Dissenting Opinion: Breyer

FACTS:

The Texas State Legislature has authorized the Texas Department of Motor Vehicles ("TDMV") to approve and issue specialty license plates for Texas residents. A specialty plate is a plate that contains a slogan, graphic, or both. The TDMV has a process to consider proposals for a specialty license plate and to promulgate regulations to implement the process. Under that process, a specialty plate proposal must be submitted to the TDMV, which must review the proposal to determine whether it meets the requirements for approval. The TDMV may approve or disapprove a proposal, and if approved, the TDMV then sells the specialty plate in the same manner as a state issued license plate.

The Sons of Confederate Veterans ("SCV") filed a complaint challenging the TDMV’s process for approving specialty plate proposals. SCV requested that the TDMV not approve any monuments proposed by private organizations. The SCV also requested that the TDMV not approve any monuments that promote a viewpoint different from SCV’s own. The SCV argued that the TDMV’s process for approving specialty plates violated the First Amendment, as interpreted in Walker v. Texas Division, Sons of Confederate Veterans, 565 U.S. 94 (2015). The TDMV argued that its process was consistent with the First Amendment, as interpreted in Walker v. Texas Division, Sons of Confederate Veterans, 565 U.S. 94 (2015).

The SCV then requested that the TDMV not approve any monuments proposed by private organizations. The SCV also requested that the TDMV not approve any monuments that promote a viewpoint different from SCV’s own. The SCV argued that the TDMV’s process for approving specialty plates violated the First Amendment, as interpreted in Walker v. Texas Division, Sons of Confederate Veterans, 565 U.S. 94 (2015). The TDMV argued that its process was consistent with the First Amendment, as interpreted in Walker v. Texas Division, Sons of Confederate Veterans, 565 U.S. 94 (2015).
In 2009 and again in 2010, the Texas division of the Sons of Confederate Veterans (SCV) proposed a specialty license plate design that incorporated the Confederate battle flag. Both times the department rejected the design. SCV sued John Walker III and other members of the department’s governing board, claiming that the denial was a violation of the freedom of speech provision of the First Amendment. The district court ruled in favor of the state, but a divided court of appeals reversed, holding that the state had engaged in constitutionally forbidden viewpoint discrimination.

ARGUMENTS:
For the petitioner, John Walker III, Board Chairman, Texas Department of Motor Vehicles:
- The First Amendment does not compel the state to support or propagate messages and symbols with which the state does not want to associate.
- License plates are manufactured, issued, and owned by the state. They are a form of government speech. In the course of administering its licensing program, the state is free to promote certain viewpoints and not others.
- The state’s right to accept or reject specialty plate designs is akin to a city’s right to accept or reject a privately donated monument for display on public land (Pleasant Grove City v. Summum, 2009).

For the respondent, Texas Division, Sons of Confederate Veterans:
- Specialty plates are designed by private entities and purchased by private individuals exercising individual choice to do so. This constitutes private expression, not government speech.
- The state has engaged in viewpoint discrimination.
- Offensiveness is not a valid standard upon which to limit speech.
- In Wooley v. Maynard (1977), the Court recognized that license plates implicate drivers’ private speech rights.

JUSTICE BREYER DELIVERED THE OPINION OF THE COURT.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Constitution’s free speech guarantees. We conclude that it did not. . . .

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. Pleasant Grove City v. Summum (2009). That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. See Board of Regents of Univ. of Wis. System v. Southworth (2000). Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. . . .

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the latter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? . . .

[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

In our view, specialty license plates issued pursuant to Texas’s statutory scheme convey government speech. Our reasoning rests primarily on our analysis in Summum, a recent case that presented a similar problem. We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case.

In Summum, we considered a religious organization’s request to erect in a 2.5-acre city park a monument setting forth the organization’s religious tenets . . . . The religious organization argued that the Free Speech Clause required the city to display the organization’s proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments.

This Court rejected the organization’s argument. We held that the city had not “provided a forum for private speech” with respect to monuments. Rather, the city, even when “accepting a privately donated monument and placing it on city property,” had “engage[d] in expressive
The speech at issue, this Court decided, was “best viewed as a form of government speech” and “therefore [was] not subject to scrutiny under the Free Speech Clause.” . . .

Our analysis in <i>Summum</i> leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States. In 1917, Arizona became the first State to display a graphic on its plates. The State presented a depiction of the head of a Hereford steer. . . .

In 1928, Idaho became the first State to include a slogan on its plates. The 1928 Idaho plate proclaimed “Idaho Potatoes” and featured an illustration of a brown potato, onto which the license plate number was superimposed in green. The brown potato did not catch on, but slogans on license plates did. . . . States have used license plate slogans to urge action, to promote tourism, and to tout local industries. . . .

Second, Texas license plate designs “are often closely identified in the public mind with the [State].” Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name “TEXAS” in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. And Texas dictates the manner in which drivers may dispose of unused plates.

Texas license plates are, essentially, government IDs. And issuers of ID “typically do not permit” the placement on their IDs of “message[s] with which they do not wish to be associated.” Consequently, “persons who observe” designs on IDs “routinely and reasonably—interpret them as conveying some message on the [issuer’s] behalf.”

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas’s license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State “has sole control over the design, typeface, color, and alphanumeric pattern for all license plates.” The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Accordingly, like the city government in <i>Summum</i>, Texas “has ‘effectively controlled’ the messages [conveyed] by exercising ‘final approval authority’ over their selection.”

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates denouncing schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida’s oranges as far better. And Texas offers plates that say “Fight Terrorism.” But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in <i>Summum</i> to call for the same result. . . . SCV believes that Texas’s specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather provides a forum for private speech by making license plates available to display the private parties’ designs. We cannot agree.

