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First Amendment law is highly complex, even labyrinthine. But, there are fundamental principles in First Amendment law that provide a baseline for a core understanding. These ten fundamental principles are: (1) the First Amendment protects the right to criticize the government; (2) the First Amendment abhors viewpoint discrimination and often content, or subject-matter discrimination; (3) the First Amendment protects a great deal of symbolic speech or expressive conduct; (4) the First Amendment protects a great deal of offensive and even repugnant speech; (5) the First Amendment does not protect all forms of speech; (6) the First Amendment often depends upon the status of the speaker; (7) the first Amendment also protects the right not to speak (the no-compelled speech doctrine); (8) the First Amendment also protects the right to freedom of association; (9) the First Amendment rights of speakers are sometimes limited by the actions or reactions of others; and (10) First Amendment rights are fragile, especially in times of emergency or war.

It is the authors' hope that the articulation of these principles will help many understand and navigate the challenging area of First Amendment free-expression jurisprudence.

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First Amendment free-speech law can be labyrinthine, intricate, and complicated. One famous scholar referred to it as "an endless maze" with "no general framework."[1] Despite—or perhaps because of—its intricacy, First Amendment free-speech jurisprudence is rich and varied. Recognizing its capacity to confuse, scholar Kevin O'Neill cogently created a five-step compass for navigating free-speech cases:

> (1) Is the regulation content-based or content-neutral? (2) If content-based, does the regulation restrict speech or compel speech? (3) If content-restrictive, is the regulation direct or indirect? (4) Does the regulation include characteristics of over-breadth, vagueness, or prior restraint? (5) Does the regulation pertain to one of the settings for which the Supreme Court created special rules?[2]

This is an invaluable tool for engaging with what many perceive as a difficult area. And yet, though treacherous terrain requires tools like compasses, there are certain organizing principles that have emerged—such as the content discrimination principle and categorical analysis.[3] We believe these organizing principles—or what we term fundamental "free-speech principles"—can assist in examining and appreciating the richness of free-speech jurisprudence. In this Article, we lay out ten core fundamental First Amendment free-speech principles. The list is not exhaustive by any means, but it does provide a helpful place to begin the journey. We believe these ten principles will benefit those braving the free-speech frontier.

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1. STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 9, 13 (Harv. Univ. Press 1990).

2. Kevin F. O'Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 226 (2000).

3. David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms"*, 37 WASHBURN L.J. 55, 55 (1997).

I. THE FIRST AMENDMENT PROTECTS THE FREEDOM TO CRITICIZE THE GOVERNMENT

The essence of the First Amendment is the ability of individuals to criticize the government. The Supreme Court declared this a defining principle in its celebrated *New York Times Co. v. Sullivan* decision.[4] The Court explained that an editorial advertisement published in the newspaper could criticize civil rights abuses perpetrated by Southern officials without suffering crippling libel law awards imposed upon them.[5] Justice William Brennan memorably wrote, "[There is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and [] unpleasantly sharp attacks on [] public officials."[6] Legal historian Stephen D. Solomon cogently observed that the Court's opinion "celebrated robust and wide-open speech as central to the way Americans govern themselves."[7]

More than two decades after *New York Times Co. v. Sullivan*, the Court reiterated this principle in the context of a Houston-based gay rights activist who directly challenged police officers who were questioning a friend of his.[8] Raymond Wayne Hill, executive director of the Houston Human Rights League and a member of the Gay Political Caucus, approached police officers and yelled, "Why don't you pick on somebody your own size?"[9] The police arrested Hill, charging him with interfering with the official duties of a police officer.[10] After his acquittal on the criminal charges, Hill brought a Section 1983 lawsuit against the city and the police.[11] Hill sought a declaratory judgment that the interference with the official police officers law was unconstitutional.[12] A federal district court ruled the law was constitutional, but the Fifth Circuit Court of Appeals reversed.[13] On further appeal, the Supreme Court also ruled in favor of Raymond Wayne Hill and determined the statute to be too broad.[14]

The Court, per Justice Brennan again, reasoned that "contrary to the city's contention, the First Amendment protects a significant amount of

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4. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
5. *Id.*
6. *Id.* at 270.
7. STEPHEN D. SOLOMON, REVOLUTIONARY DISSENT: HOW THE FOUNDING GENERATION CREATED THE FREEDOM OF SPEECH 302 (St. Martin's Press 2016).
8. City of Houston v. Hill, 482 U.S. 451 (1987).
9. *Id.* at 453-54.
10. *Id.* at 454.
11. *Id.* at 455.
12. *Id.*
13. City of Houston v. Hill, 482 U.S. 451, 455-57 (1987).
14. *Id.* at 457-58.

verbal criticism and challenge directed at police officers."[15] Brennan added, "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[16] The decision in *City of Houston v. Hill* (1987) carries even more relevance today, as social justice activists take to the street to protest police brutality and racism in the criminal justice system.

