FROM THE VILLAGE GREEN TO THE VILLAGE SCREEN

THE FIRST AMENDMENT IN THE 21ST CENTURY:

FROM THE VILLAGE GREEN TO THE VILLAGE SCREEN

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THE FIRST AMENDMENT

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

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PREFACE

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The First Amendment, adopted in 1791 with the rest of the Bill of Rights, protects our core individual freedoms from encroachment or abuse by the government.

The five freedoms in the First Amendment — religion, speech, the press, assembly and petition — were seen by the nation's founders as the natural rights of each human being, not as rights given or granted by those in power. It's necessary to note that this aspirational declaration fell short from the start because enslaved people, some 700,000 people at that moment,[1] and Native Americans (as tribes made treaties — often coerced — with the U.S.) were excluded from its direct protection.

The nation has struggled ever since to fully correct not only this injustice but also to interpret and apply the amendment's 45 words to a dynamic, increasingly complex industrial and technological society.

That struggle has moved through three eras:

★ Debate and dissent on colonial Village Greens, rooted in freedom of conscience and religious faith, and expressed

through free speech and a free press that powered the creation and first century of a revolutionary democratic republic.

- ★ Foundational decisions in courtrooms and Congress in a second century, often driven by public voices powered and empowered by the rights of petition and assembly.
- ★ A dynamic, turbo-charged exchange of information and debate in today's era of social media communities, our "Village Screens."

Along the way, the extent, range and questions over the very need for First Amendment protections have been at issue.

The great social media revolution has, in many ways, brought us full circle in terms of public engagement, affording us, via the village screen, quick access to virtual communities that would have been available to our predecessors centuries ago through a simple stroll to a place of public gatherings.

THE BEGINNING OF THE VILLAGE GREEN

Our nation's 230-year-plus commitment to the First Amendment included, in the late 1700s, debates in taverns and meeting houses, speeches and revolutionary rallies on colonial greens, as well as writings in books, essays, pamphlets and early journals and newspapers.

In the mid-to-late 1800s, and through much of the next century, technological advancements in communication, such as the introduction of widely circulated "dailies" to radio and then television, exponentially expanded the concept of the "village

green" around which we met and exchanged information. This created a much wider, more varied "marketplace of ideas."

The U.S. Supreme Court began to apply the First Amendment to the states through the doctrine of "incorporation," a process that made most of the protections enshrined in the Bill of Rights binding on the states in the same way it operates to restrain the federal government.[2] The Supreme Court has declared that the five freedoms of the First Amendment are "incorporated" into state and local laws through the due process and equal protection requirements of the Fourteenth Amendment.

FOURTEENTH AMENDMENT

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[3]

Even today, not all parts of the Bill of Rights have been fully incorporated,[4] but all First Amendment freedoms have been:

- **Freedom of speech** — Gitlow v. New York (1925)[5] and Fiske v. Kansas (1927)[6]
- **Freedom of the press —** Gitlow v. New York (1925) and Near v. Minnesota (1931)[7]
- **Freedom of religion —** Hamilton v. Regents of the University of California (1931),[8] Cantwell, et al. v. Connecticut (1940) (free exercise clause)[9] and Everson v. Board of

Education of the Township of Ewing (1947) (establishment clause)[10]

- ★ **Freedoms of assembly and petition —** DeJonge v. Oregon (1937)[11]
- ★ **Freedom of association** — NAACP v. Alabama (1958),[12] Cox v. New Hampshire (1941)[13] and Edwards v. South Carolina (1963)[14]

A NEW, GLOBAL VILLAGE SCREEN

In the 1990s, the World Wide Web exploded[15] and the global village screen came into existence. It allowed everyone with internet access to join a global network where more people could communicate more extensively and faster than in any previous generation of humanity. The web made possible the organic development of affinity groups comprised of members with shared interests, passions and characteristics.

Against this backdrop of rapid technological change, the five freedoms have invited re-examination and critique from new vantage points and through new, highly polarized ideological lenses.

CHALLENGES AND DEFENSES

A review of how First Amendment law has evolved shows the executive and legislative branches rarely come to the defense of those freedoms. Rather, it's the independent judiciary that, time and again, has rejected those who would silence, censor and control. Particularly threatening to the amendment's survival are those with well-intended visions for a one-time constitutional

nip-tuck aimed at "modernizing" the First Amendment. These critics overlook the fact that such singular changes add up over time to the death of the entire amendment.

Still, First Amendment challenges present themselves in the courtroom as well as the chat room. Long-held concepts like the marketplace of ideas, "more speech, not enforced silence," and once-widely accepted tenets such as "The remedy to speech you don't like is more speech, not less" are seen today by some scholars as outmoded or even dangerous in an unprecedented world of 24/7 media availability, omnipresent social media, information saturation and Google searches. Technology always introduces new challenges, not the least of which in the free-speech context contends with a tidal wave of misinformation and disinformation that obscures facts and blurs the value of defending all speech.

FIRST AMENDMENT FREEDOMS ARE NOT UNLIMITED

Even though the First Amendment's 45 words begin with the phrase "Congress shall make no law," our system recognizes that a literal application of those words would be untenable. As such, legal refinements in the centuries after passage of the First Amendment have given us specifics as to how and when we may exercise our First Amendment freedoms.

The concept of time, place and manner restrictions has been embedded in law through various U.S. Supreme Court decisions. Requirements for such restrictions include:

- ★ Justified by a "compelling" public interest.
- ★ "Narrowly tailored" to achieve that interest.

- ★ Established for the minimum amount of time required by that necessity.

There's also a requirement that any such restrictions be "content" and "viewpoint" neutral to avoid partisan decisions and having the majority set rules that prevent citizens in the minority from full use of the five core freedoms.

Our society, through legislation and the courts, has carved out a limited number of areas that receive less or no protection, mainly in speech, resulting in punishment or compensation for damage, including:

- ★ Incitement
- ★ Fighting words
- ★ True threats
- ★ Obscenity
- ★ Defamation
- ★ Student and prisoner speech
- ★ Commercial speech (particularly involving fraud and deception).

Americans encounter such restrictions in circumstances requiring us to balance our First Amendment freedoms against the protections enshrined in the other amendments in the Bill of Rights — say, for example, around issues of public safety when assembled marchers block busy highways, or when the rights of students to voice their political opinions openly conflicts with the educational mission of schools.

Beyond these limited restrictions on our protected exercise of First Amendment freedoms, the ability of government to invade the private citizen's free exercise is significantly curtailed by the courts, and direct attempts on such restrictions by any level of government —

a school board, Congress or the president — is subject to an exacting judicial review called "strict scrutiny." When courts evaluate government action to restrict First Amendment freedoms under the rubric of strict scrutiny, few statutes or regulations survive without meeting those stringent and limited time, place and manner, and content and viewpoint neutral preconditions.

Strict scrutiny means a law must address a "compelling government interest" such as public safety and must be written to be the narrowest possible intrusion on First Amendment rights to accomplish that interest.

THE 21ST CENTURY PARADOX: OLD VALUES COLLIDE WITH MODERN PRIORITIES

As paradoxical as it may seem, this still relatively new century offers the potential for a First Amendment renaissance even as it poses new challenges. More communication among more people in more places carries the potential for a global conversation comprising new, diverse voices. Problems once thought unsolvable may benefit from this enhanced discussion. Furthermore, the free and rapid exchange of information can foster global understanding and compromise on a scope never experienced by humanity. But will it?

In the past 30 years, we have seen a dramatic shift in the public's perceived value and limited understanding of our First Amendment freedoms. From a relatively nascent period of legislation and legal action extending through the nation's first century and more, we saw development of 20th century definitions of individual liberty rooted in the ability of all to believe, speak and be heard as we wish, without fear of limitation or punishment by the government.

There also has emerged a shift by some First Amendment experts and citizens toward using First Amendment freedoms as a shield from government regulations they see as intrusive on First Amendment rights summarized as freedom of conscience and expression.

Freedoms of speech and the press have been expanded by the internet and social media in a manner not seen since the introduction of the printing press. And — as the printing press did to the elite of that time — the web's expansion into a necessity of daily life has shattered gatekeepers' control of information.

Some religious believers proclaim the right to worship freely as they wish as inviolate aspects of personal freedom, even as that proclamation is seen by others as sanctuaries giving cover to ideas rooted in discrimination, racism and bigotry. Coincidentally, as the United States becomes more religiously diverse, the nation has also experienced a rise among those who identify as having no religious affiliation and increased militancy by followers of the still-dominant faith, Christianity.

The rights to speak, write and protest freely, particularly as partisans on political and social issues, were once prized by conservatives and liberals alike. But some 45 states have, as of this writing, considered or adopted regulations to remove protections and increase penalties for those using their rights of assembly and petition to call for change in government policies and practices.[16]

This report reconciles the past and the present, and opines on the future, of our First Amendment freedoms — in law and in practice. Views differ. Pessimism and optimism do battle. Old values collide with new priorities (unfettered "toxic" speech versus trigger warnings and safe spaces, for example).

ROADMAP

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SECTION I: HOW WE GOT HERE

The First Amendment's history, from nearly a "quiet" century in which the First Amendment largely was not debated in the courts or Congress, then a near-100-year era of protecting individual expression from government, and then the most recent explosion of new laws and litigation intended to exempt some groups from certain laws in the name of safety, security and individual liberty.

SECTION II: WHERE WE STAND

U.S. Supreme Court decisions and other factors that shaped our understanding, interpretation and use of the First Amendment in the late 20th century and in the first decades of the 21st century.

SECTION III: WHERE WE'RE HEADED

The issues and challenges to our First Amendment freedoms — now and going forward.

SECTION I

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HOW WE GOT HERE

ESTABLISHING FIRST AMENDMENT FREEDOMS

How did we become a nation that defends so passionately (in concept, if not always in practice) the freedoms of religion, speech, the press, assembly and petition?

Initially, those five core areas of life were rooted in the nation's founders' desire to protect individual liberty from the power of the state.

The Eurocentric view of the sanctity of those core liberties, which was held by most of the founders, had evolved over several centuries, with roots in the ancient world's concepts of individualism, personal freedom and obligations to society.

HISTORIC INSPIRATIONS

MAGNA CARTA

Perhaps the first of the "modern" inspirations was the ephemeral agreement reached in 1215 between a group of barons and King John of England, known as the Magna Carta. In effect for only a short time before being voided by Pope Innocent III, the agreement provided protection from illegal imprisonment, established a fairer system of justice for at least the elite, set out certain church rights and defined nobles' payments and obligations to the crown.[17] Succeeding charters modeled after the Magna Carta helped establish an inherited legal framework in the United Kingdom.

It's more the lore than law of the Magna Carta that has stood the test of time. The charter introduced the notion of individual rights vis-a-vis an all-powerful monarch[18] in Great Britain and served as the foundation for the English Bill of Rights, which was passed in 1689.[19] As an essential statement on the right to "speak truth to power," it inspired the authors of the Declaration of Independence, the U.S. Constitution and the Bill of Rights, and this nation's reverence for the rule of law.

A renowned British lawyer just a few decades ago declared the Magna Carta "the greatest constitutional document of all times — the foundation of the freedom of the individual against the arbitrary authority of the despot."[20]

MILTON'S "AREOPAGITICA"

A second important inspiration for our founders was John Milton's "Areopagitica,"[21] published in 1644 as a speech and pamphlet

protesting the English Parliament's effort to license — and thus control — the printing of all books.

Milton argued that free discussion of ideas is essential to human development and to fight misinformation and untruth. In words that helped define the core value of free expression for generations and set out the operative theory of what later would be called the "marketplace of ideas," he wrote, "Let her [truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"

LOCKE'S "A LETTER CONCERNING TOLERATION"

Third, and more immediate for the founders of the United States, were the writings of English philosopher John Locke, whose defense of both religious liberty (except for the liberties of atheists and Catholics) and of the freedom of assembly deeply influenced the founders' thoughts on both.

In his "A Letter Concerning Toleration,"[22] published in 1689, Locke rejected state efforts to indoctrinate anyone, an idea that served as the seed for the First Amendment's free exercise and establishment clauses,[23] protecting the right of each person to believe as they will and precluding government from either endorsing or disfavoring any particular faith.

With respect to the right to assemble, Locke wrote in "Toleration" that it was essential to self-governance that people be permitted to gather and express themselves without fear of arrest or other punishment. Such unfettered discussion was a feature of the "social contract" under and through which people could resolve conflicts without violence and according to the rule of law.

To be sure, the nation's founders also built on the work of many, from the philosophers of the ancient world to Milton, Locke, Thomas Hobbs, Joseph Priestley, Roger Williams and more.

EARLY AMERICAN INFLUENCERS

ROGER WILLIAMS

Roger Williams, founder of Rhode Island as a place of religious tolerance, had fled England to escape persecution for his beliefs. Williams' concept of a hedge of separation to protect the garden of religion from the wilderness of the secular world would be among the writings that inspired Thomas Jefferson's "wall of separation" between church and state.[24]

ANDREW HAMILTON

In 1735, *New York Weekly Journal* printer John Peter Zenger was put on trial for publishing defamatory articles about Gov. William Cosby. At the trial's end, Zenger's lawyer Andrew Hamilton asked the jury to consider the truth of the statements published and concluded with these famous words:

> *"The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty."*[25]

Zenger was acquitted. In his case, truth was a defense. While the case did not change existing colonial law, it did set out a principle later enshrined in U.S. legal doctrine: Truth as an affirmative defense in cases of libel and slander.

WILLIAM WILLIAMS

As the nation formed, many proposals were debated regarding the freedoms to be protected in a national constitution, particularly religious liberty and freedom of conscience versus the concept of tolerance and the role of religion in a new public life.

As Jon Meacham recounts in his 2006 book "American Gospel,"[26] statesman William Williams thought a constitutional preamble should "acknowledge the nation's dependence on the Almighty," and that office holders should be compelled to take what amounted to a religious test in order to hold office — with that religion being Christianity.

Williams' critics derided the requirement as inevitably leading to government favoritism of one or another denomination within Christianity. Moreover, the requirement would violate the vision among many of the founders that the new nation be a "land of promise," where all faiths could be practiced without fear of reprisal. In the end, Williams dropped his proposal.

THE BILL OF RIGHTS IS BORN

In the summer of 1787, delegates gathered in Philadelphia to draft a replacement for the failing Articles of Confederation, which had created a loose and increasingly unworkable union of states.

Antifederalists were opposed to a federal constitution, many arguing that it unfairly diminished the power of individual states.

As the proposed Constitution moved toward submission to states for ratification, the issue of a Bill of Rights became the linchpin on which ratification hinged, particularly in Massachusetts, New York and Virginia, where there was a growing consensus that the newly constituted government should turn over some of its power by expressly vowing to protect personal freedoms.

Federalists placated the antifederalists with a promise of a package of amendments aimed at sheltering individual freedoms from federal encroachment. Following the ratification of the Constitution in 1789, Congress agreed to propose such amendments, and the Bill of Rights was adopted on Dec. 15, 1791.

FROM THIRD AMENDMENT TO FIRST

It's incorrect to say that the First Amendment comes first in the Bill of Rights because the founders thought it the most important or most essential. Actually, the 45 words protecting the five freedoms almost came third, originally proposed behind a "first amendment" setting out a formula for determining the size of the House of Representatives based on the population in 1789 and a "second amendment" determining when Congress can adjust its pay. Both of those proposals failed initial consideration. The language of the original Second Amendment became the 27th Amendment, which was ratified in 1992.

With ratification of the Bill of Rights — with its First Amendment protecting the rights of religion, speech, the press, assembly and

petition — the nation moved forward with a completed constitutional framework.

As Thomas Paine wrote in 1776 in the enlightenment treatise "Common Sense," "We have it in our power to begin the world again."[27]

AT FIRST, "NO LAW" MEANT JUST THAT (MOSTLY)

For roughly the first 120 years of U.S. history, Paine's new world of First Amendment law largely was dormant — with a few notable exceptions.

AN EARLY FIRST AMENDMENT CHALLENGE: THE SEDITION ACT

The Sedition Act of 1798 criminalized "false, scandalous, and malicious" writings or speech against Congress or the president.[28] In 1801, after widespread public disapproval following the arrests of two dozen editors, Congress allowed the act to expire, and President Thomas Jefferson pardoned those convicted under it.