We have previously used what we have called “forum analysis” to evaluate government restrictions on purely private speech that occurs on government property. <i>Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.</i> (1985). But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas’s specialty license plates are not a “traditional public forum,” such as a street or a park, “which ha[s] immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” <i>Perry Ed. Assn. v. Perry Local Educators’ Assn.</i> (1983). “The Court has rejected the view that traditional public forum

It is equally clear that Texas’s specialty plates are neither a “designated public forum,” which exists where “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose,” *Summum*, nor a “limited public forum,” which exists where a government has “reserved a forum for certain groups or for the discussion of certain topics,” *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995). A government “does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius*. . . .

Texas’s policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. . . . Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State’s name. These features of Texas’s license plates indicate that Texas explicitly associates itself with the speech on its plates. . . .

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role into that of a mere forum provider. In *Summum*, private entities “financed and donated monuments that the government accept[ed] and display[ed] to the public.” . . .

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. . . .

Our determination that Texas’s specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons. We have acknowledged that drivers who display a State’s selected license plate designs convey the messages communicated through those designs. See *Wooley v. Maynard* (1977). And we have recognized that the First Amendment stringently limits a State’s authority to compel a private party to express a view with which the private party disagrees. But here, compelled private speech is not at issue. And just as Texas cannot require SCV to convey “the State’s ideological message,” SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.

For the reasons stated, we hold that Texas’s specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV’s proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

**Reversed.**

*JUSTICE ALITO, with whom the CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.*

The Court’s decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment “does not regulate government speech,” and therefore when government speaks, it is free to select the views that it wants to express.” *Pleasant Grove City v. Summum* (2009). By contrast, “[i]n the realm of private speech or expression, government regulation may not favor one speaker over another.” *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995).

Unfortunately, the Court’s decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those
of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents? And when a car zipped by with a plate that reads “NASCAR–24 Jeff Gordon,” would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

The Court says that all of these messages are government speech. . . .

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State’s coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain some government speech (e.g., the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm list serve? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today’s precedent remain to be seen. . . .

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (i.e., motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint. But that is exactly what Texas did here. The Board rejected Texas SCV’s design, “specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable.” These statements indisputably demonstrate that the Board denied Texas SCV’s design because of its viewpoint.

The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board’s candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board’s approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words “Choose Life,” but the State of New York rejected such a plate because the message “[is] so incredibly divisive.” Texas allows a specialty plate honoring the Boy Scouts, but the group’s refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination. . . .
Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

Two years later, the Court revisited the issue of government speech versus private expression, this time in the context of the federal government’s regulation of trademarks. As you read the Court’s opinion in Matal v. Tam (2017), you will see the Court once again dealing with expression that combines government and private elements, viewpoint discrimination issues, and concerns over offensive messages. Also relevant are commercial speech considerations that we discussed in earlier sections of this chapter. Think about the reasons that led the Court to reach a different conclusion here than in the Texas license plate case. Do you agree that the two government programs should be viewed differently?

**Matal v. Tam**

582 U.S. ____ (2017)


Vote: 8 (Alito, Breyer, Ginsburg, Kagan, Kennedy, Roberts, Sotomayor, Thomas)

OPINION OF THE COURT: Alito

OPINION CONCURRING IN PART AND CONCURRING IN JUDGMENT: Kennedy, Thomas

NOT PARTICIPATING: Gorsuch

**FACTS:**

Simon Shiao Tam, an Asian American, is the founder and leader of a dance-rock band called The Slants. Tam’s goal in forming the band was not only to play music but also to express his concern with discrimination against Asian Americans. That’s why he hired Asian American band members, and that’s why he called the band The Slants. It was his way of transforming an insulting term into a “badge of pride” (sometimes called reappropriation). In Tam’s words, “We want to take on these stereotypes that people have about us, like the slanted eyes, and own them.”

In 2011, Tam filed an application to register THE SLANTS as a trademark. Under a section of the federal Lanham Act (the “disparagement” clause), the Patent and Trademark Office (PTO) is directed to refuse the registration of trademarks that “disparage . . . persons, living or dead, institutions, beliefs, or national symbols.” Believing that THE SLANTS refers to and disparages “persons of Asian ancestry,” the PTO refused registration.

Tam appealed the PTO’s decision, claiming that the disparagement provision of the Lanham Act violates the freedom of speech provision of the First Amendment. After Tam won in a lower court, the United States (for the PTO) asked the U.S. Supreme Court to hear the case and reverse the lower court’s decision.

**ARGUMENTS:**

For the petitioner, Joseph Matal, Interim Director, United States Patent and Trademark Office:

- Nothing in the First Amendment requires the government to encourage the use of racial slurs in interstate commerce.
- The government has significant discretion in deciding what activities to include in its programs. There is a fundamental difference between laws that regulate speech and laws that define eligibility for a government program.
• The decision not to subsidize a right is not an infringement on that right.
• In *Walker v. Texas Division, Sons of Confederate Veterans* (2015), the Court upheld government’s right not to engage in offensive expression.

*For the respondent, Simon Shiao Tam:*
• Tam’s use of the term *slant* is not disparaging.
• The disparagement provision imposes a viewpoint-based burden on speech and fails to meet the strict scrutiny standard necessary to justify it.
• Trademark registration is not government speech.
• Trademarks are not pure commercial speech.

This case concerns a dance-rock band’s application for federal trademark registration of the band’s name, “The Slants.” “Slants” is a derogatory term for persons of Asian descent, and members of the band are Asian-Americans. But the band members believe that by taking that slur as the name of their group, they will help to “reclaim” the term and drain its denigrating force.

The Patent and Trademark Office (PTO) denied the application based on a provision of federal law prohibiting the registration of trademarks that may “disparage . . . or bring . . . into contempt or disrepute” any “persons, living or dead.” . . . We now hold that this provision violates the Free Speech Clause of the First Amendment. It offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend. . . .

The First Amendment prohibits Congress and other government entities and actors from “abridging the freedom of speech”; the First Amendment does not say that Congress and other government entities must abridge their own ability to speak freely. And our cases recognize that “[t]he Free Speech Clause . . . does not regulate government speech.” *Pleasant Grove City v. Summum* (2009).