The First Amendment would be empty parchment if citizens did not have the ability to engage in dissident political speech and criticize government officials.

II. THE FIRST AMENDMENT ABHORS VIEWPOINT DISCRIMINATION BY THE GOVERNMENT OVER PRIVATE SPEAKERS

The most fundamental of all First Amendment free-speech principles is that the government may not discriminate on the basis of viewpoint with respect to private speakers.[17] The concern is the fear of mind control: it is anathema to freedom of thought for the government to disfavor some ideas over others and distort the marketplace of ideas.[18]

The leading methodological tool for First Amendment jurisprudence is the so-called content discrimination principle.[19] Content discrimination refers to subject-matter discrimination.[20] In the modern vernacular, there are content-based laws and content-neutral laws.[21] Content-based laws are subject to strict scrutiny, while content-neutral laws are subject to intermediate scrutiny.[22]

Justice Thurgood Marshall famously explained this principle in the case of Earl Mosley, a federal postal employee who picketed alone outside a Chicago high school, accusing school officials of practicing racial dis-

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15. *Id.* at 461.

16. *Id.* at 462-63.

17. David L. Hudson, Jr., *Fundamental First Amendment Principle: No Viewpoint Discrimination*, FREEDOM F. (Nov. 30, 2020), https://www.freedomforum.org/2020/11/30/fundamental-free-speech-principle-no-viewpoint-discrimination/ [https://perma.cc/K7MZ-C92N].

18. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 198 (1983).

19. David L. Hudson, Jr., *The Content Discrimination Principle and the Impact of* Reed v. Town of Gilbert, 70 CASE WEST. RES. L. REV. 259, 260 (2019).

20. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove 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.").

21. DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2.2 (2012).

22. *Id.*

crimination.[23] Mosley was cited for violating a Chicago ordinance that prohibiting picketing within 150 feet of a school, but the ordinance contained an exemption for labor picketers.[24] The Supreme Court ruled that the ordinance violated the First Amendment because it contained impermissible content discrimination, favoring the labor picketer over the racial discrimination picketer.[25] Marshall famously wrote: "[A]bove 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."[26]

While content-based discrimination is suspicious, viewpoint discrimination is even worse.[27] The discrimination against ideas is even stronger.[28] For example, a law that allows commercial speakers but not political speakers represents content discrimination. But, a law that allows the Republican Party speaker but not the Democratic Party speaker is a more focused, more intense type of speech discrimination. Justice Samuel Alito expressed it arguably the most poignantly: "Viewpoint discrimination is poison to a free society."[29]

III. THE FIRST AMENDMENT APPLIES TO A WIDE RANGE OF SYMBOLIC SPEECH OR EXPRESSIVE CONDUCT

The First Amendment clearly applies to the spoken and written word. But, the reach of the First Amendment extends to a wide range of symbolic speech and so-called expressive conduct.[30] For example, the Supreme Court ruled that then-nineteen-year-old Yetta Stromberg had an implicit free-speech right to display a red flag at a Communist youth camp.[31] The law provided:

> Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or

23. *Mosley*, 408 U.S. at 93-94.

24. *See* David L. Hudson, Jr., *Chicago-Based Lawyer Reflects on Historic U.S. Supreme Court Win*, FREEDOM F. (Mar. 23, 2015), https://www.freedomforuminstitute.org/2015/03/23/chicago-based-lawyer-reflects-on-historic-u-s-supreme-court-free-speech-win/ [https://perma.cc/P53W-JN8P].

25. *Mosley*, 408 U.S. at 94-95.

26. *Id.* at 95.

27. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

28. *Id.*

29. Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (Alito, J., concurring).

30. RONALD K. L. COLLINS ET AL., FIRST THINGS FIRST: A MODERN COURSEBOOK ON FREE SPEECH FUNDAMENTALS 17 (Found. for Individual Rts. in Educ. 2019).