Some scholars say the act, while deplorable in practice, was a good experience for the young nation. The lasting echoes of public revulsion over such a despotic measure are still heard today. As my Freedom Forum colleague Kevin Goldberg lyrically notes, "Although the Sedition Act was never tested in this court, the attack upon its validity has carried the day in the court of history."

The U.S. Supreme Court considered just a handful of First Amendment cases during the century (1791-1889) following ratification of the First Amendment, according to First Amendment scholar Michael Gibson.[29] In 1821, in Anderson v. Dunn,[30] the high

court referred to freedom of speech and freedom of the press — in what is believed to be the first time — in a case involving the charge of contempt of Congress.

ANTISLAVERY SPEECH GAINS MOMENTUM

The rising debate over slavery prompted dramatic uses of the freedoms of speech and the press, as abolitionists published and circulated pamphlets, books and magazines to make their case.

As the Emancipation Proclamation and end of the Civil War freed formerly enslaved people, books and pamphlets aimed at educating those who had been denied even the ability to read and write — such as 1865's "The Freedman's Book" by Massachusetts activist Lydia Maria Child — contained the accounts of successful Black people of the era.[31]

CIVIL WAR TESTS SPEECH AND THE PRESS

During the Civil War, the prohibition against government restraint of speech and the press was ignored at times by President Abraham Lincoln's administration and his military leaders. Lincoln also suspended the due process right of habeas corpus, which had the effect of chilling the exercise of the rights of assembly and petition. In 1863, Union Gen. Ambrose Burnside ordered the *Chicago Times* to stop publishing, charging it with printing disloyal items and inciting violence, an order that was reversed days later by Lincoln.[32]

However, in 1864, Lincoln himself ordered two newspapers to cease publication, and Gen. John A. Dix arrested the editors of the *New York Journal of Commerce* and the *New York World*, claiming that the two newspapers had printed a false presidential conscrip-

tion order. President Lincoln later rescinded the order and vacated the arrests.[33]

FOURTEENTH AMENDMENT EXTENDS FIRST AMENDMENT TO STATE LAWS

On July 9, 1868, the 14th Amendment to the Constitution was ratified, providing due process under the law and "equal protection of the laws," setting the basis for later actions called incorporation, that is, mandating that state laws that touch upon First Amendment freedoms be evaluated by courts under the same strict scrutiny rule as are federal statutes.

CONGRESS' "SILENT PERIOD" ENDS WITH A FLURRY OF ANTIOBSCENITY "COMSTOCK LAWS"

While it would be decades before the U.S. Supreme Court would fully confront First Amendment issues, on March 3, 1873, Congress approved the "Act of the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use."[34]

Advanced by young lobbyist and activist Anthony Comstock and supported by wealthy backers, the law criminalized:

> *"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calcu-*

> *lated to lead another to use or apply it for preventing conception or producing abortion."*[35]

Comstock was granted a U.S. Post Office "special agent" position with arrest powers three days later.

As recounted in "The Mind of the Censor and the Eye of the Beholder," by noted First Amendment lawyer Robert Corn-Revere,[36] Comstock's pervasive and persistent enforcement efforts resulted in thousands of arrests and the suppression of millions of books, magazines and pamphlets. By the 1920s, most states had passed their own versions of the "Comstock laws." These laws would continue to restrict Americans' freedom to read until a series of Supreme Court decisions beginning in the 1950s reset the nation's definition of obscenity.

REYNOLDS RULING: A FIRST TEST OF RELIGIOUS FREEDOM

In 1878, in Reynolds v. United States,[37] the Supreme Court issued one of its first rulings about religious freedom. The court held that a federal law prohibiting having more than one spouse simultaneously did not violate the free exercise clause of the First Amendment. The decision reaffirmed the right to hold religious beliefs but also made clear that the government could place restrictions on the practice of those beliefs.

In his written opinion on behalf of a unanimous court, Chief Justice Morrison Waite framed the central issue and the justices' response:

> *"Can a man excuse his practices to the contrary [of a criminal law] because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."*[38]

THE SUFFRAGISTS' TOOLKIT INCLUDES THE FIRST AMENDMENT

The women's suffrage movement before and after the Civil War made great use of First Amendment freedoms to press the call for women nationwide to gain the right to vote. Magazines, marches, banners, posters, petitions and rallies — and, at times, civil disobedience outside the protection of the First Amendment — were all part of the suffragist toolkit.[39]

THE TRANSITION BEGINS: DECIDING ON THE LIMITS, PROTECTIONS FOR USE OF THE FIVE FREEDOMS

TWENTIETH CENTURY TRANSFORMATIONS

Economic and social transformation accelerated through the end of the 19th and beginning of the 20th centuries. The U.S. population moved in large numbers from rural areas to industrial centers. Social changes saw women gain the vote, progressive political movements, the establishment of powerful mass media, and challenges on the world stage, which included the expansion of inter-

national trade and immigration, and the rise of communism and socialism at home and abroad.

Fear of involvement in World War I, already raging in Europe, sparked national security concerns which, in turn, had an impact on First Amendment freedoms. In particular, the Espionage Act, adopted in 1917, would have long-lasting implications for the disclosure of classified materials and the protection of news sources.

In the 1920s and 1930s, protection for First Amendment freedoms also ramped up. Some see this expansion as part of the growing prominence of the federal government in national life. During this period, the federal government assumed new and expanded roles and responsibilities, such as:

- Many New Deal economic, employment and social service programs.
- 1935's landmark Social Security Act.
- The rise of unionization, during which public demonstrations and pamphlet distribution by organizers sparked arrests and drove violent clashes with police.

PRIOR RESTRAINT VS. POST-PUBLICATION PUNISHMENT

The first free-press case, Patterson v. Colorado,[40] predated World War I. In 1907, the U.S. Supreme Court declined to review (citing lack of jurisdiction) the conviction of Denver newspaper publisher and U.S. Sen. Thomas Patterson for publishing articles and a cartoon that criticized the Colorado Supreme Court.[41] While the court's specific ruling no longer holds, this case did

establish the enduring principle that the freedoms of speech and the press only prevent prior government restraint and do not bar penalties after publication — a posture taken in the Pentagon Papers case some 66 years later.

WORLD WAR I SETS THE STAGE FOR WARTIME FREEDOM COMPROMISES

As the United States entered World War I, the nation became wary of foreign spies in its midst and of what we today would call domestic terrorists.

Just one month after taking office, President Woodrow Wilson asked Congress for a declaration of war against Germany.

PRESIDENT WILSON LIMITS FREEDOMS

From his speech to Congress onward, Wilson favored strict penalties for anyone who criticized U.S. involvement in World War I. He even proposed direct press censorship during wartime, an idea that failed in Congress. As some historians have suggested, there's more than a little irony in Wilson's speech to Congress calling for protection of liberty while proposing laws threatening liberty.

Though the speech would spark a series of laws and government actions that are now seen as an assault on First Amendment freedoms, Wilson declared to the House and Senate:

> *"The world must be made safe for democracy. Its peace must be planted upon the tested foundations of political liberty. ... We are but one of the champions of the rights of*

> *mankind. We shall be satisfied when those rights have been made as secure as the faith and the freedom of nations can make them."*[42]

ESPIONAGE AND SEDITION ACTS DURING WORLD WAR I

In 1917, Congress passed the Espionage Act,[43] making it a crime "to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service of the United States." And in 1918, a new Sedition Act — repealed a decade later — went into effect, penalizing spoken or printed criticism of the U.S. government, the Constitution or the flag.

FBI CREATED TO FERRET OUT RADICAL LEADERS AND CHILL ANTI-GOVERNMENT SPEECH

The FBI's website notes that on June 2, 1919, "a militant anarchist named Carlo Valdinoci blew up the front of newly appointed U.S. Attorney General A. Mitchell Palmer's home in Washington, D.C. — and himself up in the process when the bomb exploded too early," as part of a coordinated eight-city series of attacks on public officials.[44]

Public anxiety was high already, according to the FBI, because of the unfortunate confluence of several worldwide events: the Spanish flu pandemic, the Bolshevik Revolution in Russia resulting in the Red Scare in the United States, and frequently violent labor strikes and job actions across the nation.[45]

In response to perceived threats of domestic terror, Palmer established the Bureau of Investigation, which later became the Federal Bureau of Investigation. The agency's mission was to identify and arrest radical leaders and foreigners with anarchic

or communist leanings. The popular anarchist Emma Goldman was one casualty of the early FBI's aggressive enforcement agenda and was arrested and deported to Russia in 1919.

In 1920, a major national roundup led to thousands of arrests and came to be known as the Palmer Raids. After a few years, criticism of the manner and legality of the arrests grew louder. In the end, most charges were dropped, but more than 300 foreigners were deported.[46]

Nonetheless, this period in American history set the stage for a pattern: national concern about — and some would say overreaction to — foreign espionage, domestic security and the threat of economic disruption, followed by reactionary restriction of First Amendment freedoms.

COURT ESTABLISHES LASTING FREE SPEECH PRECEDENTS

THE REAL STORY BEHIND "FIRE IN A CROWDED THEATER"

In Schenck v. United States,[47] decided in 1919, the Supreme Court made this flowing declaration:

> *"When a nation is at war, many things that might be said in a time of peace are such a hinderance 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."*

In that decision, Justice Oliver Wendell Holmes — using his now famous, but oft misquoted, test of someone falsely crying "fire" in a theater[48] — reaffirmed the fundamental idea that not all

speech is entitled to First Amendment protection. In doing so, he established the "clear and present danger test," which has since been abandoned, for testing claims to constitutional protection. Holmes outlined the following litmus test for the type of speech outside of protection: "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."

A MARKETPLACE OF IDEAS

In the same year, Justice Holmes, in a dissenting opinion in Abrams v. United States,[49] described the rationale supporting the "marketplace of ideas" theory of the First Amendment. According to this theory, which relies upon near total freedom of speech, the best ideas will emerge and gain acceptance in society from discussions in which all may participate and be heard without fear of government restraint or punishment and that "Congress certainly cannot forbid all effort to change the mind of the country."

ACLU REACTS TO PALMER RAIDS

In January 1920, the American Civil Liberties Union was formed, in part as a reaction to the Palmer Raids. One of the first ACLU pamphlets encapsulated the concerns of its founders in a simple phrase: "with the exception of some search and seizure decisions, the Court 'has gone over to the side of repression.'"[50]

GITLOW V. NEW YORK INCORPORATES FREE SPEECH PROTECTIONS AGAINST THE STATES

In 1925, in Gitlow v. New York,[51] the Supreme Court upheld the conviction of the author of a seditious manifesto, but in so doing,

added that free speech protection under the First Amendment applies to the states through the due process clause of the Fourteenth Amendment.

BRANDEIS LAYS OUT A FREE SPEECH FRAMEWORK

Two years later, in a concurring opinion in Whitney v. California,[52] Justice Louis Brandeis famously wrote, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

BRANDEIS' FUNDAMENTAL FREE SPEECH PRINCIPLES

Given that more Americans today identify free speech as the most important of the First Amendment's five freedoms, it's worth spending time on Justice Brandeis' concurrence in Whitney where he laid out some fundamental principles about freedom of speech — its scope and limits — the consequences of which reverberate today. Brandeis wrote:

> "[T]hough the rights of free speech and assembly are fundamental, they are not, in their nature, absolute. Their exercise is subject to restriction ... in order to protect the State from destruction or from serious injury, political, economic, or moral. That the necessity ... does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled [in Schenck v. United States] ...

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.

"They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones.

"Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

"Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. ...

"In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

"Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

"Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass.

"But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, wastelands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.

"The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."[53]

FISKE V. KANSAS INCORPORATES FREE SPEECH TO THE STATES

In 1927, in Fiske v. Kansas,[54] the Supreme Court overturned the conviction of a man who had distributed labor union pamphlets, saying that the arrest violated the due process clause of the Fourteenth Amendment, applying through "incorporation" the First Amendment's protection of freedom of speech to bind the states in their ability to restrict speech.

DURING GREAT DEPRESSION, SUPREME COURT EXPANDS FIRST AMENDMENT PROTECTIONS

The 1930s saw massive social, political and economic turbulence across the nation, spurred by the Great Depression. The first five years of the decade were marked by revived concerns about the influence of socialism and communism on American life and the U.S. government, and the last five by mounting anxiety over yet another world war. These bookends set the national context in which the Supreme Court reviewed free speech protections and limits.

Two cases arrived before the Supreme Court in 1931: Stromberg v. California[55] and Near v. Minnesota.[56] The cases provided an opportunity for the court to extend firmly established protection of the spoken word to nonverbal, "expressive" conduct and set out a ban on prior restraint of the press.

In Hamilton v. Regents of the University of California,[57] decided in 1934, the Supreme Court upheld the right of states to require male university students to complete, as part of their mandatory coursework, a class in military science. In reaching its decision, the court cited the importance of military readiness to national security and noted that the suspended students,

who were members of the Methodist Episcopal Church and who objected to the requirement based on religious belief, were free to attend another university. In a concurring opinion, three justices, including Justice Brandeis, set out that the free exercise clause of the First Amendment applied to state statutes as equally as it did to federal law.

In 1937, in DeJonge v. Oregon,[58] state officials arrested a speaker at a local communist party meeting and charged him under a state criminal law aimed at disrupting organizations that advocated for worker takeover of the means of production. The U.S. Supreme Court vacated DeJonge's criminal conviction and held that "peaceable assembly for lawful discussion cannot be made a crime," and that the government cannot take actions to prevent the holding of such meetings.

THE DOCTRINE OF INCORPORATION: APPLYING THE FIRST AMENDMENT TO THE STATES

Even though earlier court decisions effectively accomplished this regarding some freedoms, Justice Benjamin Cardozo, in Palko v. Connecticut,[59] in 1937, set out clearly the process of incorporation — or "absorption" — of First Amendment rights to bind state laws and state government. Justice Cardozo wrote the following principle into law:

> "[T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress ... or the like freedom of the

> press ... or the free exercise of religion ... or the right of peaceable assembly, without which speech would be unduly trammeled ... In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."

In Thornhill v. Alabama,[60] the U.S. Supreme Court, in 1940, struck down the criminal conviction of Bryan Thornhill, who was arrested for participating in a picket line. In so doing, the court affirmed Americans' right to picket and protest because protest over labor conditions was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." The court's ruling held that, "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."

That same year, the Supreme Court, in Cantwell v. Connecticut,[61] incorporated the free exercise of religion clause of the First Amendment.

Newton Cantwell and his sons, all Jehovah's Witnesses, were going door to door in a Connecticut neighborhood and approaching passersby. Two people approached on the street protested, and the Cantwells were arrested for failing to obtain a solicitation permit and for disturbing the peace.

The Supreme Court voted unanimously in favor of the Cantwells, saying the state statute wrongly allowed local officials to target religion-based solicitation, and that while the Cantwell's faith message may offend, it did not threaten bodily harm to anyone.

WORLD WAR II-ERA CASES FOCUS ON PATRIOTISM AND FIGHTING WORDS

THE PLEDGE OF ALLEGIANCE AND COMPELLED SPEECH

As U.S. involvement in World War II loomed, two court rulings in 1940 and 1943 set out the right of all to decline to recite the Pledge of Allegiance. In 1940, the Supreme Court upheld a Pennsylvania ordinance mandating all students salute the flag and recite the Pledge of Allegiance, in Minersville School District v. Gobitis.[62] In that case, the Gobitas children (whose name was misspelled in court documents) had been expelled from school for abstaining from the pledge. Their parents, devout Jehovah's Witnesses, argued that their faith required them to pledge allegiance only to God. But, in an 8-1 decision, the court said, "We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security."

But during the next three years, the justices were appalled by reports of violence directed at people who refused to recite the pledge, often for religious reasons.

After what historians say was obvious "case-shopping," (looking for a case which the court could use for its own purposes) in West Virginia State Board of Education v. Barnette[63] in 1943, the Supreme Court reversed itself. At issue, as with Gobitis, was

a mandatory flag-salute ritual in the classroom and expulsion for students who refused to participate. In a 6-3 vote, the Supreme Court reversed its decision in Gobitis, saying no one can be forced to recite the pledge.

Writing for the majority, Justice Robert H. Jackson said, "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."

FIGHTING WORDS DOCTRINE

In 1942, the Supreme Court, in Chaplinsky v. New Hampshire,[64] addressed so-called "fighting words," which "by their very utterance, inflict injury or tend to incite an immediate breach of peace." In a unanimous decision, the court said the First Amendment does not protect words without "social value."