As we have said, “it is not easy to imagine how government could function” if it were subject to the restrictions that the First Amendment imposes on private speech. . . . When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.

Here is a simple example. During the Second World War, the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.

But while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

At issue here is the content of trademarks that are registered by the PTO, an arm of the Federal Government. The Federal Government does not dream up these marks, and it does not edit marks submitted for registration. Except as required by the statute involved here, an examiner may not reject a mark based on the viewpoint that it appears to express. Thus, unless that section is thought to apply, an examiner does not inquire whether any viewpoint conveyed by a mark is consistent with Government policy or whether any such viewpoint is consistent with that expressed by other marks already on the principal register. Instead, if the mark meets the Lanham Act’s viewpoint-neutral requirements, registration is mandatory. . . .

In light of all this, it is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.

For example, if trademarks represent government speech, what does the Government have in mind when it advises Americans to “make.believe” (Sony), “Think different” (Apple), “Just do it” (Nike), or “Have it your way” (Burger King)? Was the Government warning about a coming disaster when it registered the mark “EndTime Ministries”? . . .

Trademarks have not traditionally been used to convey a Government message. . . . And there is no evidence
that the public associates the contents of trademarks with the Federal Government.

This brings us to the case on which the Government relies most heavily, *Walker v. Texas Division, Sons of Confederate Veterans* (2015), which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors. . . . First, license plates have long been used by the States to convey state messages. Second, license plates “are often closely identified in the public mind” with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of “government ID.” Third, Texas “maintain[ed] direct control over the messages conveyed on its specialty plates.” [N]one of these factors are present in this case . . .

Trademarks are private, not government, speech . . .

Our cases use the term “viewpoint” discrimination in a broad sense, and in that sense, the disparagement clause discriminates on the bases of “viewpoint.” To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.

We have said time and again that “the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” . . .

For this reason, the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.

Having concluded that the disparagement clause cannot be sustained under our government-speech . . . doctrine, we must confront a dispute between the parties on the question whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.* (1980). The Government and *amicus* supporting its position argue that all trademarks are commercial speech. They note that the central purposes of trademarks are commercial and that federal law regulates trademarks to promote fair and orderly interstate commerce. Tam and his *amicus*, on the other hand, contend that many, if not all, trademarks have an expressive component. In other words, these trademarks do not simply identify the source of a product or service but go on to say something more, either about the product or service or some broader issue. The trademark in this case illustrates this point. The name “The Slants” not only identifies the band but expresses a view about social issues.

We need not resolve this debate between the parties because the disparagement clause cannot withstand even *Central Hudson* review. Under *Central Hudson*, a restriction of speech must serve “a substantial interest,” and it must be “narrowly drawn.” This means, among other things, that “[t]he regulatory technique may extend only as far as the interest it serves.” The disparagement clause fails this requirement.

It is claimed that the disparagement clause serves two interests. The first is phrased in a variety of ways in the briefs. Echoing language in one of the opinions below, the Government asserts an interest in preventing “‘underrepresented groups’ from being ‘bombarded with demeaning messages in commercial advertising.”

An *amicus* supporting the Government refers to “encouraging racial tolerance and protecting the privacy and welfare of individuals.” But no matter how the point is phrased, its unmistakable thrust is this: The Government has an interest in preventing speech expressing ideas that offend. And . . . that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”

The second interest asserted is protecting the orderly flow of commerce. Commerce, we are told, is disrupted by trademarks that “involv[e] disparagement of race, gender, ethnicity, national origin, religion, sexual orientation, and similar demographic classification.” Such trademarks are analogized to discriminatory conduct, which has been recognized to have an adverse effect on commerce.

A simple answer to this argument is that the disparagement clause is not “narrowly drawn” to drive out trademarks that support invidious discrimination. The clause reaches any trademark that disparages any person, group, or institution. It applies to trademarks like the following: “Down with racists,” “Down with sexists,” “Down with homophobes.” It is not an anti-discrimination clause; it is a happy-talk clause. In this way, it goes much further than is necessary to serve the interest asserted. . . .

There is also a deeper problem with the argument that commercial speech may be cleansed of any expression...
likely to cause offense. The commercial market is well stocked with merchandise that disparages prominent figures and groups, and the line between commercial and non-commercial speech is not always clear, as this case illustrates. If affixing the commercial label permits the suppression of any speech that may lead to political or social “volatility,” free speech would be endangered.

For these reasons, we hold that the disparagement clause violates the Free Speech Clause of the First Amendment. The judgment of the Federal Circuit is

Affirmed.

JUSTICE KENNEDY, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and concurring in the judgment.

At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as “persons, living or dead, institutions, beliefs, or national symbols.” Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government’s disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.

The Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker’s audience.

The parties dispute whether trademarks are commercial speech and whether trademark registration should be considered a federal subsidy. However that issue is resolved, the viewpoint based discrimination at issue here necessarily invokes heightened scrutiny.

“Commercial speech is no exception,” the Court has explained, to the principle that the First Amendment “requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.” Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context.

To the extent trademarks qualify as commercial speech, they are an example of why that term or category does not serve as a blanket exemption from the First Amendment’s requirement of viewpoint neutrality. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government. These marks make up part of the expression of everyday life, as with the names of entertainment groups, broadcast networks, designer clothing, newspapers, automobiles, candy bars, toys, and so on. Nonprofit organizations—ranging from medical-research charities and other humanitarian causes to political advocacy groups—also have trademarks, which they use to compete in a real economic sense for funding and other resources as they seek to persuade others to join their cause. To permit viewpoint discrimination in this context is to permit Government censorship.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I . . . write separately because “I continue to believe that the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’” I nonetheless join Justice Alito’s opinion because it correctly concludes that the disparagement clause is unconstitutional even under the less stringent test announced in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y. (1980).