31. Stromberg v. California, 283 U.S. 359 (1931).

> on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony.[32]

When Stromberg displayed the red flag, arguably as an "emblem of opposition," she was clearly engaging in a protected form of political expression.

In the 1960s, John and Mary Beth Tinker similarly engaged in protected symbolic speech when they wore peace armbands to protest US involvement in the Vietnam War at their high school and middle school, respectively.[33] The school district had learned that students were going to engage in a black armband protest and hastily passed a rule singling out and proscribing black armbands.[34] By allowing students to wear other symbols—such as Iron Crosses and political campaign buttons—the school district engaged in blatant viewpoint discrimination.[35]

The Court famously proclaimed that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[36] But, for purposes here, the Court also reasoned that the wearing of the black armbands was a form of protected symbolic speech.[37] The Court called it closely "akin to 'pure speech.'"[38]

More controversially, the First Amendment also protected the right of political protestor Gregory Lee Johnson to burn an American flag as part of a protest against policies of the Reagan administration.[39] Prosecuted for violating a Texas flag desecration law, the Court found that Johnson's act was a form of pure speech.[40]

The difficult task is determining when expressive conduct is "expressive" enough to merit First Amendment review. The Supreme Court has examined this in a variety of contexts. One of their efforts came from the unusual expression of a student named Spence, who flew an upside down flag outside his dormitory room as a way to express his displeasure at the US bombing of Cambodia.[41] The Court created what has become known as

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32. *Id.* at 361.
33. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).
34. *Id.* at 504.
35. *Id.* at 510.
36. *Id.* at 506.
37. *Id.*
38. *Tinker*, 393 U.S. at 508.
39. Texas v. Johnson, 491 U.S. 397 (1989).
40. *Id.* at 411.
41. Spence v. Washington, 418 U.S. 405 (1974).

"the Spence Test."[42] First, there must be an intent to convey a particularized message; and, second, that message must be reasonably understood by others.[43]

The test is not as protective of First Amendment rights as it should be. After all, not all messages are particularized—nor should they be. As Justice David Souter explained, a requirement that a message be particularized would preclude First Amendment protection for the "painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[44] Furthermore, First Amendment freedoms should not necessarily depend on the understanding of third parties. In such an instance, a novel or groundbreaking scientific idea—for example—might receive no protection because—by definition of its novel, groundbreaking nature—no one is reasonably able to understand it. Another potentially obfuscating dynamic introduced by predicating protection upon the understanding of recipients or hearers of speech is that the latter might misunderstand a speaker. Furthermore, an audience wishing to mitigate a speaker's protection could misrepresent their ability to engage with a speaker's speech (or a court could execute that misrepresentation on their behalf)—either intentionally or incidentally.

But it remains true that—as Chief Justice William Rehnquist once wrote—there are a lot of things out there with a "kernel of expression"—but they are not sufficiently expressive enough to merit protection.[45] Some of the First Amendment claims can border on the bizarre. Take the case of the Indiana man who claimed he had a First Amendment-based right to grow the grass in his yard as high as he wanted to protest the overly authoritarian nature of city officials.[46] Or the Minnesota man who claimed he had a First Amendment right to throw a pie in the face of a city councilman whose policies he detested.[47]

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42. David L. Hudson, Jr., *Spence Test*, *in* THE FIRST AMENDMENT ENCYCLOPEDIA (Middle Tenn. State Univ. 2016) (2009), https://www.mtsu.edu/first-amendment/article/1590/spence-test [https://perma.cc/8N2M-YE4R].

43. *Spence*, 418 U.S. at 410-11.

44. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

45. City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989).

46. Gul v. City of Bloomington, 22 N.E.3d 853 (Ind. Ct. App. 2014).

47. State v. Greenberg, No. C6-99-1201, 2000 Minn. App. LEXIS 596 (Minn. Ct. App. June 20, 2000).

IV. THE FIRST AMENDMENT PROTECTS A GREAT DEAL OF OFFENSIVE AND EVEN REPUGNANT SPEECH

The flag burner,[48] the hatemonger,[49] and the funeral protestor[50] all have benefited from the generosity of the First Amendment's broad coverage. The First Amendment protects much offensive and even repugnant speech.[51] It also has protected its share of less than salutary characters.[52] Justice William Brennan expressed it quite succinctly in *Texas v. Johnson*: "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."[53]

The Court persisted in its application of that principle when it ruled in favor of members of the Westboro Baptist Church who protested outside the funeral of slain Marine Matthew Snyder.[54] The members held up unthinkably hurtful and hateful signs—not to mention thoroughly un-Christian[55]—such as "God Hates Fags" and "Thank God for Dead Soldiers."[56] Snyder's father, Albert, had sued the Westboro Baptist Church and its founder Fred Phelps for intentional infliction of emotional distress and other torts.[57] A federal jury had rendered a whopping verdict of nearly $11 million.[58] But, both the Fourth Circuit Court of Appeals and the Supreme

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48. Texas v. Johnson, 491 U.S. 397 (1989).