In 1949, the justices refined Chaplinsky by limiting government power to criminalize speech that leads others to disorderly conduct. In Terminiello v. Chicago,[65] a priest was arrested for inciting an angry crowd. On appeal, the high court refused to characterize the priest's speech as "fighting words," saying "a function of free speech under our system of government is to invite dispute" even if it "stirs people to anger."

The fighting words doctrine came into play some 50 years later as the justices considered whether and to what extent "hate speech" falls outside of First Amendment protection, specifically, cross-burning with the intent to intimidate, an issue examined by the court in Virginia v. Black in 2003.[66]

POST-WAR ERA: 1950s SOCIAL MORES AND ENTERTAINMENT

The 1950s were a time of rapid economic expansion. The start of the Cold War face-off with the Soviet Union and the impact of post-war prosperity produced a new generation with more opportunity for life changes. The Baby Boom impacted families and culture and created a growing concern about social issues. The period also saw the birth of the modern Civil Rights Movement, the explosive growth of television, and the rabidly anti-communist McCarthy era marked by the blacklisting of suspected communists throughout all levels of government and the entertainment industry.

In 1954, Congress added the words "under God" to the Pledge of Allegiance[67] and, in 1956, adopted "In God We Trust" as the national motto[68] — with President Dwight Eisenhower endorsing the moves as a means to combat communism's anti-religion posture.

ENTERTAINMENT INDUSTRY GAINS FIRST AMENDMENT PROTECTIONS

The 1950s saw an extension of First Amendment press and speech protection to the silver screen, kicking off an evolution of First Amendment protections for other kinds of entertainment. In 1915, the U.S. Supreme Court had decided that the then-fledgling film industry did not merit free speech protection. The rationale underlying the court's 9-0 opinion in Mutual Film Corp. v. Industrial Commission of Ohio[69] was simple: "The exhibition of moving pictures is a business, pure and simple, originated and conducted for profit ... not to be regarded, nor intended ... as part of the press of the country, or as organs of public opinion."

Over time, however, it became apparent that films were, in fact, a major social force interwoven with the nation's culture. The 1952 Joseph Burstyn Inc. v. Wilson[70] decision recognized as much when the Supreme Court held that the First Amendment prohibited New York state from banning from theaters the film "The Miracle." The Roman Catholic Church's National Legion of Decency had given the movie a "C" (condemned) for its sacrilegious content.

In much the same vein as Burstyn, in Bantam Books Inc. v. Sullivan,[71] the court found the actions by the Rhode Island Commission to Encourage Morality in Youth went beyond merely advising book distributors and sellers about following the law to actions intended to suppress speech.

HOLLYWOOD SELF-CENSORS

At about the same time, filmmakers began ignoring the movie industry's self-imposed Hays Code (or production code),[72] which had been instituted industry-wide in the 1930s to avoid government censorship. The code was eventually replaced in 1968 by the Motion Picture Association of America rating system[73] of G, PG, R, and X or NC-17, warning the film is not intended to be shown to those under age 18.

A half-century following its "The Miracle" decision, the court held in 2011, in Brown v. Entertainment Merchants Association,[74] that even video games are a form of speech protected by the First Amendment. By that ruling, the court refused to add "violent content" to the very short list of types of speech that do not receive First Amendment protection.

Unprotected Speech Types: Incitement, true threats, fighting words, obscenity, defamation and speech used in criminal acts such as fraud.

MCCARTHYISM BRINGS BLACKLISTING AND PRESS CENSORSHIP

Among the constellation of free press and free speech setbacks and milestones of the late 1940s and early 1950s, some of the most important are:

- ★ The development of the practice of "blacklisting" nonconformists during the McCarthy years under the cloak of anti-communism.
- ★ The rise of television news.
- ★ The introduction by the Federal Communications Commission of the fairness doctrine for broadcasters.

CONGRESS FEARS SPECTER OF COMMUNISM IN HOLLYWOOD

The practice of "blacklisting" was deployed during the anti-communist fervor that gripped the nation in the years following World War II and the start of the Cold War. It was largely driven by Republicans in Congress, particularly by Sen. Joseph McCarthy of Wisconsin, who was a master of using the press to hype what proved to be largely fictitious lists of communists he claimed had infiltrated the U.S. government and other areas of American life.

While congressional hearings about communist influence in the U.S. film industry began in 1941, it was the 1947 hearings by the

U.S. House Un-American Activities Committee that marked the start of blacklisting.

In Hollywood and in New York, still the centers for broadcast radio and television, lists were drawn up of people with supposed communist or subversive connections. Movie studios reportedly used the lists to demonstrate "patriotism" to the public — and avoid business losses. Mere rumors were enough to cost screenwriters and others their jobs, after which they became virtually unemployable. Blacklists also were created or promoted by powerful private entities, from the magazine *Red Channels* to the American Legion.

As part of its report on the McCarthy era,[75] The First Amendment Encyclopedia notes that opponents of Congressional contempt citations for Hollywood professionals who refused to testify argued that HUAC had conducted its inquiry illegally. In speaking out against the committee, Rep. Herman P. Eberharter of Pennsylvania asserted that the House had the choice of supporting either HUAC or free speech. "We cannot do both," he said. "I cannot escape the conclusion ... that the purpose of this committee was not to destroy an existent subversive threat in Hollywood, but to intimidate and control the movie industry."

The blacklist era in films began to unravel when Hollywood star Kirk Douglas and director Otto Preminger gave blacklisted writer Dalton Trumbo screenwriting credit for the movie "Spartacus," released in 1960, successfully defying both Congress and major studio bosses.[76]

HOLLYWOOD REVISITS BLACKLISTING

Through film, Hollywood has examined the blacklisting era. Among the films that depict the collective madness of the McCarthy era, the top pictures include "The Front" (1976);[77] "Guilty by Suspicion" (1991);[78] "Good Night, and Good Luck" (2005)[79] and "Trumbo" (2015).[80]

NEW JOURNALISM VALUES, PLATFORMS AND POLICIES

In this same era, media leaders produced a new, modern school of newspaper journalism rooted in "accountability," and the government tried to provide "fairness" in the broadcast industry.

A Call for New Journalistic Values

After World War II and through the early post-war era, newspapers continued to serve as the dominant news source for most Americans. Academics and industry leaders identified a need to examine how the American press operated — from dominance by press moguls to a legacy of tabloid journalism — and to chart a new path following tacit cooperation with wartime censors in the name of national security and patriotism.

A Commission on the Freedom of the Press, known as the Hutchins Commission, was formed.

According to the Poynter Institute,[81] on March 27, 1947, Robert M. Hutchins, the president of the University of Chicago, published the commission's report, "A Free and Responsible Press."[82] The report concluded that freedom of the press was in danger. The commission cautioned against ownership concentration of newspapers, rising costs, and the media's preoccupation with sensa-

tional news. The commission felt that the media needed to take more responsibility for its actions and take more care to pursue stories and report in the public interest.

REGULATION OF THE MEDIA THROUGH THE FAIRNESS DOCTRINE

Courts had held that government regulations for electronic media, because they used public airwaves, would not apply to print media due to the First Amendment. The fairness doctrine, imposed in 1954 by the Federal Communications Commission with support from Congress, mandated that publicly licensed broadcasters provide varied views on issues of importance to the public.

The U.S. Supreme Court validated the doctrine in 1969, in Red Lion Broadcasting Co. v. FCC,[83] by upholding an FCC rule that radio or television stations must allocate airtime for a response by a political figure named in personal attacks or commentary.

But several rulings also made clear that newspapers and satellite and cable TV stations — because the latter do not use public airwaves — were outside such requirements. By the mid-1980s, the fairness doctrine was seen as out of step with both the broader culture and with the reality of modern media. In 1987, the FCC repealed the rule.[84]

Occasionally there are calls to reinstate the rule, often by the very liberals who would have opposed the government regulation in its early years. Conservatives now see the reinstatement movement as aimed by liberals at the conservative-dominated talk radio industry and at conservative television operations like Fox News, to force progressive voices into programming. In the early 1990s, such efforts were tagged as "Hush Rush" (Limbaugh) leg-

islation.[85] And after Jan. 6, 2021, such a "fairness doctrine" regime again was proposed by a few liberal lawmakers as an antidote to what they saw as deliberate misinformation being broadcast by ultra-right-wing online and cable outlets.[86]

COMEDY, CENSORSHIP AND OBSCENITY

Today, comedians concede that they self-censor, avoid booking college campuses where so-called political correctness may provoke negative reviews, and fear blowback on social media for offending one group or another.[87]

But in the 1960s performer Lenny Bruce's commentary provoked frequent government censorship and arrests. The nature of his expletive-laced stand-up routine challenged laws on profanity. Bruce was "a hipster who worked with junkie jazz bands and hooker strippers [and who] became a defender of the Constitution simply by repeating common words for body parts, excreta, and sexual activity," according to the *Kirkus Review*.[88] In an outstanding look at Bruce's career, "The Trials of Lenny Bruce," authors Ronald L.K. Collins and David M. Skover detail how those legal challenges helped to clear a path for generations of comics to follow.

The *Review* noted that beginning in 1961:

> *"Arrests followed across the country, culminating with the most hotly contested trial in New York. By 1970, the case against Bruce's co-defendant (operator of the club where he uttered the words) was overturned. But it was too late for Bruce. He died more than three years before of a morphine overdose ... sick, bankrupt, and killed, some said, by the law."*

Another significant case involving a comedian stemmed from George Carlin's "Seven Dirty Words You Can't Say on Television." The Supreme Court, in a 1978 case based on Carlin's monologue being heard on a car radio, FCC v. Pacifica Foundation,[89] ruled that because the public owned the airwaves, the FCC could fine broadcasters who presented obscene, indecent or profane language outside of certain time periods or in certain cases.

THE SUPREME COURT CONSIDERS THE QUESTION OF OBSCENITY

Touching on the emotionally charged issue of obscenity, the Supreme Court held in Roth v. United States,[90] in 1957, that obscene speech "is not within the area of constitutionally protected speech or press." The notable portion of the decision was the determination that what constitutes obscenity be measured against "contemporary community standards." The articulation of this evolving standard continues to shape the landscape of obscenity law.

Nine years later, in Memoirs v. Massachusetts,[91] the court elaborated further on the standard for obscenity when it said that a work cannot be classified as obscene unless it is "utterly without redeeming social value." And in 1969, in Stanley v. Georgia,[92] the court held personal possession of obscene works at home cannot be made a criminal offense.

THE COURT FINALLY DEFINES OBSCENITY

In 1973, the court finally provided a definition of "obscenity," thereby greenlighting hundreds of government prosecutions. According to the Supreme Court in Miller v. California,[93] the test for obscenity was a fact-based one following an average viewer

standard. For a work depicting sexual activity to be obscene, and thus subject to government restraint, the Miller test asks whether:

> *"The 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ... depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and ... the work, taken as a whole, lacks serious literary, artistic, political or scientific value."*

THE CIVIL RIGHTS MOVEMENT

The Civil Rights Movement may well be the most significant use of all five First Amendment freedoms in the nation's history.

From its roots in freedom of conscience and religion, through its use of speech and the press to make the case for equality to the American people, to assembling and petitioning the government for a redress of the centuries-long grievances flowing from racial segregation and disenfranchisement of Black citizens, it was the First Amendment that provided legal protection for voices and views that had for too long been suppressed.

As the Rev. Martin Luther King Jr. would proclaim, even when denied other basic rights, Black people had the right to petition for their rights.

THE PRESS SHINES A LIGHT ON THE BATTLE FOR EQUITY

Without the news media, the modern Civil Rights Movement "would have been as a bird without wings," civil rights hero and

U.S. Rep. John Lewis of Georgia was fond of saying of news coverage in the 1950s and 1960s.

Still-fledgling national network television news operations focused the nation's eyes on the movement's sit-ins, freedom marches and voting rights efforts. On-the-scene reporting by journalists touched the conscience of a nation. In combination, the impact of the images, words and photos broke through the bias, ignorance and neglect that had previously characterized biased or absent news reporting by mainstream news outlets large and small.[94]

THE SUPREME COURT USHERS IN POST-"SEPARATE BUT EQUAL" ERA

In 1954, the Supreme Court unanimously declared in Brown v. Board of Education[95] that the segregationist doctrine of "separate but equal" was unconstitutional. The court's holding and constitutional reasoning in the case redefined government, our society and our very selves, according to Professor Emeritus Robert Bickel of the Stetson University College of Law.

MAKING A CHANGE: THE FIRST AMENDMENT AND THE CIVIL RIGHTS MOVEMENT

See how advocates for and against political and social change in the civil rights era leveraged the five freedoms of the First Amendment to ensure their voices were heard in the free multimedia course from Freedom Forum. The course by Robert Bickel includes video interviews with leading figures in civil rights history and historical front pages from the period.[96]

Structurally and philosophically, Bickel wrote, the federal legislature, the court and the presidency united behind an aspirational vision in the way that French historian Alexis de Tocqueville had envisioned in his 1835 treatise "Democracy in America."

DR. KING HARNESSES THE POWER OF PROTEST

Professor Bickel wrote that in this watershed moment, a young Rev. Dr. Martin Luther King Jr. emerged on the civil rights scene at the urging of older leaders of who saw in him the fresh, modern advocate that the movement and the unique historical moment called for. These leaders hoped to translate the win in the Brown decision into further gains for African Americans, many of whom lived everyday under a system of legalized segregation in the South.

King understood the importance and power of the First Amendment. His first words in Montgomery, Alabama, in defining the beginning and foundation of the bus boycott as the seminal effort to make Brown's promise real, were as simple and powerful as Frederick Douglass' call to action nearly 100 years earlier for the abolition of slavery. Douglass had told a celebratory crowd on July 4, 1852, that to remedy the nation's racial inequities it was "not light that is needed, but fire; it is not the gentle shower, but thunder. We need the storm, the whirlwind, and the earthquake."[97]

In 1955, King found the perfect words for the modern nonviolent equivalent that would inspire in his followers the same fire, thunder, whirlwind and quake required for meaningful social change: "The only weapon that we have in our hands this evening is the weapon of protest. That's all."[98]

Energized by Dr. King's leadership, the Montgomery bus boycott of 1955 set out to change the nation — and sparked social change and examination that continues today.

DESPITE PUSHBACK, COURTS REAFFIRM CIVIL RIGHTS

Fostered by First Amendment protection, peaceful mass protest gained momentum for a decade throughout the South. In turn, the movement propelled federal courts to reaffirm Brown in its most expansive terms — with a free press and free speakers reporting on every victory.

These cases challenged the courts from within to publicly oppose those Southern district and appellate judges interested in maintaining the status quo of legalized segregation. The doctrine of interposition,[99] the pre-Civil War theory that states could pass laws that, in effect, "stood between" their citizens and the U.S. Constitution, the Bill of Rights and federal law, had to be overturned once and for all as an unconstitutional expansion of states' rights.

In one such case, the U.S. Supreme Court defended the right of assembly in 1958, when it rejected a demand from Alabama authorities that the NAACP hand over its membership list. In NAACP v. Alabama,[100] the court found that the intent of the request was, in effect, to intimidate current and future members of the group, rather than to fulfill a legitimate public interest.

FREEDOM TO ASSEMBLE FRONT AND CENTER

The freedom to assemble was also front and center in 2000, in Boy Scouts of America v. Dale,[101] where a bare 5-4 majority of the justices held that the Boy Scouts of America, a private group, could not be required — under a New Jersey law dealing with public accommodations — to accept a gay scoutmaster.

Defendants opposing attempts by authorities to identify participants in the Jan. 6, 2021, attack on the U.S. Capitol have cited the NAACP and Dale cases as precedent against the legality of police investigative efforts to use online membership lists to find and charge the rioters who stormed the building.

Today's Black Lives Matter movement and marches across the nation large and small are this era's equivalent to the 1965 Selma-to-Montgomery march across the Edmund Pettus Bridge. That protest was bolstered by one of the most seminal civil rights decisions in the movement's history: federal district court Judge Frank Johnson's decision and opinion in Williams v. Wallace.[102]

Johnson wrote that Alabama officials had acted illegally when they took steps to discourage voting rights protests in the state. "The law is clear that the right to petition one's government for the redress of grievances may be exercised in large groups," wrote Johnson. "Indeed where, as here, minorities have been harassed, coerced and intimidated, group association may be the only realistic way of exercising such rights."