The Right Not to Speak

Freedom of speech lawsuits most commonly involve claims that the government has unconstitutionally prohibited, limited, or punished expression. Although curtailing speech is the most prevalent form of government regulation, there are situations in which the government requires us to speak or write. For example, we may be ordered to appear as witnesses before courts, grand juries, or legislative investigating committees. We may be required to take oaths when we become citizens, provide court testimony, or assume public office. Americans generally consider these regulations to be reasonable requirements relevant to legitimate government functions. But what if an individual does not want to comply with a government regulation that requires expression? Other than the Fifth Amendment’s protection against compelled self-incrimination, is there any restraint on the government’s authority to
coerce expression? To put it another way, does the First Amendment’s guarantee of freedom of speech carry with it the freedom not to speak?

To understand this issue, we need to turn our attention once again to the flag salute cases discussed in Chapter 4. As you recall, in 1940 the Court in *Minersville School District v. Gobitis* upheld flag salute regulations against claims that the school system was violating the children’s right to free exercise of religion. Just three years later, in *West Virginia State Board of Education v. Barnette*, the Court again considered a challenge to the constitutionality of the compulsory flag salute laws brought by Jehovah’s Witnesses.

By this time, however, some conditions had changed. First, public opinion, so feverishly patriotic at the beginning of World War II, had calmed somewhat following a series of important American military victories. As a consequence, public pressure on the government to impose mandatory expressions of patriotism had moderated. Second, the Court had undergone some personnel changes that strengthened its civil libertarian wing. Third, the *Gobitis* decision had been roundly criticized in legal circles. These circumstances encouraged the Witnesses to be more optimistic about their chances of winning.

But one additional factor distinguished *Barnette* from *Gobitis*. Lawyers for the Witnesses decided to base the attack primarily on the freedom of speech rather than on religious liberty. As a consequence, the case clearly addresses the right not to speak.

West Virginia State Board of Education v. Barnette
319 U.S. 624 (1943)


Vote: 6 (Black, Douglas, Jackson, Murphy, Rutledge, Stone)
3 (Frankfurter, Reed, Roberts)

OPINION OF THE COURT: Jackson
CONCURRING OPINIONS: Black and Douglas (joint), Murphy
DISSENTING OPINION: Frankfurter

FACTS:
Following the *Gobitis* decision, the West Virginia legislature amended its laws to require that all public schools teach courses to increase students’ knowledge of the American system of government and to foster patriotism. In support of this policy, the state board of education required that the American flag be saluted and the Pledge of Allegiance recited each day. Students who refused to participate could be charged with insubordination and expelled. Not attending school because of such an expulsion was grounds for a child to be declared delinquent. Parents of delinquent children were subject to fines and jail penalties of up to thirty days. In some cases, officials threatened noncomplying students with reform school.

The Jehovah’s Witnesses challenged these regulations in the name of the Barnette family, church members who had been harassed by the school system for failure to participate in the flag salute ritual. One of the Barnette children had, in fact, been expelled.

Despite the Supreme Court’s decision in *Gobitis*, a three-judge district court sympathized with the Barnette family’s plight. According to well-respected circuit court judge John J. Parker: “The salute to the United States’ flag is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it is petty tyranny unworthy of the spirit of the Republic, and forbidden, we think, by the United States Constitution.” After the decision, the West Virginia School Board appealed to the U.S. Supreme Court.

ARGUMENTS:
For the appellant, West Virginia State Board of Education:

- All questions presented in this case have already been authoritatively answered by the Court in *Minersville School District v. Gobitis*.

- No relevant changes in federal law have occurred since *Gobitis*.

- The case should be settled by applying the *Gobitis* precedent and upholding the state’s flag salute law.

For the appellees, Walter Barnette, et al.:

- The challenged regulations abridge freedom of speech, freedom to worship, and freedom of conscience.

- The conduct of the appellees does not constitute a clear and present danger of a substantive evil that the government has a right to prevent.

- The advantages said to flow from compulsory flag saluting are not so great as to justify depriving children of an education merely because they refuse to salute the flag.

- The *Gobitis* decision has encouraged widespread, violent attacks on Jehovah’s Witnesses.

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Here... we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. . . .

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their following to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. Stromberg v. California [1931]. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind... [H]ere the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muzzle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . .

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomfort of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The Gobitis decision, however, assumed as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power... [A]t the very heart of the Gobitis opinion [is the reasoning] that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence [the Court] reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversity that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

*Affirmed.*

**MR. JUSTICE FRANKFURTER, dissenting.**

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench. . . . [It] would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the “liberty” secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

In striking down the West Virginia compulsory flag salute law, the Court ruled that the individual has at least a qualified right to be free of government coercion to express views he or she disavows. This decision does not go so far as to hold that an individual’s First Amendment right can be used to avoid obligations such as testifying in a court, but it precludes certain forms of coerced expression.

The constitutional principles espoused in Justice Jackson’s *Barnette* opinion have remained well established in the Court’s First Amendment jurisprudence. Consider, for example, the words of Chief Justice Warren E. Burger speaking for the Court in *Wooley v. Maynard* (1977):

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. A system which secures the right to proselytize religious,
political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”

The Court consistently has endorsed the notion that when government compels speech, serious First Amendment interests are implicated. However, this does not mean that the Court has always found claims of unconstitutional forced expression to be valid. An example is *Rumsfeld v. Forum for Academic and Institutional Rights* (2006). As you read the opinion of Chief Justice Roberts for a unanimous Court, note how he uses precedent to explain the Court’s conclusion and how he distinguishes relevant precedents from those he believes do not apply to the case before the Court.