49. Brandenburg v. Ohio, 395 U.S. 444 (1969).

50. Snyder v. Phelps, 562 U.S. 443 (2011).

51. David L. Hudson, Jr., *The First Amendment Protects the Unsavory – And All of Us Too*, FREEDOM F. (Dec. 8, 2020) https://www.freedomforum.org/2020/12/08/the-first-amendment-protects-the-unsavory-and-all-of-us-too/ [https://perma.cc/35HW-HKCX].

52. Frederick Schauer, *The Heroes of the First Amendment*, 101 MICH. L. REV. 2118, 2119 (2003).

53. *Johnson*, 491 U.S. at 414.

54. *Snyder*, 562 U.S. at 443.

55. Just to provide a few among many important Biblical axioms disregarded by the Westboro Baptist members in this protest: "Rejoice with those who rejoice, weep with those who weep." *Romans* 12:15 (English Standard Version); Disregarding discussion of the underlying issue, "Have nothing to do with foolish, ignorant controversies; you know that they breed quarrels. And the Lord's servant must not be quarrelsome but kind to everyone, able to teach, patiently enduring evil, correcting his opponents with gentleness. God may perhaps grant them repentance leading to a knowledge of the truth, and they may come to their senses and escape from the snare of the devil, after being captured by him to do his will." 2 *Timothy* 2:23–26 (English Standard Version); ". . . speaking the truth in love . . ." Ephesians 4:15 (English Standard Version); "But I say to you, love your enemies and pray for those who persecute you . . ." *Matthew* 5:44 (English Standard Version); "For God is not a God of confusion but of peace." 1 *Corinthians* 14:33 (English Standard Version).

56. *Snyder*, 562 U.S. at 448.

57. *Id.* at 449-50.

58. *Id.* at 450.

Court reversed and ruled in favor of the unpopular group.[59] Chief Justice John Roberts famously wrote:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow—as it did here—inflict 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.[60]

This principle is the sometimes-unpleasant but perennially-indispensable counterpart to the principle outlined in part II ("The First Amendment abhors viewpoint discrimination by the government over private actors"). Unsurprisingly, then, this fundamental principle has been under attack for quite some time—especially in the last several decades. Many people often act—to quote the late, great Nat Hentoff—in a spirit of "Free Speech for Me, But Not for Thee."[61] In other words, people claim they support freedom of speech in theory, but when push comes to shove, they are quick to censor speech *they* find offensive or disagreeable. Jonathan Rauch warned of this troubling tendency back in the early 1990s, writing: "A very dangerous principle is now being established as a social right: Thou shalt not hurt others with words. This principle is a menace—and not just to civil liberties. At bottom it threatens liberal inquiry—that is, science itself."[62]

V. THE FIRST AMENDMENT DOES NOT PROTECT *ALL* FORMS OF SPEECH

The text of the First Amendment is absolute: "Congress shall make no law . . . abridging the freedom of speech." In the words of Justice Hugo Black—in certain contexts at least— "no law" meant *no law,* as Black had a

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59. *Id.* at 450-51.

60. *Id.* at 460-61.

61. NAT HENTOFF, FREE SPEECH FOR ME —BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (Harper Collins ed., 1992).

62. JONATHAN RAUCH, KINDLY INQUISITORS: THE NEW ATTACKS ON FREE THOUGHT 4 (Univ. of Chicago Press ed., 1995).

"steadfast conviction about the absolute right of free speech."[63] But, freedom of speech is not absolute. You don't have a First Amendment right to perjure yourself in court or extort money from another person. There are a host of other examples. Scholar Ronald K. L. Collins has identified forty-three different examples of unprotected speech.[64]

Way back in 1919, Justice Oliver Wendell Holmes colorfully explained that the First Amendment doesn't protect someone "falsely shouting fire in a theatre and causing a panic."[65] But, the modern iteration of unprotected categories comes from 1942 when Justice Frank Murphy, normally a First Amendment champion,[66] explained this in his now famous (or infamous) opinion in the classic fighting words opinion *Chaplinsky v. New Hampshire* when he wrote:

> 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 inflict injury or tend to incite an immediate breach of the peace.[67]

There are several narrow categories of unprotected speech, which are not entitled to First Amendment protection. The more common categories include incitement, fighting words, true threats, child pornography, obscenity, and defamation.[68] These unprotected categories often started as quite broad, but they narrowed over time.[69]

Take "fighting words," for example. It used to mean that a person could not utter profanity at a law enforcement official, as Walter Chaplin-

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63. Irving Dilliard, *The Individual and the Bill of Absolute Rights*, *in* HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 111 (Stephen Parks Strickland ed., 1967).

64. Ronald K. L. Collins, *Foreword, Exceptional Freedom—The Roberts Court, The First Amendment, and The New Absolutism*, 76 ALB. L. REV. 409, 417-22 (2013).

65. Schenck v. United States, 249 U.S. 47, 51 (1919).

66. David L. Hudson, Jr., *Justice Frank Murphy: 'Champion of First Amendment Freedoms'*, FREEDOM F. (Nov. 26, 2001), https://www.freedomforuminstitute.org/2001/11/26/justice-frank-murphy-champion-of-first-amendment-freedoms/ [https://perma.cc/S5BB-CSUL].

67. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

68. David L. Hudson, Jr., *A Trend Away from Silencing Offensive Speech*, N.Y. TIMES (Mar. 6, 2013), https://www.nytimes.com/roomfordebate/2013/03/05/in-free-speech-a-line-between-offputting-and-illegal/a-trend-away-from-silencing-offensive-speech [https://perma.cc/3QBD-G2D7].

69. *Id.*

sky did to Marshall Bowering.[70] But, now there is significant precedent protecting the profane speaker or even the middle-digit posturer.[71] The Supreme Court famously narrowed the fighting words doctrine in the celebrated free-speech decision *Cohen v. California* to purely face-to-face personal insults.[72]

Obscenity is another salient example. There used to be obscenity prosecutions for booksellers who sold James Joyce[73] and D. H. Lawrence novels. Now, obscenity prosecutions are generally reserved for traffickers of sexually violent materials.[74]

In recent years, the Roberts Court has proven resistant to accepting the idea of new, unprotected categories of speech. The Court rejected arguments that images of animal cruelty,[75] violent video games,[76] funeral protests,[77] and false speech[78] should be categorically prohibited from free-speech protection. Chief Justice Roberts wrote that there was no "free-wheeling authority" to create such new, unprotected categories of speech unless they were rooted in history and tradition.[79]

VI. THE FIRST AMENDMENT OFTEN DEPENDS ON THE STATUS OF THE SPEAKERS

At times, discrimination against speakers—so-called speaker discrimination—can be a form of impermissible content discrimination, but certainly not all of the time.[80] Instead, the Court has carved out separate tests and bodies of law for four types of speakers: public employees, public school students, prisoners, and members of the military. All four of these types of speakers do not forfeit all of their rights when they enter the schoolhouse gate, the workplace, the jail cell, or the military base—but they certainly don't retain the level of rights they would receive outside of those contexts.

For example, when the Supreme Court in *Tinker v. Des Moines Independent Community School District* famously declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it qualified the pronouncement by explaining that stu-

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70. *Chaplinsky*, 315 U.S. at 568.
71. *See* Duran v. City of Douglas, 904 F.2d 1372 (9th Cir. 1990).
72. Cohen v. California, 403 U.S. 15, 20 (1971).
73. *See* United States v. One Book Entitled Ulysses, 72 F.2d 705 (2d Cir. 1934).
74. *See* Hudson, *supra* note 68.
75. *See* United States v. Stevens, 559 U.S. 460 (2010).
76. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).
77. *See* Snyder v. Phelps, 562 U.S. 443 (2011).
78. *See* United States v. Alvarez, 567 U.S. 709 (2012).
79. *Stevens*, 559 U.S. at 472.
80. *See, e.g.*, Michael Kagan, *Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLA. ST. U. L. REV. 765 (2015).

dent free-speech rights must be interpreted "in light of the special characteristics of the school environment."[81] Under *Tinker*, public school officials can regulate student speech if they can show that the student speech will cause a substantial disruption of school activities.[82]