As David Halberstam wrote in his 1993 book "The Fifties," the Civil Rights Movement educated the news media, and the media educated America. As Judge Johnson noted regarding petition, First Amendment freedoms powered every aspect of that education, from protecting the rights of those marching to providing a free press to help those in the movement touch the conscience of the nation.[103]

The protests and petitions of the 1950s and 1960s led to the White House and Congress taking ownership of their duty to enforce the human rights identified in Brown — and that required bipartisan political commitment and action.

THE 1960s AND 1970s BRING ENDURING COURT PRECEDENTS

The 1960s saw massive social challenges and upheavals. Vietnam War protests, a new youth culture and changing attitudes about religion, politics and social justice tested the First Amendment in novel ways.

The 1970s saw a raft of decisions by the Supreme Court. These decisions have had enduring impacts on us today, from questions about the operations of a free press to the extent to which the amendment protects speech and religious practices. Also during this period, the nation faced the Watergate scandal, President Richard M. Nixon's resignation, steep inflation, the end of the Vietnam War and resurgent political conservatism.

HISTORIC RULINGS ON SCHOOL PRAYER

In 1962, in Engel v. Vitale,[104] the Supreme Court made a historic ruling that state-sponsored nondenominational prayer violates

the establishment clause. The ruling is often erroneously portrayed as banning all prayer in public schools, rather than its more modest holding, which banned only prayer sponsored or imposed on students by school officials.

One year later, the high court struck down a Pennsylvania public school requirement that called for daily Bible reading in the classroom in School District of Abington Township v. Schempp.[105] Despite the state's argument that reading from the Bible was not an exercise designed to promote religious faith, but rather a neutral one to instill in students secular moral values, the court, led by Justice Thomas Clark, found for the objectors and wrote:

> *"They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion. ... It is no defense to urge that the religious practices here today may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent."*

The Lemon Test

1971 saw the court establish landmark rules on state funding for parochial schools engaged in religious instruction, which opponents argued violated the establishment clause. In Lemon v. Kurtzman,[106] the Supreme Court crafted the famous three-part Lemon test to determine the lawfulness of such aid. According to the court, any state statute authorizing funding:

1. Must have a secular purpose.
2. Its primary effect must neither advance nor inhibit religion.
3. There must be no excessive "government entanglement" inherent in the administrative provision of aid.

The decision stuck down a Pennsylvania law allowing the state to reimburse Catholic schools for the salaries of its teachers. The court said the law violated the establishment clause, which prohibits the federal and state governments from endorsing a "state religion."

PRECEDENTS TO PROTECT SPEECH AND PRESS

Landmark New York Times v. Sullivan Press Freedom Ruling

In 1964, the court delivered a watershed free press decision, New York Times Co. v. Sullivan,[107] which set an "actual malice" standard for public officials to win a defamation lawsuit. The standard requires proof that the originator of the statement knew it was false or proceeded with reckless disregard for its truthfulness.

The *Times* had published an ad detailing claimed abuses against Black students by Montgomery, Alabama, police. Lester Sullivan, the city's police commissioner, sued the newspaper for defamation, citing several minor inaccuracies.

The Sullivan decision included two memorable observations:

★ 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 sometimes unpleasantly sharp attacks on government and public officials."

★ "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive.'"

Three years later, in Curtis Publishing Co. v. Butts,[108] the requirement to show actual malice was expanded to include public figures of all kinds. A series of cases[109] further defined the meaning and application of the actual malice standard. In 1991, Masson v. New Yorker Magazine Inc.[110] would determine that even deliberately altering attributed quotes would not necessarily be actual malice, if the altered words were faithful to the intended meaning of a speaker.

In a review of Masson,[111] scholar Kathy Roberts Forde quoted from Justice Anthony Kennedy's majority opinion, where he said, "writers and reporters, by necessity, alter what people say, at the very least to eliminate grammatical and syntactical infelicities."

Citing the case's impact on narrative journalism — i.e., storytelling to convey news — the court created a "material alterations" test, in which a defamation claim might be supported if "the alteration results in a material change in the meaning conveyed by the statement."

NEW YORK TIMES CO. V. SULLIVAN MAKING HEADLINES TODAY

The New York Times Co. v. Sullivan decision continues to make headlines today. Both Justice Clarence Thomas and Justice Neil Gorsuch have criticized the logic and the impact of the decision.[112] Thomas would toss the entire decision, saying it has no basis in the original text of the Constitution. Gorsuch stops short of wholesale repeal, but seemingly would drop or significantly change the "public figure" definition from Curtis, noting that the social media universe and opinion-centric news media environment we have today require changes.

Pickering Test

In 1968, the Supreme Court created what is known as the Pickering test.[113] The test requires courts to balance a citizen's right to comment on "matters of public concern," such as government corruption or waste, against the government's need for efficient operation. In Pickering v. Board of Education,[114] a high school teacher sued the board of education for wrongful termination and violation of his First Amendment rights. The teacher had been dismissed from his teaching position after the publication of his article in a local newspaper in which he criticized the board's financial plan for the school district. The school board said he was fired because he damaged the reputation of the school district. The court said the teacher had spoken as a private citizen and addressed "a matter of legitimate public concern," which, under their balancing test, weighed heavily in favor of speech protection. The court also said Pickering's right to free speech outweighed any damage to the district's reputation.

Symbolic Speech Tests

During this period, the court, in United States v. O'Brien,[115] also set out an analysis of whether "expressive conduct" associated with free speech is protected by the First Amendment. Several men burned their draft cards in protest of the Vietnam War. In holding that anyone who burned a draft card could face penalties, the court ruled 8-1 that because the government at times must be able to draft citizens for military service:

> *"It is within the constitutional power of the Government [to limit expressive conduct] if it furthers an important or substantial governmental interest [that is] unrelated to the suppression of free expression, and if the incidental restriction on the alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."*[116]

Landmark Rulings on Campus Speech

Student speech received landmark support in 1969, when the justices held in Tinker v. Des Moines Independent Community School District[117] that school officials may not stop or punish student self-expression unless they can reasonably forecast that it will cause a "substantial disruption" of the educational process or intrude on the rights of others.[118]

TINKER TODAY

While subsequent student speech and press decisions hollowed out some of the ground gained under Tinker, the decision was robust enough to be the essential underpinning of a 2021 court decision involving a cheerleader whose social media post with expletives the court held was protected speech and not grounds for school punishment.[119]

In 1973, the court's decision in Papish v. Board of Curators of the University of Missouri[120] reaffirmed that public universities cannot punish students for indecent or offensive speech that does not disrupt the orderly operation of campus affairs or interfere with the rights of others.

The Court's Limit on Speech That Incites

In the 1969 Brandenburg v. Ohio case,[121] the court held that speech advocating the use of force or criminal activity loses First Amendment protection when it is "directed to inciting or producing imminent lawless action," and when it is "likely to incite or produce such action." As Thomas Emerson observed in his 1976 paper "Colonial Intentions and Current Realities of the First Amendment," the court, in reaching its decision, parsed the crucial "dividing line between militant expression and illegal action."[122]

Supreme Court Protects "F--- the Draft" Jacket

In 1971, in Cohen v. California,[123] the Supreme Court reversed the breach-of-peace conviction of Paul Robert Cohen for wearing a jacket painted with the words "F--- the Draft" into a California

courthouse where he was scheduled to testify in an unrelated matter. In a close 5-4 decision for Cohen, the court ruled that offensive and profane speech is protected by the First Amendment.

Justice John Marshall Harlan II wrote that the language could not rightfully be called "fighting words" — a reason cited by the lower courts that had upheld Cohen's criminal conviction — because it did not target any specific person and, thus, could not be viewed as a personal insult or invitation to violence. Harlan also wrote that the language could be defended under the idea that "one man's vulgarity is another man's lyric," and that those offended by the words could simply look away rather than requiring the government step in to punish the speaker.[124]

In a 2016 interview with Freedom Forum Fellow David Hudson, Cohen said he never intended to cause a constitutional flap. A woman he met the night before had stenciled the words on the jacket. "I had a Ph.D. in partying back in those days," he said. "I wasn't trying to make a political statement."[125]

Still, Cohen — who never got his jacket back from authorities — said he agreed with the court's decision. "I came to the conclusion that I agreed with the decision simply because the government shouldn't be able to decide what speech an individual can or cannot speak. That would be quite a slippery slope."

The Pentagon Papers: Court Protects Press from Prior Restraint

The seminal 1971 case New York Times Co. v. United States,[126] commonly called the Pentagon Papers case, is a hallmark case for press freedom. But the enthusiastic response at the time did not, in retrospect, properly balance the Supreme Court's refusal to permit

prior restraint against the open invitation from a majority of the justices to possible prosecution of the press after publication.

Chief Justice Warren Burger, along with Justices John Marshall Harlan II and Harry Blackmun, voted in the minority to grant the government's request to bar publication of a top-secret report on the U.S. Department of Defense's engagement and conduct in the Vietnam War, which had been leaked to *The New York Times* and *The Washington Post* for publication.

Justices Hugo Black, William Douglas, William Brennan and Thurgood Marshall voted against blocking publication. Justices Potter Stewart and Byron White joined to create the majority, saying in this instance, the government's interest in national security could not overcome the "heavy presumption against" prior restraint of the press.

Justice Stewart acknowledged that the Pentagon Papers contained information:

> *"[T]hat the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable harm to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us."*[127]

The decision did leave open in the future the possibility of restraint where the government could show "direct, immediate and irreparable harm to the nation."

Justices White and Stewart also were clear that the government could prosecute a news operation *after* publication. White was particularly direct: "I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations." But, noting laws preventing the unauthorized possession of national defense documents or sensitive plans for military installations, he wrote, "I would have no difficulty in sustaining convictions under these sections on facts that would not justify ... the imposition of a prior restraint."

JOURNALIST PRIVILEGE PREVENTING DISCLOSURE OF SOURCES IS NOT ABSOLUTE

In 1972, the Supreme Court ruled in Branzburg v. Hayes[128] that the First Amendment does not exempt journalists from "the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task." This case made clear that reporters, when summoned to testify in federal court, cannot hide the identity of their confidential sources.

SPEECH, POLITICS AND MONEY

Political Speech in Private Spaces

Also in 1972, in Lloyd Corp. Ltd. v. Tanner,[129] the justices held that the owners of a shopping plaza could prevent anti-war activists from distributing leaflets there. The court held that people do not have an unlimited First Amendment right to free speech on private

property, even when that private property is generally open to the public, as is the case with a shopping center.

In 1974's Miami Herald Publishing Co. v. Tornillo,[130] the court held that newspapers cannot be required by law to provide space for a response from political candidates whom the paper had criticized. In today's media world, there have been proposals to require social media companies to permit candidate responses to online critics and to prevent those companies from refusing to carry any political ads. None of those proposals as yet has been successful.

Political Speech and Campaign Spending

A core element of First Amendment consideration in this area boils down to the principle that money in the form of campaign contributions is tantamount to speech.

In a flurry of legislation some 50 years ago — amid increases in contributions and spending in elections — Congress enacted the Federal Election Campaign Act of 1971, amended several times since,[131] and the Presidential Election Campaign Fund Act.[132]

In 1976, in Buckley v. Valeo,[133] the Supreme Court considered the constitutionality under the First Amendment of limiting donor spending and candidate expenditures. The court struck down limits on the spending by individual candidates but upheld mandatory disclosure of contributors. The ultimate effect was to create a host of other means of supporting candidates or political views, including political action committees that support candidates but are not connected or coordinated with campaigns.

CITIZENS UNITED AND ELECTION SPENDING

In 2010, the Supreme Court added definition to Buckley in Citizens United v. Federal Election Commission,[134] saying 5-4 that the First Amendment did not allow restrictions on corporate spending in elections for things like political ads but that a ban on direct contributions to candidates by corporations was legal.

REGULATING AND PROTECTING SPEECH BY BUSINESSES

First Amendment issues range widely in matters of daily life, such as decisions by towns or cities on zoning, advertising signage, advertisement of products and more.

Municipal Zoning Laws

In 1976, the Supreme Court held that cities could establish zoning laws that barred adult movie theatres within 1,000 feet of places like schools or churches or within 500 feet of residential areas. In Young v. American Mini Theatres Inc.,[135] the court determined that an ordinance passed by the city of Detroit was not improper prior restraint.

Ten years later, in 1986, the court said in City of Renton v. Playtime Theaters Inc.[136] that zoning laws and land use plans can be based on the anticipated, but speculative, harmful effects on the surrounding community, even if there's no specific evidence of such effects. This rationale came to be known as the "secondary effects" doctrine. For some First Amendment advocates, the doctrine opened the door for abuse by city officials.

Rules for Advertising

In 1976, the court also found that the public has a First Amendment right to consumer product information, such as advertisements about prescription drug prices, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc.[137] First Amendment advocates place this decision in line with other decisions supporting the idea that "money is speech."

INDECENT SPEECH ON THE AIR

In 1978, the power of the government to regulate "indecent speech" in broadcast media was upheld by the Supreme Court in Federal Communications Commission v. Pacifica Foundation,[138] in part because over-the-air programs were widely available to children and in part because the listener could never predict what would be heard over the public airwaves from one moment to the next. But the court also limited the authority to regulate to public broadcast media only, excluding from its ruling cable TV, satellite, and the online systems to come, since users there made at least one conscious decision to hear or see the content.

In 2000, the court, in United States v. Playboy Entertainment Group Inc.,[139] granted cable programming the highest level of First Amendment protection. This decision freed cable TV from having to scramble channels with sexually explicit content or to shut down during hours when children were likely to be watching.

Regulating Commercial Speech

Entering the 1980s, in Central Hudson Gas & Electric Corp. v. Public Service Commission,[140] the Supreme Court, 8-1, set forth a four-prong test for determining when commercial speech may be regulated by states. According to the court:

- Such speech must not be misleading or involve illegal business.
- Any regulation must deal with a substantial public interest.
- Any regulation must directly protect the public interest or achieve a goal identified with the public interest.
- The regulation must be at the minimum to achieve that public protection or goal.

This decision established that even commercial speech — long considered entitled to the lowest level of speech protection — could only be regulated for specific purposes (such as preventing fraud) and always in the least-restrictive manner possible.

Several subsequent decisions defined the limits and the range of First Amendment protections for commercial speech, notes Freedom Forum First Amendment Specialist Kevin Goldberg:

- Rubin v. Coors Brewing Co. (1995)[141] invalidated a federal statute prohibiting the disclosure of alcohol content on beer labels.
- 44 Liquormart Inc. v. Rhode Island (1996)[142] reaffirmed the Central Hudson test to invalidate laws prohibiting advertising of an alcohol's price anywhere other than at point of

sale, sparking lower courts nationwide to overturn a slew of advertising restrictions.

★ Greater New Orleans Broadcasting Association Inc. v. United States (1999)[143] again affirmed Central Hudson as it struck down federal statutes prohibiting the broadcast of casino gambling advertisements, even where the ads were seen in states that made gambling illegal.

CONSERVATISM DOMINATES THE 1980s

The 1980s saw the conservative political movement become a powerful national influence with the rise of religious conservatives and conservative-dominated talk radio. During this period, the Supreme Court set new guidelines on student speech and student press rights.

THE SUPREME COURT PROTECTS BOOKS IN SCHOOLS

In 1982, the Supreme Court found in Board of Education, Island Trees Union Free School District v. Pico[144] that books cannot be removed from school libraries simply because officials disapprove of the books' content.

Justice William Brennan wrote that while school officials "rightly possess significant discretion to determine the content of their school libraries," they cannot act "in a narrowly partisan or political manner." Brennan opined that:

> *"If a Democratic school board, motivated by party affiliation, ordered the removal of all books by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to*

> *those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration."*[145]

Brennan noted "Our Constitution does not permit the official suppression of ideas," and he cited the Barnette decision 40 years earlier that said, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

SUPREME COURT BACKS OFF TINKER PROTECTIONS FOR STUDENT SPEECH

In what would be a series of decisions to limit the student speech protection of the Tinker decision, the 1986 Supreme Court decision in Bethel School District v. Fraser[146] announced a new, pro-school administration rule. In that case, the student Matthew Fraser gave a "lewd and vulgar" speech to the student body boosting a high school government candidate. The court said the school administration had the power to censor student speech when the expression involved "a captive audience" such as a student assembly, because such speech was "disruptive and contrary to the values the school desired to promote."