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**Rumsfeld v. Forum for Academic and Institutional Rights, Inc.**

http://caselaw.findlaw.com/us-supreme-court/547/47.html
Oral arguments are available at https://www.oyez.org/cases/2005/04-1152.
Vote: 8 (Breyer, Ginsburg, Kennedy, Roberts, Scalia, Souter, Stevens, Thomas)

**OPINION OF THE COURT:** Roberts

**DID NOT PARTICIPATE:** Alito

**FACTS:**

At issue in this case is the Solomon Amendment, which says that if any part of a college or university denies military recruiters the same access granted to other employers, the entire institution may lose certain federal funds (10 USC, § 983). Congress passed the law after some colleges and universities began protesting the government’s since-renounced policy about homosexuals in the military by refusing to allow armed forces recruiters on campus. The schools objected to a provision in federal law (10 USC, § 654) that allowed the military to dismiss members who engaged in homosexual acts, stated that they were homosexual, or married persons known to be of the same biological sex.

The Forum for Academic and Institutional Rights (FAIR) is an association of law schools and law faculties with a declared mission “to promote academic freedom, support educational institutions in opposing discrimination, and vindicate the rights of institutions of higher education.” FAIR members have adopted policies against discrimination based on, among other factors, sexual orientation. FAIR opposed the military’s policy on sexual orientation and, as a consequence, also opposed the military’s recruitment efforts on law school campuses.

As part of a campaign to keep military recruiters off campus, FAIR filed suit to have the Solomon Amendment declared unconstitutional. The organization argued that forced inclusion and equal treatment of military recruiters violated its members’ First Amendment freedoms of speech and association. The district court upheld the Solomon Amendment, but the court of appeals reversed, holding that the statute forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university. The Supreme Court granted review.

**ARGUMENTS:**

For the petitioners, Donald Rumsfeld,
Secretary of Defense, et al.:

- The Solomon Amendment is a carefully tailored exercise of congressional authority to raise and support the armed forces.
- The Solomon Amendment does not interfere with a law school’s right to associate for expressive purposes, force a law school to take a position with which it does not agree, or affect the internal composition of a law school.
- Law schools can avoid the equal access requirement by declining federal funds.

For the respondent, Forum for Academic and Institutional Rights, Inc.:

- The Solomon Amendment effectively forces law schools to disseminate military recruiting messages.
- The Solomon Amendment prohibits law schools from teaching their lessons of nondiscrimination in the most effective way.
- The Solomon Amendment forces law schools to associate with military recruiters.
- The penalty for not complying, the loss of federal funds, is the same as a command.

**CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.**

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Art. I, § 8, cl. 1,
Congress’ power in this area “is broad and sweeping” [United States v. O’Brien [1968]], and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. See Rostker v. Goldberg (1981). But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in Rostker, “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies. . . .

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds. As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.

Nevertheless, the Third Circuit concluded that the Solomon Amendment violates law schools’ freedom of speech in a number of ways. First, in assisting military recruiters, law schools provide some services, such as sending e-mails and distributing flyers, that clearly involve speech. The Court of Appeals held that in supplying these services law schools are unconstitutionally compelled to speak the Government’s message. Second, military recruiters are, to some extent, speaking while they are on campus. The Court of Appeals held that by forcing law schools to permit the military on campus to express its message, the Solomon Amendment unconstitutionally requires law schools to host or accommodate the military’s speech. Third, although the Court of Appeals thought that the Solomon Amendment regulated speech, it held in the alternative that, if the statute regulates conduct, this conduct is expressive and regulating it unconstitutionally infringes law schools’ right to engage in expressive conduct. We consider each issue in turn.

Some of this Court’s leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In West Virginia Bd. of Ed. v. Barnette (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. And in Wooley v. Maynard (1977), we held unconstitutional another that required New Hampshire motorists to display the state motto—“Live Free or Die”—on their license plates.

The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer’s behalf. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. As FAIR points out, these compelled statements of fact (“The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m.”), like compelled statements of opinion, are subject to First Amendment scrutiny.

This sort of recruiting assistance, however, is a far cry from the compelled speech in Barnette and Wooley. The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only “compelled” if, and to the extent, the school provides such speech for other recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

The compelled speech to which the law schools point is plainly incidental to the Solomon Amendment’s regulation of conduct, and “it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” Giboney v. Empire Storage & Ice Co. (1949). Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading “White Applicants Only” hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct. Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto “Live Free or Die,” and it trivializes the freedom protected in Barnette and Wooley to suggest that it is.

Our compelled-speech cases are not limited to the situation in which an individual must personally speak the government’s message. We have also in a number of instances limited the government’s ability to force one speaker to host or accommodate another speaker’s message. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. (1995) (state law cannot require a parade
to include a group whose message the parade’s organizer does not wish to send); *Miami Herald Publishing Co. v. Tornillo* (1974) (right-of-reply statute violates editors’ right to determine the content of their newspapers). Relying on these precedents, the Third Circuit concluded that the Solomon Amendment unconstitutionally compels law schools to accommodate the military’s message “[b]y requiring schools to include military recruiters in the interviews and recruiting receptions the schools arrange.”

The compelled-speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate. The expressive nature of a parade was central to our holding in *Hurley*. We concluded that because “every participating unit affects the message conveyed by the [parade’s] private organizers,” a law dictating that a particular group must be included in the parade “alter[s] the expressive content of th[e] parade.” As a result, we held that the State’s public accommodation law, as applied to a private parade, “violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”

*In Tornillo*, we recognized that “the compelled printing of a reply . . . tak[es] up space that could be devoted to other material the newspaper may have preferred to print,” and therefore concluded that this right-of-reply statute infringed the newspaper editors’ freedom of speech by altering the message the paper wished to express.

In this case, accommodating the military’s message does not affect the law schools’ speech, because the schools are not speaking when they host interviews and recruiting receptions. Unlike a parade organizer’s choice of parade contingents, a law school’s decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school’s recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter’s message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.

The schools respond that if they treat military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military’s policies, when they do. . . .

... Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military’s policies. . . .