Similarly, the Court has famously declared that public employees do not lose all of their free-speech rights when they take public employment.[83] But, the Court has said that to be protected, the public employee must be speaking on a matter of public concern—that right outweighs the employer's right to a disruption-free, efficient workplace.[84] Then, in *Garcetti v. Ceballos* (2006), the Court created an additional threshold categorical rule that public employees have no free-speech protection for official, job-duty speech.[85] The Court declared that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[86]

Comparably, the Court created a standard very deferential to prison officials when inmates bring constitutional claims in *Turner v. Safley*.[87] The Court declared that prison officials do not violate the constitutional rights of inmates when their actions are "reasonably related to legitimate penological interests," such as safety or rehabilitation.[88] The penological interest test has been used by courts to limit the ability of so-called *jailhouse lawyers* to *practice*,[89] limit inmates' religious dietary requests,[90] limit the ability for inmates to engage in religious services,[91] limit inmates' ability to receive pornography,[92] and restrict other otherwise-protected activities. The result, as the late, great Robert M. O'Neil said, resulted in a "significantly diminished standard of review."[93]

Additionally, the First Amendment certainly does not apply with full force when it comes to members of the armed services. The Uniform Code

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81. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
82. *Id.* at 511.
83. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
84. *Id.* at 568.
85. Garcetti v. Ceballos, 547 U.S. 410 (2006).
86. *Id.* at 421.
87. Turner v. Safley, 482 U.S. 78 (1987).
88. *Id.* at 87.
89. Shaw v. Murphy, 532 U.S. 223 (2001); Watkins v. Kasper, 599 F.3d 791 (7th Cir. 2010).
90. Williams v. Morton, 343 F.3d 212 (3d Cir. 2003).
91. Sharp v. Johnson, 669 F.3d 144 (3d Cir. 2012).
92. Brittain v. Beard, 974 A.2d 479 (Pa. 2009).
93. Quoted in David L. Hudson, Jr., Turner v. Safley*: High Drama, Enduring Precedent*, FREEDOM F. (May 1, 2008), https://www.freedomforuminstitute.org/2008/05/01/turner-v-safley-high-drama-enduring-precedent/ [https://perma.cc/Z4UU-NNPN].

of Military Justice permits far more speech restrictions than would be acceptable for adults in general society. The Supreme Court has not been very protective of free-speech principles in the military setting, even prohibiting the distribution of political materials on military bases.[94]

VII. THE FIRST AMENDMENT ALSO PROTECTS THE RIGHT *NOT* TO SPEAK

When one traditionally thinks of freedom of speech or even First Amendment cases, we think of a person engaging in speech that offends, annoys, or disturbs others—and then the government reacts by punishing the speaker. But, the First Amendment also applies when the government attempts to force or compel someone to speak.

The classic example comes from the Court's flag-salute opinion *West Virginia Board of Education v. Barnette*, rendered on Flag Day in 1943—in the thick of World War II.[95] A West Virginia law required public school students to salute the flag and recite the Pledge of Allegiance. Students who failed to conform faced expulsion from school and their parents could potentially be sentenced to thirty days in jail.[96]

Three years earlier, the Supreme Court had upheld a similar flag salute when it was challenged by Jehovah's Witness students Lillian and Billy Gobitis.[97] The Court ruled eight to one in favor of the state, elevating political authority over religious liberty and freedom of conscience. This decision contributed to a wave of violence against Jehovah's Witnesses, including acts as gruesome as roping and castration.[98] In the wake of that decision, the Court began actively looking for another student flag salute case.[99]

They got it in *Barnette.* Once again hearing a challenge to an analogous statute brought by Jehovah's Witness students, three justices—Hugo Black, William O. Douglas, and Frank Murphy—took the unusual step of announcing that their previous ruling had been wrong.[100] The Court ruled six to three to overrule *Gobitis* and protect freedom of conscience.[101]

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94. Greer v. Spock, 424 U.S. 828 (1976).
95. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
96. *Id.* at 629.
97. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).
98. DAVID L. HUDSON JR., LET THE STUDENTS SPEAK!: A HISTORY OF THE FIGHT FOR FREE EXPRESSION IN AMERICAN SCHOOLS 34 (2011).
99. *Id.* at 36.
100. *Id.*
101. W. V. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

VIII. THE FIRST AMENDMENT ALSO PROTECTS FREEDOM OF ASSOCIATION

We often talk about the five textually based freedoms of the First Amendment: religion, speech, press, assembly, and petition. But, the First Amendment also protects another liberty interest inextricable from these five: the freedom of association. (After all, what good are the aforementioned freedoms when one is in isolation?)