Based on decisions in the years after Bethel, court watchers noted that both students and prisoners, as a practical matter, enjoy less speech protection than most other groups. In 1987, the high court upheld a Missouri corrections regulation limiting inmates' mail rights, after finding that the regulation was "reasonably related to legitimate penological interests."[147]

A year later, in Hazelwood School District v. Kuhlmeier,[148] the court held that school officials could censor a student newspaper if the censorship is "reasonably related to legitimate pedagogical concerns," given that the paper was a classroom exercise.

PARODY PROTECTED

In Hustler Magazine Inc. v. Falwell,[149] in an opinion by conservative Justice William Rehnquist, the justices said the First Amendment protected parody even given the magazine's lewd fake advertisement caricature of conservative public figure the Rev. Jerry Falwell. In reaching its unanimous decision, the court cited the extensive American tradition of such cartoons and written parody lampooning politicians and public figures.

CONGRESS AND COURTS SPAR OVER FLAG BURNING

The always-contentious issue of flag burning was revived when, in 1989, Congress passed the Flag Protection Act.[150] The act was aimed at anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any U.S. flag." However, later that year, the Supreme Court struck down a similar Texas law, in Texas v. Johnson,[151] and the court declared in 1990, in United States v. Eichman,[152] that the Flag Protection Act violated the First Amendment.

At various times, Congress has tried — and failed — to work around the two decisions and punish flag desecration, even going so far as to propose a constitutional amendment to that effect. Opponents of such an amendment argue against its efficacy on the grounds that:

- ★ Such laws are easily avoided (e.g., by burning a 51-star flag resembling the U.S. flag).
- ★ Such a change would be the first time the First Amendment was itself amended.
- ★ Such an alteration would impose an unprecedented constitutional limit on speech.

AMENDING THE CONSTITUTION TO REMOVE A RIGHT

Though not involving a First Amendment right, the only other attempt to amend the Constitution to curtail individual conduct — the 18th Amendment establishing Prohibition — was a resounding failure. Adopted in 1919, it went into effect in 1920 and was repealed in 1933. During the period in which Prohibition was in effect, bootlegging, and the organized crime that supported it, flourished.[153]

THE 1990s: RELIGION, HATE AND THE INTERNET

In 1995, in Rosenberger v. Rector and Visitors of the University of Virginia,[154] the Supreme Court approved a public university using mandatory student activity fees to fund printing costs of a newspaper with a Christian editorial viewpoint. The court said the funding program was neutral and not intended to support religious expression. Rather, it gave the paper the same access to printing facilities that all other student publications received.

CONGRESS AND COURTS SPAR OVER RELIGIOUS FREEDOM

In 1993, in what some would chart as the start of the now red-hot debate over accommodation of religious beliefs, Congress passed

the Religious Freedom Restoration Act. The act commanded the federal government and states to ensure all laws and statutes "did not unfairly burden" people of faith. This language required "carve-outs," or exemptions, from laws that conflicted with religious belief.[155]

Four years later, in City of Boerne v. Flores, [156] the Supreme Court found that Congress overstepped its constitutional authority in extending the RFRA to states, but that it could be applied to federal laws. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act, which protects land used for religious purposes from most government restrictions and also provides that prisoners can worship freely.[157]

PROTECTING HATE SPEECH, PUNISHING HATE CRIMES

Hate speech, one of the more contentious contemporary issues facing the nation, has come to the Supreme Court many times in the past 30 years. Each time it does, it challenges the justices to balance public and personal safety against the free speech rights of those expressing views many find repugnant.

In 1992, in R.A.V. v. City of St. Paul,[158] the court reversed the conviction of a man who burned a cross in a Black neighbor's yard. The court unanimously said local laws were too vague to sustain the conviction. The law said a person could be arrested for speech likely to "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The court noted other groups might be targeted by similar speech but were not included in the law.

Eleven years later in Virginia v. Black,[159] the court said a state law that banned cross-burning passed constitutional review if the

government could prove it was intended as a "true threat," but noted exceptions such as a cross burning at a rally.

ONLINE CONTENT WARS

In 1996, Congress passed the Communications Decency Act.[160] One year later, the Supreme Court found, in Reno v. ACLU,[161] that the act's definition of "obscenity" was so vague that it threatened to violate the speech rights of law-abiding adults to access and share indecent or offensive material on the assumption that children might see it. The only section of this act to survive the Supreme Court's decision — Section 230 — is a controversial provision that still shields online companies from liability for what users post on their sites.

In 1998, Congress adopted the Child Online Protection Act.[162] The act criminalized an entire swath of internet content, by making it a crime to "knowingly" post or transmit online and for commercial purposes material considered harmful to minors.

But in 2004, in Ashcroft v. American Civil Liberties Union, the Supreme Court found COPA too broad.[163] The court said tactics such as filtering software to limit access by youngsters was a better solution, since it leaves intact adults' access. A year earlier, in United States v. American Library Association Inc.,[164] the court had upheld a law requiring public libraries and public schools to install filtering software on computers in order to be eligible to receive federal funds.

"CLEAN HANDS" AND CONFIDENTIAL PRESS SOURCES

In what has proven to be a landmark ruling — but also a "thin reed" on which the press relies in dealing with sources and secret documents — the justices held in 2001's Bartnicki v. Vopper[165] that the publication of an intercepted phone conversation is protected by the First Amendment as long as the publisher is not the one who intercepted the call. This is called the "clean hands" doctrine. The critical element needed to qualify for protection under this doctrine is that the journalist has played no role in any criminal activity to obtain the leaked information.

"THIRD WAVE" FIRST AMENDMENT DOCTRINE

The 21st century's First Amendment disputes began with noteworthy decisions on the freedoms of religion and speech in which the 45 words were used to argue for important exceptions to the law.

CHURCH AND STATE IN THE 2000s

SCHOOLS AND RELIGION

In 2000, the Supreme Court found in Mitchell v. Helms[166] that a federal program requiring states to lend educational material and equipment to both public and parochial schools alike does not violate the establishment clause. Two years later, in Zelman v. Simmons-Harris,[167] the court upheld a Cleveland school district voucher program where parents could get funds from the government to pay the tuition at a school of their choice. The court said that since the state funds did not go directly to schools, but

in effect reimbursed parents, it did not violate the establishment clause prohibition on direct funding of religion — the "separation of church and state" concept.

To be sure, the court did, at times, refuse to expand religious exceptions. It found in 2000 that the establishment clause was clearly violated by a school policy of starting football games with a prayer led by a selected student representative in Santa Fe Independent School District v. Doe.[168]

However, in 2022, in Kennedy v. Bremerton School District,[169] the Supreme Court held that a Washington State high school football coach was within his First Amendment rights to pray on the field at certain times, citing that it was done after the game and when he no longer was "responsible" for students. Opponents had raised what had been generally accepted arguments that no matter the time or place, such a public display by a government representative with authority was inherently coercive and violated the rights of others not to participate in any particular religious observance or worship.

The case — apart from its individual issues — was seen as emblematic of the shift on the Supreme Court toward greater accommodation of freedom of expression when connected to personal religious beliefs.

PUBLIC RELIGIOUS DISPLAYS

On another recurring issue, display of the Ten Commandments in public spaces, the court decided two companion cases addressing the issue in 2005 but with opposite results.

In McCreary County v. American Civil Liberties Union of Kentucky,[170] the court ruled that the Kentucky county violated

the establishment clause of the First Amendment with Ten Commandments displays in the courthouse and public schools, saying "any observer" would see the displays as endorsing religion.

In Van Orden v. Perry,[171] the court approved placement of a Ten Commandments display near the Texas statehouse, reasoning that the monument was simply an homage to aspects of the state's past and that there was no evidence state officials were attempting to use the monument to endorse one faith over others.

PUBLIC PRAYER

A common practice around the nation of opening town meetings with prayer was upheld in 2014 in Town of Greece v. Galloway.[172] The Supreme Court's majority said such opening prayers do not violate the First Amendment when the purpose is to impart a tone rather than endorse or denigrate a particular faith or recruit attendees to a certain faith.

AFFORDABLE CARE ACT EXEMPTIONS

In Burwell v. Hobby Lobby Stores Inc.,[173] in 2014, the court said 5-4 that "closely held corporations" — for example, those with family members as the sole stockholders — could cite "sincere religious beliefs" and thus opt out of provisions of the Affordable Care Act that would require them to violate those beliefs.

Justice Antonin Scalia's opinion for the majority acknowledged that it understood that to hold that all insurance-coverage mandates should fail if they conflict with an employer's religious beliefs could be seen as providing an excuse for employers who simply want to avoid the cost of such coverage or for discriminatory purposes.[174] The ruling also noted that the government could

fund alternative, nonemployer means of insurance coverage that included contraceptives.

COURT DEADLOCKS ON RELIGIOUS OBJECTION TO INSURANCE PAPERWORK

In Zubik v. Burwell,[175] the court tied 4-4 and returned the issue to the lower courts to resolve. Zubik involved nonprofit religious institutions that said the portion of the Affordable Care Act that requires religious employers who cite their beliefs in denying insurance coverage for contraceptives to participate directly in an alternative process for employees to receive such coverage.

The groups told the court that such a requirement still meant they were assisting in providing contraceptives. But the other side in the case said the process allowed employees to seek coverage elsewhere.

Ultimately, a federal regulation was created in 2019 allowing people and health care organizations to opt out of providing health care services if they object on religious or moral grounds.[176]

FREE SPEECH EXCEPTIONS AND BALANCES

Beginning in 2007, the court decided a spate of high-profile decisions concerning free speech.

MORE LIMITS TO TINKER'S STUDENT SPEECH PROTECTIONS

In 2007, in Morse v. Frederick,[177] the U.S. Supreme Court set out an exception to the Tinker protections for student speech. It said school administrators could restrict drug-related speech by students.

In 2002, a group of students including Joseph Frederick held up a makeshift banner with the phrase "Bong hits for Jesus" as students observed the passing of the Olympic torch through Juneau, Alaska. As the principal crossed the street to confront the group, only Frederick remained when the others fled. He was suspended but disputed the penalty saying he had skipped school that day and that the "nonsense" phrase was simply meant as a test of his freedom of speech.

The Supreme Court found, however, the banner conveyed support for drug use, and that it is within a school's legitimate mission to combat such endorsements. The banner survives. For many years, it was displayed in the Newseum's First Amendment gallery, and it now hangs in the First Amendment Museum in Augusta, Maine.[178]

ANIMAL CRUELTY VIDEOS

In 2010, a widely misunderstood decision in United States v. Stevens[179] demonstrated once again the challenge of balancing freedoms. The court overturned a federal law that criminalized the creation, sale or possession of video depictions of animal cruelty for commercial purposes. One example offered in support of the legislation: So-called "crush videos" showing women using their bare feet to crush small animals.

The court found that the statute's wide net of prohibited activity could, and likely would, be interpreted so broadly as to enable prosecution of those producing legal hunting videos and videos by animal rights activists showing animal mistreatment. While some media reports and animal rights groups said the court excused abusers, in fact the decision itself invited Congress

to craft a more tailored law, which it did shortly following the court's decision.[180]

CITIZENS UNITED AND CAMPAIGN SPENDING

In a seminal ruling, Citizens United v. Federal Election Commission,[181] in 2010, the court decided, by a 5-4 vote, that election laws that capped corporate spending in elections, including spending on political ads, violated the First Amendment. Under the Citizens United framework, direct corporate contributions to candidates remain banned.

Critics see a pattern by which the court has cleared a legal path for special interest spending.

One important element in the debate over election spending is the internet. Coincidentally, a post that "goes viral" may have more impact than well-funded campaign advertising and activity. An example: the posting in 2012 by one person of a surreptitious cellphone camera video of Republican presidential nominee Mitt Romney criticizing "47 percent" of voters he termed irresponsible and overly dependent on government assistance.[182]

SPEECH THAT TOUCHES UPON "MATTERS OF PUBLIC INTEREST" AND NATIONAL SECURITY

In 2010, in Holder v. Humanitarian Law Project,[183] the court held that the government did not violate First Amendment speech rights of nonprofit groups when it outlawed providing training or advice to terror groups, even when the training was aimed at encouraging peace and negotiation. The government had argued that even such "innocent" efforts would effectively free up resources that could be used by such groups to fund violence.

In the 2011 case Snyder v. Phelps,[184] the Supreme Court found the Westboro Baptist Church's protest at the funeral of slain U.S. Marine Matthew Snyder to be protected speech because the protesters were on public property and speaking about matters of public concern. The deceased's family sued the church for defamation and intentional infliction of emotional distress. The church — essentially one extended family — had garnered headlines with protests that included strident anti-LGBTQ+ language. Chief Justice John Roberts said in the majority opinion that the nation's commitment to free speech on matters of public interest is so strong that it stands even when the speech is painful or offensive to some.

In a 2012 ruling in United States v. Alvarez,[185] the court ruled that Congress' Stolen Valor Act, which prohibited anyone from falsely claiming military medals, was an unconstitutional restriction of speech. Use of such claims to commit fraud or other criminal acts remains a prosecutable offense.

In 2014, in Lane v. Franks,[186] Justice Sonia Sotomayor wrote that firing a public employee for subpoenaed, truthful speech violated the First Amendment. The ruling is a rare exception to broad limits imposed on public employees' job-related speech upheld by Garcetti v. Ceballos in 2006.[187]

In Garcetti, the court held that the government may limit employee speech in the name of efficiency and effective management and operations when the employee is speaking in an official role on matters related to specific government work. But if the employee is speaking on a matter of public interest unrelated to their job or the government unit where they work, the government cannot regulate the employee's speech.

UNION DUES AND COMPELLED SPEECH

The 2016 Friedrichs v. California Teachers Association[188] case involving the right of a public employee to opt out of the payment of public employee union dues was seen by many union leaders as a serious threat to organizations like theirs. But a group of conservative California teachers argued that being required to pay dues violated their free speech right to be silent.

In 1977, in Abood v. Detroit Board of Education,[189] the court had said public employees could be required to pay for getting certain benefits but opt out of a portion of dues used for political activity.

A 4-4 tie in the 2016 case left intact the lower court decision holding that nonmembers must pay a public employee union a "fair share" of dues for negotiating wages and benefits that all workers enjoy.

WORLD EVENTS RESHAPE FIRST AMENDMENT LANDSCAPE

The First Amendment and its values were argued, tested and challenged in major ways in 2015 in the Supreme Court — and in the world at large.

The high court considered cases ranging from offensive speech to religious freedom to the display of the Confederate battle flag on state license plates.

But larger disputes took place outside the court's chambers, as differing world views collided on the meaning of religious liberty, the scope of protection for speech and the press, and on the limits — if any — of the ability to organize for the advancement of political and social change.

ISIS KILLINGS

In the Middle East, a new and violent gang of terrorists known as ISIS paraded under the banner of Islam, declaring a new Muslim state and committing barbaric acts of butchery in the name of religion. Two U.S. freelance journalists — James Foley and Steven Sotloff — were captured and beheaded by ISIS, as were several other hostages.[190]

ISIS demonstrated a chilling ability to seize attention by using YouTube and other channels of new media to post videos of the murders and diatribes against the West. When sites such as Twitter removed the ISIS posts, the terrorists threatened the founder and employees of that company.[191]

POLICE AND PROTEST

In Ferguson, Missouri; Charleston, South Carolina; Baltimore and other cities and towns, Black men and women had fatal encounters with police that led to protests. These protests raised new questions about the power of local authorities to limit activities ranging from public demonstrations to press coverage to citizen photographs of police activity.

CHARLIE HEBDO MURDERS

In Paris, a Jan. 7, 2015, killing spree at the offices of the *Charlie Hebdo* magazine echoed the ongoing violent reactions by some in the Muslim community to cartoon parodies of the Prophet Muhammad. These events raised new questions worldwide about the meaning and extent of free speech and religious liberty.[192]

When may nations restrict such deliberate insults? Do governments have an obligation to protect religious faith from criticism

and caricature? Or does free speech mean people of faith, and of other groups such as the LGBTQ+ community, may be subjected to speech that falls short of "true threats"?

In the global court of public opinion, no verdict is expected soon. But at the U.S. Supreme Court, decisions in several cases set out First Amendment freedoms in the 21st century.

COURT CASES BRING WORLD ISSUES HOME

COURT QUERIES: WHAT IS A TRUE THREAT?