Having rejected the view that the Solomon Amendment impermissibly regulates speech, we must still consider whether the expressive nature of the conduct regulated by the statute brings that conduct within the First Amendment’s protection. In *O’Brien*, we recognized that some forms of “symbolic speech” were deserving of First Amendment protection. But we rejected the view that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Instead, we have extended First Amendment protection only to conduct that is inherently expressive. In *Texas v. Johnson* (1989), for example, we applied *O’Brien* and held that burning the American flag was sufficiently expressive to warrant First Amendment protection.

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. Prior to the adoption of the Solomon Amendment’s equal-access requirement, law schools “expressed” their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it. For example, the point of requiring military interviews to be conducted on the undergraduate campus is not “overwhelmingly apparent.” An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school’s interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.

The expressive component of a law school’s actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O’Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into “speech” simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O’Brien* to determine whether the Tax Code violates the First Amendment. Neither *O’Brien* nor its progeny supports such a result.
...[T]he Third Circuit... concluded that... the Solomon Amendment does not pass muster under O'Brien because the Government failed to produce evidence establishing that the Solomon Amendment was necessary and effective. The Court of Appeals surmised that “the military has ample resources to recruit through alternative means,” suggesting “loan repayment programs” and “television and radio advertisements.” As a result, the Government—according to the Third Circuit—failed to establish that the statute's burden on speech is no greater than essential to furthering its interest in military recruiting.

We disagree with the Court of Appeals’ reasoning and result. We have held that “an incidental burden on speech is no greater than is essential, and therefore is permissible under O’Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” United States v. Albertini (1985). The Solomon Amendment clearly satisfies this requirement. Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. The Court of Appeals' proposed alternative methods of recruiting are beside the point. The issue is not whether other means of raising an army and providing for a navy might be adequate. That is a judgment for Congress, not the courts. It suffices that the means chosen by Congress add to the effectiveness of military recruitment. Accordingly, even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under O'Brien.

The Solomon Amendment does not violate law schools' freedom of speech, but the First Amendment's protection extends beyond the right to speak. We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a “right of expressive association.” See, e.g., Boy Scouts of America v. Dale (2000). The reason we have extended First Amendment protection in this way is clear: The right to speak is often exercised most effectively by combining one's voice with the voices of others. See Roberts v. United States Jaycees (1984). If the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect. . .

...Law schools therefore “associate” with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school’s expressive association. This distinction is critical. Unlike the public accommodations law in Dale, the Solomon Amendment does not force a law school “to accept members it does not desire.” The law schools say that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters, but just as saying conduct is undertaken for expressive purposes cannot make it symbolic speech, so too a speaker cannot “erect a shield” against laws requiring access “simply by asserting” that mere association “would impair its message.” . .

...Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school's First Amendment rights. A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message. In this case, FAIR has attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. The law schools object to having to treat military recruiters like other recruiters, but that regulation of conduct does not violate the First Amendment. To the extent that the Solomon Amendment incidentally affects expression, the law schools' effort to cast themselves as just like the schoolchildren in Barnette, the parade organizers in Hurley, and the Boy Scouts in Dale plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents.

...We therefore reverse the judgment of the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Although in 2010 Congress passed legislation allowing for the inclusion of gays in the military, the Court's constitutional ruling in Rumsfeld v. FAIR remains good law. The justices, however, have shown greater sympathy for First Amendment claims that challenge more direct forms of compulsory expression. In Janus v. American Federation of
The justices addressed this question in *Roberts v. United States Jaycees* (1984). The Jaycees, established in 1920 as the Junior Chamber of Commerce, is a private civic organization founded to help young men participate in the affairs of their community. This dispute centered on the Jaycees’ policy of restricting regular membership to men between the ages of eighteen and thirty-five. The Minnesota Department of Human Rights claimed that the organization’s exclusion of women violated a state law prohibiting sex-based discrimination in public accommodations. The United States Jaycees argued that applying the Minnesota antidiscrimination law to its membership policies was a violation of the First Amendment’s right to freedom of association.

In a 7–0 decision, the Supreme Court ruled against the Jaycees. The justices acknowledged that freedom of association is a necessary component of the First Amendment, but, they said, the right is not absolute and it does not apply equally to all private organizations. The greatest degree of protection goes to small, intimate relationships, such as marriage and family, and to those organizations expressing sincerely held political or ideological messages. Large groups with nonideological or commercial purposes and nonselective membership policies are less deserving. The Jaycees, according to the Court, is a large, national organization with no firm ideological views and membership selectivity based only on age and sex. As such, the group merited a level of First Amendment protection inferior to the state’s interest in reducing arbitrary discrimination.

The Court in *Roberts* considered not only the nature of the organization itself but also the relationship between the expressive activities of the group and the effect of the government regulation. Two important questions must be asked: Is the group an expressive organization that attempts to communicate its viewpoints either publicly or privately? And, does the state regulation significantly burden the expression of those viewpoints?

The scheme adopted in the Jaycees’ case was applied subsequently in two similar disputes. First, in *Board of Directors of Rotary International v. Rotary Club of Duarte* (1987), the Court approved the enforcement of California’s antidiscrimination laws against Rotary Club chapters that excluded women as regular members. And in *New York State Club Association v. City of New York* (1988), the justices upheld a New York ordinance that applied antidiscrimination regulations to organizations having more than four hundred members, providing regular meal service, and receiving payment from nonmembers for services or facilities for the furtherance of business interests. These decisions emphasized factors such as the size of the group, the commercial activities of the group, and the low level of selectivity exercised in conferring membership. Both decisions concluded that the
application of the nondiscrimination law would not significantly burden the group's expressive activities.

Roberts, Rotary, and New York State Club Association were unanimous rulings, creating the impression that the law was relatively settled: freedom of association rights must give way to state interests in combating discrimination. This impression was weakened in 1995, however, when the justices decided Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston. This dispute arose when a private association organizing a Saint Patrick's Day parade in Boston rejected the application of a gay rights group to march in the celebration. The gay rights group sued, claiming that its exclusion from the parade violated the Massachusetts antidiscrimination statute. The Supreme Court unanimously ruled in favor of the parade organizers. The justices held that the First Amendment is violated by a state law requiring private sponsors of a parade to include among the marchers a group imparting a message that the organizers do not wish to convey. The Court applied the principles set in Roberts but came to quite a different result. Here, the forced inclusion of the gay rights group was found to place a significant burden on the expression rights of the parade organizers.