The Supreme Court recognized this in the famous decision of *NAACP v. Alabama* when the state of Alabama sought to force the NAACP to turn over its rank-and-file membership list.[102] The NAACP refused, knowing full well that state officials would use that information to harass and cause individual members to lose their jobs or otherwise suffer. The Court explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."[103]

The right identified by the Court in the civil rights litigation is the right of expressive association—the ability of individuals or groups to associate together and express themselves on political matters.[104] There is another right of association—called the freedom of intimate association—the ability to associate together in close relationships free from governmental scrutiny or control.[105] This right falls more often under the ambit of the Due Process Clause, not the First Amendment.

IX. FIRST AMENDMENT RIGHTS AT TIMES ARE LIMITED BY THE ACTIONS OF OTHERS

One would think that a person should have the ability to speak at all times if the person speaks peacefully and offers her commentary. But, the First Amendment ideal does not match the real. The reality is that our First Amendment free-speech rights often depend upon the actions of others.

Take public school students, for example. The leading standard in First Amendment free-speech law is that student speech is protected by the First Amendment, unless school officials can reasonably forecast that the speech

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102. NAACP v. Ala. *ex rel*. Patterson, 357 U.S. 449 (1958).

103. *Id.* at 460.

104. David L. Hudson, Jr., *Freedom of Association*, THE FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1594/freedom-of-association [https://perma.cc/37BY-D4L7].

105. Obergefell v. Hodges, 576 U.S. 644 (2015); Griswold v. Connecticut, 381 U.S. 479 (1965).

will cause a substantial disruption.[106] A student speaker could speak in an entirely peaceful manner, but onlookers could react to that speech with unruly behavior and create a substantial disruption.[107] In other words, the unruly recipients create a heckler's veto on the peaceful speaking students.[108]

This occurred in a high school speech out in California when school officials prohibited five students from wearing American flag t-shirts to school on Cinco de Mayo because it offended other students.[109] One dissenting judge warned: "by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them."[110]

The problem is not confined to students. Consider the sad case of Irving Feiner, a Syracuse University student who was punished for delivering a speech on a New York street corner.[111] The police arrested Feiner for disturbing the peace based on the unruly actions of people listening to his speech.[112] Justice Hugo Black warned that allowing government officials to arrest peaceful speakers for the unruly actions of others was a "long step toward totalitarian authority."[113]

X. FIRST AMENDMENT RIGHTS ARE ALWAYS FRAGILE—ESPECIALLY IN TIMES OF REAL OR SUPPOSED EMERGENCIES

First Amendment rights are always fragile—especially during supposed times of crisis. Consider the massive restriction on free-speech rights when the United States was in a quasi-war with France. Professor Geoffrey R. Stone points out that though the Founding Fathers were a "remarkable group of visionaries and political thinkers," they were "also subject to petty jealousies, partisan squabbling, and deep distrust, especially of one another."[114] This is how we got the Alien and Sedition Acts of 1798. Hentoff argued that the passage of these acts made "political dissent [] as dangerous as if there were no First Amendment in the new republic."[115] Among the

106. David L. Hudson, Jr., *Substantial Disruption Test*, THE FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1584/substantial-disruption-test [https://perma.cc/Q5CH-Y5P9].

107. David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1118-19 (2020).

108. *Id.* at 1118.

109. Dariano v. Morgan Hills Unified Sch. Dist., 767 F.3d 764 (9th Cir. 2014).

110. *Id.* at 768 (O'Scannlain, J., dissenting).

111. Feiner v. New York, 340 U.S. 315, 323 (1951).

112. *Id.* at 319.

113. *Id.* at 323 (Black, J., dissenting).

114. GEOFFREY R. STONE, *The Story of the Sedition Act of 1798: 'The Reign of Witches'*, *in* FIRST AMENDMENT STORIES 13-14 (Richard W. Garnett & Andrew Koppelman eds., Found. Press/Thomson Reuters., 2012).

115. NAT HENTOFF, THE FIRST FREEDOM: THE TUMULTUOUS HISTORY OF FREE SPEECH IN AMERICA 79 (Doubleday 1980) (1981).

outrageous acts of governmental censorships taken by President John Adams and the Federalists under the auspices of the Sedition Act was the imprisonment of "four of the five most important Republican newspapers in the country."[116] While such unabashed censorship—the literal jailing of one's detractors—will undoubtedly strike the contemporary reader as astonishing, we would all do well to remember that a censorious nature is engrained in the hearts of men.