In Elonis v. United States,[193] the court resolved differences among various federal circuits as to what constitutes a true threat, which is not protected by the First Amendment. The Supreme Court ruled that juries must be instructed to consider the intent of the person speaking, as well as how the speech was perceived by others, because true threats require a subjective, rather than objective, intent to threaten.

Lawyers for Anthony Elonis, who had made online threats of killing his estranged wife on Facebook, argued Elonis' posts were akin to rap lyrics and not intended to instill fear.

Government lawyers argued that Elonis was properly convicted under laws that ask whether an average, reasonable person would have found the posts threatening.

Justice Samuel Alito Jr. said during the oral arguments that "this sounds like a road map for threatening a spouse and getting away with it. So, you put it in a rhyme ... then you are free from prosecution."[194]

But writing for the majority in reversing Elonis' conviction, Chief Justice John Roberts wrote that a criminal conviction

requires more than a review of how the words would be understood by a "reasonable person." Prosecutors must show that the speaker intended to threaten a specific individual.

CONFEDERATE FLAGS ON AUTO TAGS

In Walker v. Texas Division, Sons of Confederate Veterans Inc.,[195] the court held in 2015 that Texas officials could ban use of the Confederate battle flag on state specialty license plates. A private group called Sons of Confederate Veterans challenged the law, arguing that state officials violated their First Amendment right to free speech by banning the flag.

The justices said a license plate, even when carrying the slogan or image of a private group, is "government speech."

Following the decision, critics of the ruling warned it would encourage other governmental entities, such as universities, to attempt to ban speech they find offensive or counter to the school's mission.

CHURCH MURDERS DRIVE PUBLIC OPINION

In a Freedom Forum "State of the First Amendment" survey taken before the court ruled in Walker, a majority of Americans rejected a ban on the Confederate battle flag. Following the court's ruling in 2015, and the murder of nine Black people in a Charleston, South Carolina, church by a white man who was photographed with a Confederate battle flag, a second survey showed that public opinion had reversed.

THE SUPREME COURT LEGALIZES SAME-SEX MARRIAGE

In Obergefell v. Hodges,[196] the issue directly engaged the 14th and Fifth Amendments' guarantees of equal protection and due process under the law. But same-sex marriage also touches religious belief and freedom of assembly.

The court's decision in Obergefell declared same-sex marriage legal everywhere. The Sixth Circuit Court of Appeals had upheld state bans in the four states at issue, but such marriages already were legal in 36 states.

Relying in part on its 2013 decision United States v. Windsor,[197] the Supreme Court held that state bans on or refusals to recognize same-sex marriage were "a deprivation of the liberty of the person protected by the Fifth Amendment."

In Freedom Forum's 2015 "State of the First Amendment" survey,[198] 54% of Americans did not see the court's same-sex marriage decision having "a lasting impact" on religious liberty, but 31% saw it as "harmful" in the long term.

RELIGIOUS LIBERTY AND EXPRESSION TESTS

PRISONER RELIGIOUS RIGHTS

Religious liberty and personal expression were the focus in Holt v. Hobbs.[199] The issue: Can prison wardens' security concerns trump an inmate's sincere religious belief? The court unanimously upheld the right of Arkansas inmate Gregory Holt, a Muslim, to have a half-inch beard, in keeping with the dictates of his faith.

The Arkansas Department of Corrections had banned most beards. The court said simply using two photos — one with a beard and one without — would suffice to identify a prisoner. Justices

also noted some short beards were allowed if the prisoner had a diagnosed skin condition.

EMPLOYEE RELIGIOUS RIGHTS

In an 8-1 opinion, in Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores Inc.,[200] the court held that clothing retailer Abercrombie & Fitch was not allowed to reject a job applicant because she wore a religious headscarf, even though the scarf violated the company's dress code.

CHURCH SIGNAGE RIGHTS

In the oft-cited Reed v. Town of Gilbert ruling,[201] the court held that an Arizona town had improperly restricted the size, location, display duration and number of political, ideological and religious signs, violating the First Amendment's prohibition on content discrimination. A church had been told by town officials that it had to use small signs announcing its religious services, while larger signs were permitted for other purposes.

TECHNOLOGY, PRIVACY AND FREE SPEECH COLLIDE

GOVERNMENT DEMANDS PHONE LOGIN OVERRIDE ACCESS

A collision occurred in 2015 between law enforcement officials and high tech, in this instance Apple, involving national security, public safety, freedom of speech and even foreign policy considerations with respect to repressive regimes and those governments' efforts to track journalists' sources.

Following a mass shooting in San Bernardino, California, the FBI went to court to force Apple to break the encryption on its iPhone used by one of the killers. A federal magistrate — in

what was said to be the first such order of its kind — told Apple to create a new technological method that would allow government officials to override login safeguards built into its latest phones. Apple refused. Ultimately, the government found another way to get the information.[202]

TECH COMPANIES OBJECT

Calling the request "chilling," Apple CEO Tim Cook forecasted that "in the wrong hands, this software — which does not exist today — would have the potential to unlock any iPhone in someone's physical possession."

In a letter, Cook defended his company, writing that it has "no sympathy for terrorists," that the company has turned over data whenever requested by law enforcement, and made Apple engineers available to offer "our best ideas on a number of investigative options at their disposal."[203]

Apple cited what it said was a long-held business decision to protect its customers who prize the data protection built into iPhones. In a later New York legal dispute with prosecutors in 2016, The Daily Beast reported that the company said, "forcing Apple to extract data ... absent clear legal authority to do so, could threaten the trust between Apple and its customers and substantially tarnish the Apple brand."[204]

In the end, Apple and other tech firms feared that a single government request to override access protection will eventually mean a flood of such demands by governments that foment terror rather than fight it.

Google CEO Sundar Pichai, whose company's Android phone operating system has encryption features like Apple's iPhone

system, said, "We give law enforcement access to data based on a valid legal order. But that's wholly different from requiring companies to enable hacking of customer devices and data."[205]

ANOTHER VIEW OF PHONES AND PRIVACY

Blair Reeves, a writer for the tech blog On Medium, encouraged the public to "bear in mind: at no period in American history has there ever been any personal information, let alone any whole class of information, that was ever considered wholly immune to government access. The government has been wiretapping for a century. The FBI accessed bank records to catch mobsters in the '30s. Location tracking — the old-fashioned way, in person — is as old as government itself."[206]

THE ROOTS OF PRIVACY LAW

The legal thicket involving the Apple-government standoff was rooted in laws on the evolving standard for personal privacy, first outlined in the late 1880s. National security investigations have changed direction through the years, most recently to address threats from foreign terrorists. The debate intensified after national security and surveillance leaks by former U.S. Army soldier Chelsea Manning and later by rogue NSA analyst Edward Snowden.

In 1928, in Olmstead v. United States,[207] the Supreme Court said it was legal for federal officers to wiretap suspected bootleggers without a court order because tapping into the phone line did not involve an actual, physical entry into a home or business. However,

during the 1960s, in Berger v. New York[208] and more prominently in Katz v. United States,[209] the court reconsidered and said that in modern life, there was a "reasonable expectation of privacy" outside the physical home, including phones and computer data. And in 2012, in United States v. Jones,[210] the court ruled that the placement by police of a GPS device to track the movements of a suspected drug dealer was an impermissible "search" because police had failed to obtain a court warrant before planting the device.

NEW TECHNOLOGY RENEWS AND CHANGES PRIVACY DEBATES

In our new world of global communication and data-sharing, it often is not the content of phone calls that police are interested in, but the connections and other data involved.

One 19th-century thinker defined privacy as the "right to be let alone."[211] The modern question, typified by the Apple dust-up, is whether we add "except when the government needs to go through your phone data" in the name of national security or a criminal investigation.

A MOCK SUPREME COURT DEBATE IN APPLE V. FBI

A panel of First Amendment, cybersecurity, civil liberties and national security experts stage mock arguments — supported by written briefs — of Pear v. United States in a June 15, 2017, Freedom Forum event.[212]

Back in the real world, the issue was resolved — or at least rendered moot — when the FBI was finally able to break through the encryption without help from Apple.[213]

SECTION II

★ ★ ★

WHERE WE ARE NOW

INTERNET SPEECH, REGULATION AND FREE SPEECH QUESTIONS

In the 1980s and 1990s, according to "The History of Social Networking" by Digital Trends,[214] the public was able to use online sites such as CompuServe, America Online and Prodigy to find information and share it by email. What are today known as social media sites began with Six Degrees and Friendster. In 2002, LinkedIn was founded as a networking site for career-minded professionals. By 2020, it had more than 675 million users.

In 2003, Myspace launched and, by 2006, it was the most visited website on the planet. But by 2008, a new site, 4-year-old Facebook, was dominant. According to the History Cooperative's account of the growth of social media as of 2015, "Facebook today has just over 2.6 billion active users, a number that has

grown consistently since its launch. This amounts to just under 30 percent of the entire global population [and is] the most popular social media platform in the world."

The report notes that X, created as Twitter in 2006, has around 335 million monthly active users.[215] YouTube debuted in 2005, allowing users to share videos. Today, 400 hours of video are uploaded every minute to YouTube. There are 1.9 billion active monthly logged-in users. And ContentWorks reports that the number of channels with more than a million subscribers has increased by 75% since 2017.[216]

These staggering numbers represent a fundamental change in how we communicate with each other. For the first time in humanity's history, it is possible to be in contact with most of the world's population within an instant. Profound challenges abound as a result:

- The very concepts of truth and fact are threatened by the pervasive presence of misinformation and disinformation.
- Great potential exists for the misuse of personal data by those governments that would track everyone.
- Venerated legal constructs, such as the law of defamation, are ill-prepared to counter harm that is worldwide, instantaneous and — at least online — seemingly eternal.
- Technology can make it more difficult — if not impossible — to connect wrongs to wrongdoers.

Currently, social media companies operate privately, with their own terms of service that exist outside the First Amendment's restraint on government censorship, control or punish-

ment. Legislation in various states and Congress would bring some measure of government oversight and legal restrictions to bear on how those companies operate. Such laws would create a regulatory framework for these uniquely positioned entities, resembling the regulatory framework for public utilities, which were created a century ago to give the public some voice in the operation of electric, water, gas and telephone channels deemed essential to our society.

SECTION 230

Section 230, a legal flashpoint, is the only remaining effective portion of the 1996 Communications Decency Act. It states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[217] Both conservatives and liberals have proposed changes in the legal protections provided by Section 230. Conservatives argue that it allows tech companies to favor liberal voices or ban right-wing views, while liberals charge that the section's legal protections insulate tech companies from taking responsibility for harmful or misleading information posted to their sites.

"CANCEL CULTURE"

And then there are the larger social issues rooted in free speech, such as "cancel culture," a term used to cover everything from negative responses to something spoken or posted, to coordinated attacks on a person, to formal bans that block a person from communicating on the web. Many have likened the practice to that of "shunning" or banishment from society at large.

These "First Amendment-ish" conflicts are roiling societies worldwide. And as my then-colleague Lata Nott has said, while such issues are outside of government action and, thus, outside the scope of First Amendment reach, they are clearly "something that impacts what the First Amendment is meant to do, which is [protect] free expression."[218]

ONLINE CONTENT TAKEDOWNS

So-called takedown laws have gained support particularly in Europe where the online posting of personal information has long been an opt-in arrangement from fee-based internet operators. By contrast, the advertising and marketing approach to a "free internet" allows personal search data and some individual information to be widely available, unless a user opts out.

The European Union has a "right to be forgotten" rule, already updated a few times, under which a person has the right to ask websites to remove personal information if outdated or offensive to the person.[219]

In recent years, news organizations in the United States have started "second chance" programs, which remove past reports of minor crimes after a prescribed lapse of time. Groups such as the Reporters Committee for Freedom of the Press have cautioned that while such programs are voluntary, European lawmakers have begun to codify such requirements and that, despite First Amendment protections, similar legislative moves can be expected in the U.S.

TECHNOLOGY AND ACCOUNTABILITY

Technology, such as cellphone cameras, increasingly allows us to see, and vicariously participate in, protests in real time on the streets of Ferguson, Missouri, New York City and Los Angeles. Images available instantly on the web from those same cameras meant that police and local authorities would be accountable for violent or fatal incidents in new ways not possible even a few years ago.

2017-2018 SUPREME COURT TERM

In its 2017-2018 term, the U.S. Supreme Court took up cases that pitted religious liberty and presidential power against claims of discrimination and bias, the power of the government to compel speech on abortion, and how rapidly developing technology is affecting our privacy rights.

RELIGION AND ANTI-DISCRIMINATION COLLIDE

In a 2018 decision that captured national attention, Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission,[220] the court found that the commission had shown hostility to religion when considering the matter of a baker who declined for religious reasons to create a cake for a gay couple's wedding, violating the First Amendment provision that government be neutral in matters involving religious beliefs and practices.

FREEDOM FORUM EXPERT INSIGHTS: MASTERPIECE CAKESHOP

"So where does that leave us? Almost exactly where we were before," said Lata Nott, then a Freedom Forum fellow. "Colorado's Anti-Discrimination Act, and laws like it, is still constitutional. Freedom of religion could still be a possible loophole to avoid compliance with such laws. A custom-made cake may or may not be an act of speech."[221]

NATIONAL SECURITY AND DISCRIMINATION COLLIDE IN IMMIGRATION POLICY

The court found that the Trump administration, in Trump v. Hawaii,[222] could implement an immigration ban even though the ban would apply unequally and disproportionately to Muslim immigrants. Opponents of the Trump policy said national security was just a pretense for anti-Muslim discrimination, but the court said Trump "lawfully exercised the broad discretion granted to him under [law] to suspend the entry of aliens into the United States."

FREEDOM FORUM EXPERT INSIGHTS: THE "MUSLIM BAN"

Freedom Forum Senior Fellow Charles Haynes has compared the Supreme Court's tenor in both Masterpiece Cakeshop and Trump v. Hawaii and noted that the 5-4 decision invalidated the Colorado commission's decision "because of perceived hostility by two commissioners toward the Christian faith of a Colorado baker." But "just weeks later, the court tells us that overwhelming evidence of government hostility toward Muslims and Islam should be ignored in the name of protecting 'national security' and upholding presidential powers. In other words, hostility by the government towards Christians is a violation of the First Amendment, but hostility by the government towards Muslims is not."[223]

ABORTION AND COMPELLED SPEECH

The court ruled in National Institute of Family Life Advocates v. Becerra[224] that a California law violated the First Amendment by requiring that anti-abortion pregnancy centers provide information about where abortion services were available. The court said California law also did not recognize the state could achieve its goal of informing women through a public information campaign.

FREEDOM FORUM EXPERT INSIGHTS: PROFESSIONAL SPEECH

Freedom Forum Fellow David L. Hudson, Jr. observed that within the Family Life Advocates decision, the court also rejected the creation of a new First Amendment "professional speech" exception. Justice Clarence Thomas reasoned that "speech is not unprotected merely because it is uttered by professionals. This Court has been reluctant to mark off new categories of speech for diminished constitutional protection."[225]

ARRESTS SUPPRESS SPEECH

In Lozman v. City of Riviera Beach,[226] the court recognized that arrests could have a chilling effect on speech and found that an arrest can be an act of unlawful retaliation by the government, even when the officer had acted upon "probable cause." Hudson wrote that the opinion "has some golden nuggets for free-expression advocates" including raising the objection that police officers could "exploit the arrest power as a means of suppressing speech" and support for the right of citizens to petition the government.[227]

ASSOCIATION, PRIVACY AND CELLPHONE SURVEILLANCE

In Carpenter v. United States,[228] the court held that a search warrant is required to obtain the cellphone movement records of a person even if those records are owned by someone else — in this case, the cellphone service provider. While not directly a First Amendment case, it did touch on freedom of assembly.

Chief Justice Roberts' opinion noted that as technology has evolved, the tracking features of cellphones are now able to track very specific movement. Noting the earlier decision in Jones v. United States, Roberts compared the two cases and the two technologies:

> *"Much like GPS tracking ... cell phone location information is detailed, encyclopedic, and effortlessly compiled. ... While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales."*[229]

2018-2019 SUPREME COURT TERM

The Supreme Court, in its 2018-2019 term, reset a significant marker in church-state separation, voided an intellectual property practice barring "immoral or scandalous" trademarks, returned to the issue of retaliatory arrests, and addressed the legal status of private employees working on behalf of the government.