This decision set the stage for the next major freedom of association dispute, Boy Scouts of America v. Dale (2000), a challenge to the dismissal of a scout leader on sexual orientation grounds. Would the Court find the facts in this case similar to the exclusion of women in Roberts, Rotary, and New York State Club Association, or would the justices conclude that the Boy Scouts' membership policies were protected by the First Amendment's freedom of association?

Boy Scouts of America v. Dale
530 U.S. 640 (2000)
Vote: 5 (Kennedy, O'Connor, Rehnquist, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stevens)

OPINION OF THE COURT: Rehnquist
Dissenting Opinions: Souter, Stevens

FACTS:

James Dale began his involvement in the Boy Scouts organization in 1978, when, at the age of eight, he joined Cub Scout Pack 142 in Monmouth, New Jersey. He became a Boy Scout in 1981 and remained an active scout until he turned eighteen. Dale was an exemplary member; he was admitted to the prestigious Order of the Arrow and achieved the rank of Eagle Scout, the organization's highest honor. In 1989 he became an adult member and was an assistant scoutmaster.

Around the same time, Dale left home to attend Rutgers University. At college, Dale first acknowledged to himself and to others that he was gay. He joined and later became copresident of the Rutgers University Gay/Lesbian Alliance. After attending a seminar devoted to gay/lesbian health issues in 1990, he was interviewed and photographed for a newspaper story in which he discussed the need for gay teenagers to have appropriate role models.

Shortly after the newspaper article appeared, Dale received a letter from the Monmouth Council of the Boy Scouts of America revoking his adult membership in the Boy Scouts. When he requested a reason for this action, the council informed him that the Scouts “specifically forbid membership to homosexuals.” In 1992, Dale filed a complaint against the Boy Scouts claiming that the revocation of his membership violated a New Jersey law prohibiting discrimination based on sexual orientation.
in public accommodations. The Boy Scouts countered that as a private, nonprofit organization, it had the right under the freedom of association guarantees of the First Amendment to deny membership to individuals whose views are not consistent with the group’s values. The New Jersey Supreme Court ruled in favor of Dale, and the Boy Scouts asked for review by the U.S. Supreme Court.

**ARGUMENTS:**

**For the petitioner, Boy Scouts of America:**

- **Requiring a Boy Scout troop to appoint an adult leader who opposes the group’s values.**
- **Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston** controls this case.
- As intimate associations, Boy Scout troops have the constitutional right to decide for themselves whom to select to supervise other people’s children.
- No state interest justifies these infringements on the First Amendment.

**For the respondent, James Dale:**

- The Boy Scouts is a large, national, relatively unselective organization with significant commercial activities. As such, it is not an intimate private group that is immune from government regulation.
- **Hurley** does not apply. This case involves identity-based exclusion, not compelled speech.
- Pluralism and diversity characterize the ideology of the Scouting movement, not a condemnation of homosexuality.
- Reinstating Dale would have no significant effect on the Boy Scouts carrying out its expressive purposes.

**CHIEF JUSTICE REHNQUIST DELIVERED THE OPINION OF THE COURT.**

In *Roberts v. United States Jaycees* (1984), we observed that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. Government actions that may unconstitutionally burden this freedom may take many forms, one of which is “intrusion into the internal structure or affairs of an association” like a “regulation that forces the group to accept members it does not desire.” Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, “[f]reedom of association . . . plainly presupposes a freedom not to associate.”

The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints. *New York State Club Assn., Inc. v. City of New York* (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts.*

To determine whether a group is protected by the First Amendment’s expressive associational right, we must determine whether the group engages in “expressive association.” The First Amendment’s protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private. . . .

... [T]he general mission of the Boy Scouts is clear: “To instill values in young people.” The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts’ values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts’ ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts’ view of homosexuality.

The values the Boy Scouts seeks to instill are “based on” those listed in the Scout Oath and Law. The Boy Scouts explains that the Scout Oath and Law provide “a positive moral code for living; they are a list of ‘dos’ rather than ‘don’ts.’” The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath.
and Law, particularly with the values represented by the terms "morally straight" and "clean."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership . . . [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.'" The court concluded that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." But our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.

The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," and that it does "not want to promote homosexual conduct as a legitimate form of behavior." We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

A 1978 position statement to the Boy Scouts' Executive Committee . . . expresses the Boy Scouts' "official position with regard to 'homosexuality and Scouting':

". . . The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership."

Thus, at least as of 1978—the year James Dale entered Scouting—the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

A position statement promulgated by the Boy Scouts in 1991 (after Dale's membership was revoked but before this litigation was filed) also supports its current view:

"We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts."

This position statement was redrafted numerous times but its core message remained consistent. . . .

. . . We cannot doubt that the Boy Scouts sincerely holds this view.

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. That is not to say that an expressive association can erect a shield against anti-discrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior. . . .

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster. . . .

We disagree with the New Jersey Supreme Court's conclusion. . . .

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. . . .

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues—a fact that the Boy Scouts disputes with contrary evidence—the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order
for the group’s policy to be “expressive association.” The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. . . . The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey’s public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts’ freedom of expressive association. We conclude that it does. . . .

. . . The state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law. . . .

We are not, as we must not be, guided by our views of whether the Boy Scouts’ teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message. . . .

The judgment of the New Jersey Supreme Court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The majority holds that New Jersey’s law violates BSA’s [Boy Scouts of America’s] right to associate and its right to free speech. But that law does not “impose[e] any serious burdens” on BSA’s “collective effort on behalf of [its] shared goals,” Roberts v. United States Jaycees (1984), nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey’s law, therefore, abridges no constitutional right of the Boy Scouts. . . .