Consider the era of World War I—when the suppression of civil liberties became a patriotic duty. At the behest of President Woodrow Wilson (in his desire to defend democracy on the global stage), "Congress passed the Espionage Act of 1917, a law that would, ironically, deal a severe blow to the practice of democracy at home."[117] This act was passed not only as a response to the tension surrounding the first World War, but "also in large part [as] a reaction to radical political agitation and labor unrest, including several notorious acts of political terrorism, which for decades had increasingly alarmed the dominant forces in the United States."[118] A piece of legislation born of fear and paranoia, the Espionage Act has been used to quell anti-war voices in cases like *Schenk v. United States*, where a man dispensing leaflets encouraging non-compliance with the World War I effort was found in violation.[119]

In more recent times, look at what happened after the terrorist attacks on September 11, 2001. We got the USA PATRIOT Act, which led to the suppression of critical speech once again (with only one senator voting against the bill, Wisconsin Democrat Russell Feingold).[120] Within a year of the passage of the PATRIOT Act, scholar John W. Whitehead wrote, "Much of the legislation enacted pursuant to the government's prosecution of the 'War on Terrorism' has had a deleterious effect on the sacrosanct protection of the First Amendment right to free speech."[121] In particular, Whitehead was alarmed that the PATRIOT Act allowed official determina-

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116. *Id.* at 83.

117. JAMES WEINSTEIN, *The Story of* Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet*, *in* FIRST AMENDMENT STORIES 63 (Richard W. Garnett & Andrew Koppelman eds., Found. Press/Thomson Reuters., 2012).

118. *Id.*

119. Schenck v. United States, 249 U.S. 47 (1919).

120. *H.R. 3162 (107th): Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT)*, GOVTRACK (Oct. 25, 2001, 1:54 PM), https://www.govtrack.us/congress/votes/107-2001/s313 [https://perma.cc/WC2W-TFWV].

121. John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1096 (2002).

tions about individuals' rights to be based upon "an individual's beliefs or speech."[122]

Importantly, the PATRIOT Act lowered the government's burden for receiving FISA warrants from showing a primary purpose of obtaining foreign intelligence to merely a "significant" purpose.[123] And after the disclosures revealed by Edward Snowden in 2013, Americans were shocked and disturbed to see just how massive the scale of government surveillance had become over more than a decade of the War on Terrorism.[124] As one writer cautions, "[w]henever the government is operating a broad agenda of surveillance, there is danger that the power is abused to infringe on First Amendment rights."[125] Hentoff concluded the solution is for "censorial power [to be vested] in the people over the government, not in the government over the people."[126]

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122. *Id.* at 1098.

123. David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487, 508 (2006) ("In early September 2001, shortly after the attacks, DOJ sent Congress a FISA amendment designed to permit greater coordination between intelligence and law enforcement. The amendment, which ultimately became Section 218 of the Patriot Act, initially sought to replace 'the purpose' with 'a purpose' in the certification provisions of 50 U.S.C. 1804(a)(7)(B) and 1823(a)(7)(B). This amendment did not challenge the courts' interpretation of 'foreign intelligence information' to exclude information sought for law enforcement efforts to protect national security. Instead, it made clear that law enforcement may nevertheless be the primary purpose of FISA searches or surveillance as long as 'a purpose' remains that does not involve law enforcement. Eventually, the DOJ acceded to Congressional preferences and changed 'a purpose' to a 'significant purpose' in the final version of Section 218. The basic approach and effect of the amendment, however, remained unchanged.").

124. Nicole B. Cásarez, *The Synergy of Privacy and Speech*, 18 U. PA. J. CONST. L. 813, 814 (2016) ("However history ultimately judges Edward Snowden, his 2013 revelations regarding secret bulk collection of domestic phone records by the National Security Agency ('NSA') eroded many Americans' trust in their government, as well as their confidence in the privacy of their electronic conversations. Americans were shocked and angered to learn that their government had been collecting all kinds of information about their communications, without serious judicial supervision and when most or all of the data was domestic. Fears that America had turned into a surveillance state fueled sales of encryption technology and were reflected in both the media and popular culture.").

125. Kyle Welch, *The Patriot Act and Crisis Legislation: The Unintended Consequences of Disaster Lawmaking*, 43 CAP. U.L. REV. 481, 532 (2015).

126. HENTOFF, *supra* note 115, at 85.