A DIVIDED COURT WEIGHS A PUBLIC CROSS DISPLAY

In American Legion v. American Humanist Association,[230] the court considered a challenge to a large cross erected in 1918 to honor veterans. The American Humanist Association said the monument and spending taxpayer funds on maintenance and repairs endorsed Christianity, violating the First Amendment's establishment clause.[231]

Supporters countered that the cross served a secular purpose, honoring U.S. service members who died in World War I.

The court voted 7-2 to reject the challenge. While noting that where first installed, the cross may well have carried religious meaning, Justice Samuel Alito Jr. said, "With sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community's landscape and identity. The community may come to value them without necessarily embracing their religious roots."

Alito's constitutional analysis emphasized history and tradition, overriding the Lemon test — created in 1971 in Lemon v. Kurtzman[232] — that set out three questions to determining an establishment clause violation:

- ★ Is there a secular legislative purpose?
- ★ Does the activity avoid advancing or inhibiting religion?
- ★ Does it mean excessive government entanglement with a religious belief or sect?

Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented. She said that by maintaining the cross on a public highway, a state commission elevated Christianity over other faiths, and religion over nonreligion.

GOVERNMENT CAN'T PROHIBIT "IMMORAL" TRADEMARKS

In a second significant First Amendment decision of the term, the court rejected the Lanham Act's Section 2(a) prohibition on the federal registration of "immoral" or "scandalous" trademarks, two

years after the court, in Matal v. Tam,[233] invalidated the ban on racially disparaging phrases.

The court ruled on a claim by clothing designer Erik Brunetti who had been denied a trademark for the label "FUCT." The justices said the trademark law as it stood was "too broad" and open to vague decision-making.[234]

COURT SIDESTEPS GERRYMANDERING QUESTIONS

In a pair of decisions, Lamone v. Benisek[235] and Rucho v. Common Cause,[236] the court avoided the hot political issue of partisan gerrymandering by declining to reconsider voting maps drawn by state legislatures. Responding to a claim that the map violated a right to political association, it said the judiciary had no role in the claims, since it involved a "political question" best decided by elected officials.

COURT RULES ARREST NOT RETALIATORY

In Nieves v. Bartlett,[237] the court held that generally, if a police officer can show probable cause to believe a crime has been committed, that will defeat a claim of speech-related retaliation. Russell Bartlett, arrested in Alaska in 2014, said police violated his First Amendment rights by arresting him in retaliation for his refusal to speak with officers. But police said Bartlett was "belligerent" at the time of arrest.

PRIVATE TV OPERATOR NOT ENGAGED IN STATE ACTION

The court ruled — in an area of law called "state action" — that a nonprofit private cable TV access channel operator in New York

was not acting on behalf of the state government by refusing to rebroadcast a video that the operator felt contained threatening language. In Manhattan Community Access Corp. v. Halleck,[238] the court voted 5-4, saying that the cable operator was a private company and even though it was licensed by the state, the First Amendment did not apply.

The court said that "private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights. ... it 'is not at all a near exclusive function of the state to provide the forums for public expression, politics, information, or entertainment.'" Justice Brett Kavanaugh also wrote that for the First Amendment to apply, the private company must be performing a duty or action traditionally done *only* by government, and that in New York City's history, both government and private companies have operated cable TV access channels.

CALLS TO REVISIT TIMES V. SULLIVAN

What may well prove to be one of the more significant moments in the court's 2018-19 term didn't directly involve a decision. In February 2019, Justice Clarence Thomas — in a case on another issue — called for the Supreme Court to revisit its landmark 1964 decision New York Times Co. v. Sullivan, which set a high standard for public officials and figures hoping to successfully sue for defamation.

The Times decision held that public officials (later expanded to include "public figures") must prove more than falsity, but "actual malice," which in law means the publisher knowingly or recklessly

disregarded the truth. Thomas also noted, as he had done before, that there is no mention of the "actual malice" standard in the First Amendment or the Constitution as a whole.

2019-2020 SUPREME COURT TERM

In the 2019-2020 term, in South Bay United Pentecostal Church v. Newsom,[239] the court said municipal limits on attendance at houses of worship during the COVID-19 pandemic did not violate the First Amendment.

However, in 2021, the court reversed California's total ban on religious congregation, though it upheld the state's right to set attendance limits and bans on chanting and singing.[240]

And in Our Lady of Guadalupe School v. Morrissey-Berru,[241] the court held that state anti-discrimination laws in this instance could not override the First Amendment's "ministerial exception," which allows religious organizations to hire and fire staff unlike other operations. In this case, two teachers at different Catholic elementary schools alleged that they had been fired because of age and requests for medical leave — and both circumstances violated state law. Both teachers taught "secular" subjects and performed what the lawsuit described as "vital religious duties." The court agreed that the teachers qualified as ministers within the exception.

In Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,[242] the justices held, citing Burwell and Zubik, that religious liberty allows religious groups to opt out of providing employees with contraceptive insurance coverage when it conflicts with the group's sincerely held religious views.

2020-2021 SUPREME COURT TERM

Significant First Amendment cases involving religion, as well as student speech, assembly and press rights were at the top of the Supreme Court docket in the 2020-2021 term. In several key cases, the court ruled on the side of First Amendment freedoms. But the court's support was not equally strong for all five freedoms.

RELIGIOUS RIGHTS FOR FOSTER AGENCY

In Fulton v. City of Philadelphia,[243] a Catholic social services agency sued the city of Philadelphia after it was barred from placing children in foster homes because it would not work with same-sex couples. The justices unanimously held that the city violated the religious rights of the agency, and that no harm came to the same-sex candidates because the Catholic group would refer them to other such agencies that did not have such a restriction.

RELIGIOUS GATHERINGS DURING COVID-19 PANDEMIC

In Roman Catholic Diocese of Brooklyn v. Cuomo,[244] in a 5-4 decision, New York state was found to have violated the First Amendment by forbidding in-person religious services in response to the COVID-19 pandemic. The opinion said the state unfairly singled out religious groups while allowing group gatherings for others such as large businesses — and even for customers in liquor stores.

THE CUSSING CHEERLEADER CASE

A decision that attracted major media attention was the "cussing cheerleader" case, Mahanoy Area School District v. B.L.[245] The court held that school officials in most instances cannot punish

students for off-campus speech. After failing to make her high school's varsity cheerleading squad, B.L. posted an expletive-laden rant to Snapchat. School officials saw the post and disciplined B.L., but the court, 8-1, said, "It might be tempting to dismiss [the student's] words as unworthy of the robust First Amendment protections … . But sometimes it is necessary to protect the superfluous in order to preserve the necessary."

FREEDOM FORUM EXPERT INSIGHTS: DISCIPLINING STUDENT SPEECH

As Freedom Forum Fellow and student speech expert David Hudson wrote, the court "reaffirmed the core principles" of Tinker v. Des Moines Independent Community School District, the nation's major student speech case.[246] But the court also left open the question of whether administrators can act on speech uttered during field trips and "away" athletic events that have a strong school identity or support. The increasing use of social media and distance learning tools no doubt will increase debate over where "off-campus" begins and where school officials can discipline student speech.

RENEWED CALLS TO REVISIT TIMES V. SULLIVAN

In Berisha v. Lawson[247] in 2021, the court declined to hear a defamation case that would have squarely presented New York Times v. Sullivan for reconsideration. Justice Neil Gorsuch disagreed with that refusal and appeared to join the earlier call by Justice Clarence Thomas to revisit the seminal 1964 case. Given the court's new conservative majority, press advocates have increased fear that the court soon will reconsider at least the

extent of the decision, most likely the definition of "public figure," if not abandon the case entirely.

And in 2022, in Coral Ridge Ministries Media Inc. v. Southern Poverty Law Center,[248] the court again declined to review a lower court decision in a case challenging Sullivan — a decision opposed by Justice Thomas.

Those who would not revisit Sullivan say journalists, and anyone speaking or writing in public, would face a near-impossible task in this litigious society if even inadvertent error could subject them to the expense of defending themselves in a lawsuit, as well as a potential judgment for damages.

But the two justices in favor of reconsideration say deliberate falsehoods are so prevalent that a revision is needed. Gorsuch wrote in Berisha v. Lawson, in favor of granting review, that in the 1960s era of the Sullivan case, the news media needed protection for occasional error. Today, he said, the media landscape has changed so much that "If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?"[249]

MONEY, ASSEMBLY AND PRIVACY

The final First Amendment decision of the 2020-2021 term was an unusual case, notes then-Freedom Forum special correspondent Tony Mauro:

> *"Americans for Prosperity Foundation v. Bonta[250] involved a broad range of nonprofit organizations challenging California's requirement that the names and addresses*

> *of organizations' donors be disclosed. California said the information is needed to monitor potential misconduct by charities. But the organizations said the names should be private, especially in the current divisive political climate where donors could be harassed."*[251]

To protect the freedom of association, which has long been viewed as a component of "the right of the people peaceably to assemble," the Supreme Court has ruled in the past that such organizations and their members should be granted a significant privacy from government scrutiny, especially if the groups are controversial, Mauro wrote. Anything less would produce a chilling effect on the people's right to organize with like-minded individuals.

The high court reaffirmed that view in its July 1, 2021, ruling, Mauro noted. By a 6-3 vote, with Chief Justice John Roberts writing for the majority, the court held that California's disclosure regulation was not important enough to outweigh the "risk of a chilling effect on association" of donors who may fear public censure for their political views and activity.

The decision was applauded by some as a First Amendment victory but criticized by others as a boost for the "dark money" donors who prefer to keep anonymous their outsized contributions to political campaigns.

TRUMP, JAN. 6 AND INCITEMENT

While not a pending case before the Supreme Court, the second impeachment trial of then-President Donald Trump in spring 2021 raised the defense by his lawyers that Trump's haranguing Jan. 6 speech was protected free speech, falling short of "incitement,"

which is unprotected. At issue in a criminal charge against Trump was whether his call to the crowd to march to the Capitol to oppose certification of the 2020 election results and to "fight like hell" was merely speech not meant to be taken literally. Or was it support for an insurrectionist attack on the government? See my "red light, yellow light, green light" analysis of which actions on Jan. 6 around the disruption at the U.S. Capitol were protected or not protected by the First Amendment.[252]

2021-2022 SUPREME COURT TERM

The court's 2021-2022 term may well be most remembered for the Supreme Court's decision that reversed Roe v. Wade, empowering states to once again outlaw most if not all abortions. But runners up in the historical recollections may be decisions made in support of individual religious liberty in First Amendment cases.

In Ramirez v. Collier,[253] the court decided, by an 8-1 vote, that a Texas law allowing the presence of a pastor at an execution, but disallowing touch and audible prayer, violated the Religious Land Use and Institutionalized Persons Act. While the state cited "security" as a reason to disallow the actions, the justices said Texas had failed to satisfy the court's "least restrictive means" test in implementing a regulation placing a significant burden on free exercise.

In Houston Community College System v. Wilson,[254] the court held, by unanimous vote, that a community college board of trustees' public censure of a member did not violate the First Amendment.

In City of Austin v. Reagan National Advertising of Texas Inc.,[255] the court held, by a 6-3 vote, that an Austin code concerning "off-premises" signage was content-neutral.

In Carson v. Makin,[256] the court decided that Maine's public education voucher program, which permits parents to use a taxpayer-funded coupon to defray costs of tuition, does not violate the establishment or equal protection clauses when parents use those vouchers to pay for religious private education. In an analysis of the ruling, my Freedom Forum colleague Kevin Goldberg wrote, "In short: Maine does not have to offer tuition assistance, but once it does, it cannot disqualify schools because they are religious."[257] Chief Justice John Roberts wrote that the court found shortcomings in Maine's argument that schools were not disqualified because of their "religious status" but instead because of their level of religious instruction, saying such examination of curriculum was impermissible government scrutiny and invited potential favoritism based on the religious denomination involved.

In Federal Election Commission v. Ted Cruz for Senate,[258] the court held that a federal statute limiting campaign finance loan repayments to $250,000, regardless of the original amount loaned, is an unconstitutional burden on free speech.

In Shurtleff v. City of Boston,[259] the court held, by unanimous vote, that the city's refusal to fly a Christian organization's flag on a flagpole open to all public groups was a violation of the group's First Amendment rights.

2022-2023 SUPREME COURT TERM

In its 2022-2023 term, the court considered multiple cases involving First Amendment issues.

Freedom Forum First Amendment Specialist Kevin Goldberg wrote:

> *"In a much-watched case, 303 Creative LLC v. Elenis, the Supreme Court in June 2023 ruled that a Christian website designer cannot be required to create wedding websites for same-sex couples. The designer said that doing so would violate her religious beliefs.*
>
> *"Fans of the decision saw it as protecting the free speech provisions of the First Amendment, affirming that the government cannot force a person to speak, which in this case meant creating a web page.*
>
> *"Others expressed concern that the decision could open the door to business owners finding ways to discriminate because the court did not define what business activities would constitute expression."*[260]

Other cases in the term that are likely to have wide impact in the future:

Counterman v. Colorado:[261] The court essentially heightened the need to consider the speaker's intent in assessing what is a "true threat."

United States v. Hansen:[262] The court upheld a federal law making it illegal to encourage illegal immigration. The court said

the law was a permissible regulation on speech in that it only applies to encouraging criminal conduct.

WIDE-RANGING FIRST AMENDMENT DECISIONS IN THE 2023-2024 SUPREME COURT TERM

The court continued to define or redefine how we use our First Amendment rights, particularly how we interact on the village screen: social media and the web.

The justices ruled on what we can post and which posts of ours social media platforms can delete. It ruled on how government officials can control or influence social media or public demonstration organizers. It even weighed in on whether we can use former President Donald Trump's name for a satirical purpose without his permission.

- ★ Murthy v. Missouri:[263] The court ducked the First Amendment question of whether the government could force social media companies to censor posts. It said there was no legal right for social media users or two state attorneys general to bring the case, given no evidence of actual harm.
- ★ Vidal v. Elster:[264] The court ruled that the U.S. trademark law that requires permission of a living person to trademark their name does not violate First Amendment freedom of speech. It ruled against a man who wanted to trademark the words "Trump Too Small" for a line of T-shirts.
- ★ National Rifle Association v. Vullo:[265] The court said a New York State public official violated First Amendment protections by pressuring banks and insurance companies to

stop doing business with the National Rifle Association because of its pro-gun activism. The ruling said the government cannot censor speech through a third party just as it cannot do so directly.

- ★ Lindke v. Freed[266] and O'Connor-Ratcliff v. Garnier:[267] The court declined to set hard guidelines to decide when a public official's social media account is a government site or personal one. It said courts should determine whether the official is authorized to speak for government and does so in a clearly official capacity. Sites that are a mix of official and personal posts should be individually reviewed based on the specific content. The two cases involving the ability of officials to delete comments and block users went back to lower courts.
- ★ Moody v. NetChoice LLC[268] and NetChoice LLC v. Paxton:[269] The Supreme Court reviewed state laws from Florida and Texas that would empower state officials to regulate content on social media sites. Conservatives complained in the cases that "Silicon Valley" censors were blocking their views, violating the First Amendment. In both cases, the court passed on any final resolution of the constitutional questions involved, returning both cases to lower courts for added review while blocking implementation of the laws during further review.[270]

The court declined to hear an appeal by demonstration organizer DeRay Mckesson, who asked it to block a pending lawsuit, since dismissed, that could hold a protest organizer responsible for another person's criminal acts at a protest.[271] Mckesson received a Freedom Forum Free Expression Award in 2021 for using his First Amendment rights as an activist and educator.

For a more thorough look at these cases, please see the report by my colleague and First Amendment Specialist Kevin Goldberg on Freedom Forum's website.[272]

WIKILEAKS: PLEA ENDS ESPIONAGE VS. FREE PRESS CASE

One potentially landmark controversy involving free speech and free press ended abruptly with a plea deal on June 26, 2024, in a U.S. District Court. Federal charges had been brought under the Espionage Act against WikiLeaks founder Julian Assange for obtaining and publishing secret U.S. government documents in 2010.[273]

Assange agreed to plead guilty to one charge of illegally encouraging former U.S. Army intelligence analyst Chelsea Manning to leak classified information about U.S. actions during wars in Iraq and Afghanistan.

The charges had raised significant First Amendment issues ranging from Assange's status as a journalist; the extent to which newsgathering involving national security should be protected from government sanctions; and whether the Espionage Act should be used to prosecute someone — journalist or not — who disclosed classified information in the public interest, rather than acting as a spy on behalf of another nation.