In this case, Boy Scouts of America contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention, quite plainly, requires us to look at what, exactly, are the values that BSA actually teaches.

. . . BSA describes itself as having a “representative membership,” which it defines as “boy membership [that] reflects proportionately the characteristics of the boy population of its service area.” In particular, the group emphasizes that “[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy . . . to meet these responsibilities we have made a commitment that our membership shall be representative of all the population in every community, district, and council.” . . .

To bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase “morally straight,” which appears in the Oath (“On my honor I will do my best . . . To keep myself . . . morally straight”); the second term is the word “clean,” which appears in a list of 12 characteristics together comprising the Scout Law. . . .

It is plain as the light of day that neither one of these principles—“morally straight” and “clean”—says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts’ Law and Oath expresses any position whatsoever on sexual matters.

BSA’s published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization. . . . In light of BSA’s self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. . . .

BSA’s claim finds no support in our cases. We have recognized “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” Roberts. And we have acknowledged that “when the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated.” But “[t]he right to associate for expressive purposes is not . . . absolute”; rather, “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case.” Indeed, the right to associate does not mean “that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the

...[T]he majority insists that we must "give deference to an association’s assertions regarding the nature of its expression" and "we must also give deference to an association’s view of what would impair its expression." . . .

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. . . . But the majority insists that our inquiry must be "limited" because "it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent."

But nothing in our cases calls for this Court to do any such thing. An organization can adopt the message of its choice, and it is not this Court’s place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State’s antidiscrimination law. More critically, that inquiry requires our independent analysis, rather than deference to a group’s litigating posture. . . .

There is, of course, a valid concern that a court’s independent review may run the risk of paying too little heed to an organization’s sincerely held views. But unless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws, an independent inquiry is a necessity. . . .

In this case, no such concern is warranted. It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey’s law. . . .

. . . Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1982 over one million adults were active BSA members. The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. . . .


That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers.

As Justice Brandeis so wisely advised, “we must be ever on our guard, lest we erect our prejudices into legal principles.”

If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

Although the 5–4 vote in the Boy Scouts case reveals significant differences among the justices, the divisions centered more on factual questions about nature of the organization’s beliefs and activities than on the constitutional principles governing the freedom of association. As for the Boy Scouts, in the years following this decision the organization has significantly altered its membership requirements (see Box 5–6).

**ANOTATED READINGS**


The potential conflicts between freedom of expression and national security are explored in works such as Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, CT: Yale University Press, 2006); Lee Epstein, Daniel E. Ho, Gary King, and Jeffrey A. Segal, “The Supreme Court during Crisis: How War Affects Only Nonwar Cases,” New York University Law Review 80 (April 2005): 1–116;
Following the Supreme Court’s decision, the Boy Scouts of America (BSA) became surrounded by controversy, with supporters praising the organization’s decision to hold fast to its values and critics applying intense social pressure for lifting the ban on gay members. Inside the organization, certain segments of the Scouting community began agitating for a change in the group’s position. In addition, the Scouts suffered a modest decline in membership and financial support. Subsequently, the Boy Scouts initiated a comprehensive study to reevaluate its policy.

In May 2013, delegates at the BSA National Council meeting voted to drop the ban on gay youth members effective January 1, 2014, but to keep in place its prohibition against openly gay men serving as Scout leaders. The policy change was supported by 60 percent of the delegates. The organization, however, emphasized its position that “[a]ny sexual conduct, whether heterosexual or homosexual, by youth of Scouting age is contrary to the virtues of Scouting.”

In addition, the BSA selected former U.S. defense secretary and Eagle Scout Robert Gates to assume the presidency of the organization in 2014. Gates was instrumental in removing the military’s “Don’t Ask, Don’t Tell” policy with respect to sexual orientation.

The BSA is an organization of about 2.4 million youths and almost 1 million adult volunteers. Seventy percent of its local units are sponsored by religious organizations. Two of the largest Scouting sponsors, the Church of Jesus Christ of Latter-day Saints and the Roman Catholic Church, generally agreed with the policy change and indicated their intention to remain involved in Scouting. The Southern Baptist Convention expressed disappointment with the new policy but left to local churches the decision whether to remain in Scouting or to sever ties with the organization.

In response to the BSA’s new policy, conservative groups formed an alternative organization, Trail Life USA, a Christian adventure, character, and leadership program. Trail Life USA actively welcomed local Boy Scout troops whose sponsors opposed the change in BSA membership policies.

From the liberal side of the political spectrum came general support for BSA’s revised membership policy, but many remained at odds with the continued ban on gay Scout leaders. One critic was James Dale, whose challenge to the former membership policy was rejected by the Supreme Court. Dale said, “It sends a negative, destructive message to young gay kids that this is a youthful indiscretion, that they don’t really know who they are as a young person if they think they are gay, and once they’re an adult they’re not good enough anymore.”

In 2015, at Gates’s urging, the Scouts ended the ban on gay leaders but allowed troops sponsored by religious organizations to select local leaders who share their faith-based principles, even if this results in restricting these positions to heterosexual men. The Scouts further altered membership policies in 2017, when the organization began accepting new scouts based on the sex listed on their application, thus opening the door to transgender youths. Later that same year, the Scouts announced that the organization was open to admitting girls as full members.

In 2018, the Mormon Church, which sponsored nearly twenty percent of all Scouts, announced that it was severing its 105-year relationship with the Scouts in order to begin a new organization more compatible with the global reach of the church.


In-depth examinations of key cases dealing with the rights of students to express themselves freely in the public schools include James C. Foster, *Bong Hits 4 Jesus: A Perfect Constitutional Storm in Alaska’s Capital* (Fairbanks: University of Alaska Press, 2010); and John W. Johnson, *The Struggle for Student Rights: Tinker v. Des Moines and the 1960s* (Lawrence: University Press of Kansas, 1997).