SECTION III

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FUTURE CHALLENGES TO OUR FREEDOMS

First Amendment threats and defenses have, for much of the past 100 years, largely focused on protecting individual speech, the right of any one of us to express ourselves without interference or punishment by the government.

But there is increasing danger to our core freedoms from systemic challenges, which often involve other issues or circumstances, but which carry a First Amendment impact, if not wallop.

DATA PRIVACY AND SURVEILLANCE

The increasing public and commercial use of drones raises issues of noise, public safety, and congestion in the airways, but also

questions about what on-board cameras see and record. These concerns go far beyond earlier "peeping Tom" anxieties.

Imagine a network of drones crisscrossing the skies over your hometown, constantly sending video of the unfolding scene to the insatiable maw of computer storage. Combine that record with facial recognition software, vehicle tracking devices and surveillance cameras that can ID license plates from miles away, and it is just a small step to government discovery of who we meet, where and when, with resulting impact on the right of assembly and association.

There is a running joke in national security and spy circles that we're now willingly doing the surveillance work on social media that previously was allocated to government spies. Add the abilities of artificial intelligence to collect, collate and match social media and online data about any one of us, and the kind of "anonymous" speech that produced "The Federalist Papers" is vanishingly scarce.

Put another way, George Orwell's draconian Big Brother presence was predicated on government installation of a surveillance device in every home — and life — to observe each of us. We are now the ones installing the devices, not just at home, but as a 24/7 presence in pockets and purses through smartphones, watches, GPS devices and the like.

In 2018, in two decisions involving GPS and cellphones, the Supreme Court pushed back on the intrusion on the First Amendment right of association posed by this new technological threat. Chief Justice John Roberts said that cellphone location information is a "near perfect" tool for government surveillance, analogous to an electronic monitoring ankle bracelet.

"The time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations,'" Roberts wrote.[274]

Try being a reporter, under the threat of involuntary transparency in the future, attempting to meet secretly with a source about government corruption or official misconduct or a botched criminal investigation or an undisclosed, invasive national security policy.

And what of information harvesting that assembles digital profiles based on our web searches, information we provide in making online purchases — and what the purchases themselves reveal about our lives. Civil liberty concerns include the use of such data to determine who we meet with, what we read, and who we regularly contact by phone or computer.

Facial recognition software is being debated as to its accuracy and possible misuse but lost in those areas is the concern that it makes even more possible the tracking of an individual's daily movements, and that by matching up many such individuals, a roadmap of our daily "assembly" activities is laid bare for potential government misuse.

AI AND COMPUTER-GENERATED IMAGERY

And then there are so-called deepfakes and lesser-quality cheap fake videos that purport to be actual images, but in fact are computer manipulations showing a person speaking or moving about in ways that never actually happened. Legitimate reports by a free press could be confused or compared with such high-tech

misinformation and disinformation, a new technological threat that challenges the adage that "seeing is believing."

Such "involuntary synthetic imagery" can take real situations and seamlessly paste faces of politicians and others onto actual participants. Imagine a misleading or embarrassing video that's nearly impossible for most to distinguish from the real thing.

How do we square such false imagery with First Amendment law, which would tend to side with the free expression of those who create such works? When would satire cross the line into defamation or intentional infliction of emotional distress, two traditional, but often expensive, time-consuming legal tools available to those who claim injury from such fakery?

And what of news consumers, already besieged by fakery on social media, claims of bias in news reporting by various outlets, and photo and video edits that distort, and who already have a deep distrust of much of what they see, hear and read?

Courts in the years ahead will need to decide the extent to which our right to record police activities can be restrained by law enforcement's efforts to limit such recordings. And will we have free and open access to police body cam video? Advocates say access and resulting oversight will improve policing; some law enforcement authorities say such access will lead to misuse and misinformation. And others, such as victims of crimes or innocent parties caught on the recordings, will find their most traumatic moments in perpetual replay on the web, for all to see.

Artificial Intelligence, or AI, poses the same benefit-risk circumstance as earlier technological advances, but comes with more warnings than most — from undetectable plagiarism to the

no-longer just science fiction threat of machines outpacing or even replacing human beings.

In the First Amendment area, questions arise about who ultimately bears responsibility for erroneous or defamatory "facts" — the programmers of the AI or a third-party that produced the original information relied upon by the AI in searching the web for its answers.

Some have posed the idea that, if AI is determined to have reached some level approaching human "self-awareness," it may be entitled to the full range of First Amendment protections as would human beings.

But even as those seminal topics are being debated, it is likely that through the next three to four years, court and legislative battles involving AI will center on the immediate issues of copyright, artistic valuation and libel.

A copyright lawsuit in 2023 brought by comedian Sarah Silverman involving her 2010 memoir and two authors of other books challenges, in effect, the very method by which AI "learns" i.e., scouring the web for masses of information.[275]

As Joshua Benton observed writing for Nieman Journalism Lab, news publishers asserting copyright claims over AI have to overcome the defense that most news content is available online for free. But Silverman's book "The Bedwetter" is not. Her complaint alleges that AI absorbed her book from a third-party source without purchasing a copy, and "not to learn facts or ideas from it, but to extract and then imitate the copyrighted expression therein."[276]

At present, so-called generative AI, weak AI or large language models do not include independent reasoning. Human beings

create the programs and determine what information is absorbed and what thus is reported out. While not directly ruling on ChatGPT and its ilk, courts are clear that simply inserting a computer, cellphone, typewriter or other technology in the process of "AI speaking" does not change the fact that human beings are behind the ultimate expression.

Thus, First Amendment protection would seem to follow.

As Stuart M. Benjamin of Duke University put it at the outset of AI, "So long as humans are making substantive editorial decisions, inserting computers into the process does not eliminate the communication via that editing."[277]

Social media protection debates, including around Section 230 cases, proposed protections for minors from harmful content, and defamation and copyright cases are nibbling at issues at the edges of the First Amendment, online speech and AI.

But we have no definitive legal guidelines yet when AI-generated "free expression" might *lose* protection.

We will need to look at existing exceptions for human freedom of speech: incitement to imminent lawless action, incitement to suicide (specified in at least one state, Massachusetts); fraudulent commercial speech, false statements of fact damaging to another, true threats, and credible threats against the president of the United States.

We also will need to consider other more specific instances in which we previously have limited the right of free expression, ranging from employers to prison wardens to educators, lawyers and others, with a guiding consideration here being limits narrowly tailored to serve a "compelling governmental interest" that

impinges on free expression to an extent only needed to accomplish that interest.

The real challenges to protection of AI speech will come when the next generation (or two) of AI occurs, so-called strong AI or artificial generative intelligence, when technology goes beyond direct human input to "computers designing computers designing computers."

Some AI proponents say because the First Amendment makes no distinction about the nature of speakers in protecting free speech, that same approach should apply to entirely machine-produced speech. All AI speech, now and in the future, has the same First Amendment protection as does another other kind of "speech."

Some would draw distinctions — much as we do for corporations and organizations — with limited AI free speech protection, which for example might mean a loss of protection for machine-produced "anonymous" speech. A legislative proposal, the AI Labeling Act of 2023 by Sens. Brian Schatz of Hawaii and John Kennedy of Louisiana, would require any AI-produced material to disclose the sources of information on which its "speech" is based or taken.[278]

Some theorists will continue to draw a line between human and machine-produced speech particularly once humans are reduced to "original creators" with no active role in later generations of AI variants. In that theoretical space (for now), AI speech would not automatically have the constitutional or statutory protections that exist for human-produced speech. Rather any such speech protections would need to be created and would not exist for machines under the umbrella of human "inalienable" rights.

The AI speech we have now is intrinsically linked to the free speech protection enjoyed by developers, programmers and owners of the technology or app. It also is rooted in the right of users to freely access sources of information. So as noted, it's protected.

A few relevant cases and legal issues regularly cited in the ongoing debate over AI and free expression include:

Red Lion Broadcasting Co. v. FCC (1969):[279] The public has a right to "suitable access" to information across a broad spectrum of areas: social, political, arts, medical and more. As such, the First Amendment provides for an "uninhibited" (which I read as also unrestricted) marketplace of ideas where multiple ideas irrespective of source can compete — and "truth ultimately will prevail."

Citizens United v. Federal Election Commission (2010):[280] The U.S. Supreme Court expanded free speech protection for corporations. In doing so, for AI, the case opened the legal door for nonhuman speakers to enjoy free speech protection.

The New York Times Co. v. Microsoft Corp. and OpenAI Inc. (filed in December 2023):[281] The *Times* claims OpenAI infringed on the newspaper's copyright material through "unlicensed and unauthorized use and reproduction of *Times*' works during the training of its models." It calls this use threatening to the future of a "deeply human" journalistic endeavor.

Popular Science reported that in 2024, "Almost all the pending lawsuits involve copyright, to some degree or another, so the tech companies behind each AI model are relying on fair use arguments for their defense," specifically that while based on information scraped from the internet, AI use is "transformative."[282]

In the area of defamation or other kinds of liability, the owners/operators of existing AI may well be able to claim Section 230 protection in that their machine-produced speech is the product of information produced by others. Of course, given that AI has been shown to at times have "hallucinations," a plaintiff may be able to argue that a particular AI's owner, developer or promoter recklessly failed to take reasonable care against such false speech in creating or operating the AI or to provide reasonable warning of such false speech.

So far, much of the noncopyright or defamation activity in courts seems to have been related to lawyers using AI for erroneous citations used in court documents. Among multiple examples: In 2023, two lawyers in New York state were found to have used six fake citations in court filings. The nonexistent cases were produced by ChatGPT.[283] In 2024, Colorado lawyer Zachariah C. Crabill was suspended for using false citations produced by AI in a legal brief and then lying about doing so.[284]

Finally, should AI ever achieve "self-awareness" — perhaps as determined by the Turing test — many would argue that First Amendment speech protections certainly should apply to a machine entity. But the Turing test is described as "output only." That is, no matter how a result is produced, if that result is comparable to human "output," that producer is self-aware. Others argue the Turing test outcome ignores other human conditions and remains simply a parroting of human intelligence. It lacks intentionality, purpose and reasoning, all parts of the human cognitive act.

A determination that AI is truly self-aware or has intelligence comparable to human existence also would have implica-

tions for other First Amendment freedoms (the right to petition, for example) and other areas from labor law (Can AI be forced to do work that it does not want to?) to criminal law (Would it be considered murder to delete an AI program once installed and operating?).

The mere existence of the web has long been raising new questions about old standards.

For example, defamation is today a relatively well-defined matter of law, providing both remedy for those found to have been wrongly defamed and a strong defense for the alleged defamer, starting with truth and extending to the actual malice standard denoted in Times v. Sullivan.

But defamation today — at least on the web — may well involve conditions not present mere decades ago: damage that is global, instantaneous and eternal. How is a person fairly compensated for worldwide reputational damage? Given that nothing is ever erased from the collective global digital memory, who is at fault if the original falsehood reappears years or decades later, dredged up by a search engine and made instantly "viral," through no action or intent by the original defamer?

Given a constant stream of misinformation and disinformation — combined with claims that companies have designed sites to deliberately "hook" young users in the manner of drug peddlers — how long will the public tolerate the basic tenet that the First Amendment only restrains government and not social media firms? States across the nation are considering the pervasive reach of social media largely controlled by a handful of giant tech firms.

Can those companies' First Amendment rights be limited or voided by antitrust breakups or by a forced transition to

a quasi-public utility status? To what extent do the actions of the companies themselves to fight misinformation and manipulation violate the user's First Amendment rights to post their own views and content?

In the 2023-24 term, the Supreme Court allowed to stand actions by the Biden administration to counter mis-and-disinformation on vaccines and elections — but ducked a direct First Amendment-based ruling that could have provided a defined line on how far public officials can go in controlling the information we see online. The court ruled that challengers to Biden's approach lacked legal standing to bring the lawsuit and had failed to show any actual damages.

FIRST AMENDMENT ISSUES BEYOND THE WEB

Surveys show a general lack of knowledge about the First Amendment among the public, a toxic situation for the future defense of core freedoms when coupled with surveys of younger adults who question the value of a "marketplace of ideas."

Disputes over religious exemptions from antidiscrimination, employment and other laws will continue to ramp up.

Some college campuses across the nation are consumed with debates over "trigger warnings" and "safe spaces" to root out deliberate or unconscious bias, or to restrain speakers and ideas that are seen as disruptive or dangerous.

And in 2024, campuses were a flashpoint over freedom of speech and petition, as protests, building takeovers and the use of tents to occupy public spaces around the Israel-Hamas war marked clashes with college administrators and police. As a result, the courts will reconsider when free speech crosses over to unprotected speech like

harassment or a true threat. While violence and vandalism are not protected forms of free expression, can the nonviolent, temporary occupation of a space or building find some space with the shield of the First Amendment?

Public protest — petition and assembly — has found new life in recent years, among both progressives and conservatives. But in more than 40 states, legislatures are considering or adopting new laws aimed at discouraging or punishing those who would challenge government policy or social mores by taking to the streets.

It's not an exaggeration to say the threats to the operation — and perhaps survival — of a free press are the most significant in the history of the nation. The web's economic disruption of the news media's financial model based on subscriptions and advertising income streams have forced massive cutbacks and closures at news outlets nationwide.

A crisis of public confidence has produced an unprecedented lack of public support and interest. Freedom Forum's 2023 "Where America Stands" survey[285] found just 3% of respondents said freedom of the press is the most essential First Amendment freedom. That trails the 37% who said all the freedoms are essential and lags speech (40%), religion (11%) and petition (5%), and ties assembly (3%).

Even worse, only 14% trust journalists, and 31% say journalists are a threat to the First Amendment. The concept of a watchdog press — a fourth estate holding all three branches of government accountable, on behalf of the public — has faded. The Freedom Forum survey found public support for that role at just 60%. And, in so-called news deserts, an independent watchdog has function-

ally disappeared, with even new media or bloggers failing to do the comprehensive job of holding government accountable that was once performed by print and broadcast outlets.

For better or worse, news organizations frame the discussion of national issues. Today's media landscape is limited for millions of Americans to the "thought bubbles" of social media, where algorithms feed users only those items that support existing views and where individuals can "cancel" challenging views and speakers with the click of a cursor.

Challenges to free speech, assembly and petition are not always in the legal arena. Local discussions around COVID-19 mask mandates and vaccine requirements all too often have devolved into disruption by those opposed to both — with the result that public comment periods during meetings have been eliminated and protests around such meetings curtailed.

Existing reluctance to speak freely on matters of public interest may well have been exacerbated by both meeting and parking lot confrontations and by online "doxing" or "canceling" of dissenting voices.

Still, the 45 words of the First Amendment have remained unchanged since 1791. The judiciary still seems, in the main, protective of free expression — with the exceptions of students' and prisoners' expression — and of religious freedom. And an overwhelming number of us support the First Amendment, at least in concept — some 93% in the "Where America Stands" survey.

The future of the First Amendment? Perhaps it all comes down to the modern-day application of a quick exchange in 1787 between Benjamin Franklin and a member of a crowd awaiting

the results of the Constitutional Convention. As he was leaving the final meeting, Franklin reportedly was asked what sort of government the delegates had created. His answer: "A republic, if you can keep it."[286]

We have the 45 words of the First Amendment, buttressed by the rule of law, hundreds of court decisions by an independent judiciary; laws enacted by Congress and state legislatures; and administrative applications and regulations.

The 21st century challenge will be "A First Amendment, if we *care* to keep it."

THE FIRST AMENDMENT

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

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The focus, content, and tone of this compilation is solely my responsibility. Errors, misstatements, or misinterpretations are my responsibility to acknowledge and to correct. Please contact gpolicinski@freedomforum.org with questions or corrections. However, neither I nor Freedom Forum make any representations or warranties with respect to the accuracy or completeness of the contents of this book and specifically disclaim any warranties of any kind, including implied warranties of merchantability or fitness for a particular purpose. No warranty, obligation, credit or additional permissions may be created or extended by communications entered herein. Neither I nor Freedom Forum shall be liable for any loss of profit or any other commercial damages, including but not limited to special, incidental, consequential, or other damages.

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END NOTES

The end notes identify materials on which I relied principally. It is my intention to recognize and credit every source. Quoted lines from U.S. Supreme Court decisions were taken from online repositories of court opinions posted by various universities or websites or from published opinions of the court available online.

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