Readings for Tools 2:
Free Expression in the Supreme Court

Flowchart…… (next page)

Abridgement of Free Expression: Expressive Conduct…… 1

United States v. O'Brien (1968); Texas *v. Johnson* (1989)

Abridgement of Free Expression: Right Not to Speak…… 10

West Virginia State Board of Ed. v. Barnette (1943)

Unprotected Category: Incitement of Illegal Activity…… 14

Brandenburg v. Ohio (1969)

Unprotected Category: Fighting Words…… 16

Chaplinsky v. New Hampshire (1942); *Cohen v. California* (1971)

Unprotected Category: Captive Audience…… 21

Frisby v. Schultz, 1988

Who is Speaking? Government Speech…… 24

Walker v. Texas Division (2015)

Who is Speaking? Government Employees…… 28

Garcetti v. Ceballos (2006)

Who is Speaking? Students…… 31

Tinker v. Des Moines School Dist. (1969), *Morse v. Frederick* (2007)

Prior Restraint…… 39

Near v. Minnesota (1931)

Vague/Overbroad…… 43

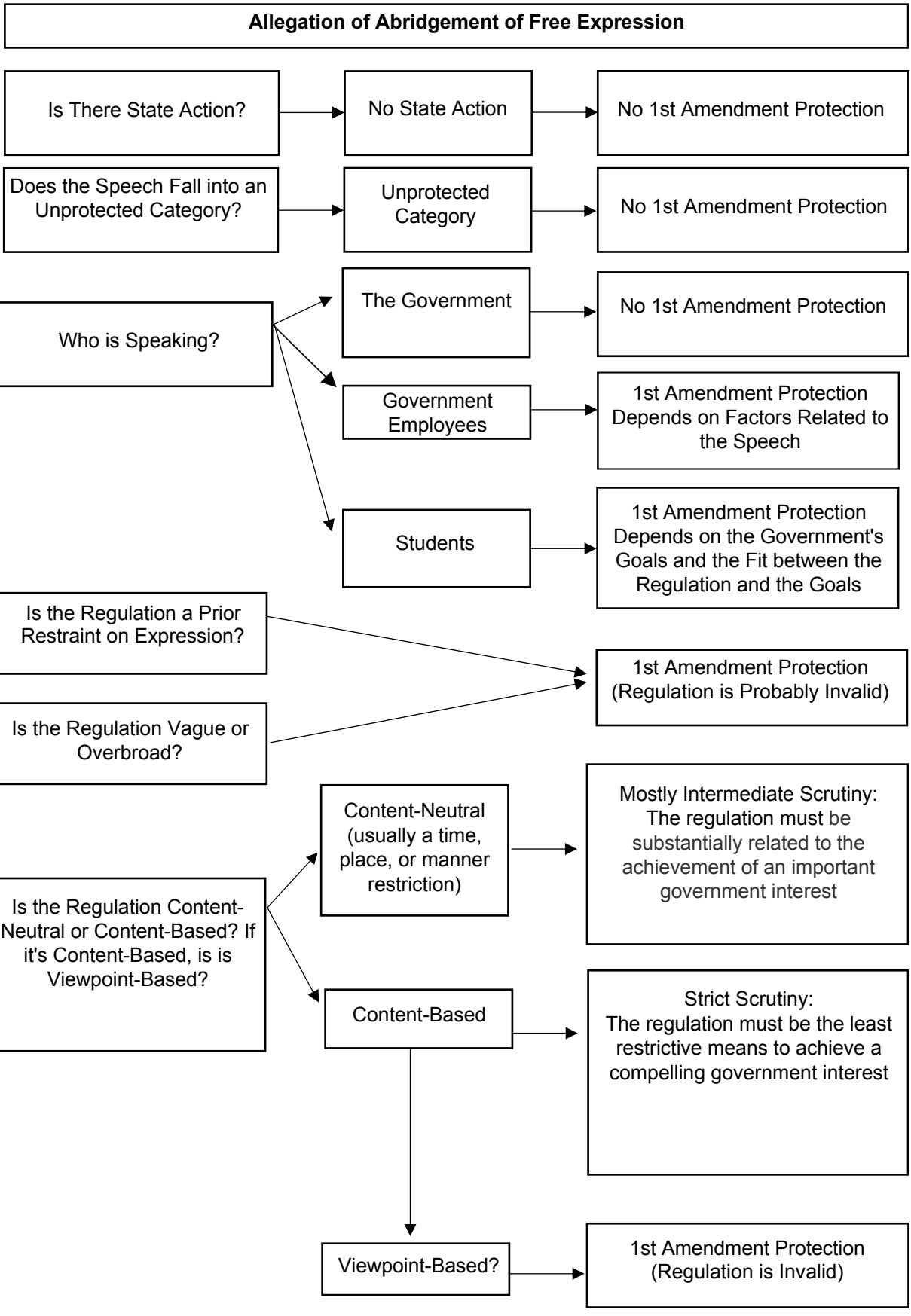
Coates v. City of Cincinnati (1971)

Content-Neutral/Content-Based/Viewpoint-Based…… 45

Boos v. Barry (1971)

Note on Readings

Some come from Lee Epstein, Kevin T. McGuire, & Thomas G. Walker. 2022. 11th edition. *Constitutional Law for a Changing America: Rights, Liberties, and Justice.* Thousand Oaks, CA: Sage/ Congressional Quarterly Press. Because these are uncorrected page proofs, you might spot a typo here and there.


Allegation of Abridgement of Free Expression
Is There State Action?
No State Action
No 1st Amendment Protection
Does the Speech Fall into an Unprotected Category?
Unprotected Category
No 1st Amendment Protection
Who is Speaking?
The Government
No 1st Amendment Protection
Government Employees
1st Amendment Protection Depends on Factors Related to the Speech
Students
1st Amendment Protection Depends on the Government's Goals and the Fit between the Regulation and the Goals
Is the Regulation a Prior Restraint on Expression?
Is the Regulation Vague or Overbroad?
1st Amendment Protection (Regulation is Probably Invalid)
Is the Regulation Content-Neutral or Content-Based? If it's Content-Based, is is Viewpoint-Based?
Content-Neutral (usually a time, place, or manner restriction)
Mostly Intermediate Scrutiny: The regulation must be substantially related to the achievement of an important government interest
Content-Based
Strict Scrutiny: The regulation must be the least restrictive means to achieve a compelling government interest
Viewpoint-Based?
1st Amendment Protection (Regulation is Invalid)

Expressive Conduct

In the days of the American Revolution, political protest customarily took the form of eloquent addresses, sharply worded editorials, and fiery pamphlets. Verbal expres-sion and published communication were the methods of political debate, and the framers unambiguously sought to protect them from government encroachment by drafting and ratifying the First Amendment. But what if today someone wishes to communicate a message by means other than word of mouth or printed copy, say, by burning a flag? Does such expressive conduct—conduct in which speech and nonspeech elements combine—qualify as "speech" under the First Amendment?

Such questions did not arise en masse until the modern era, but they were not unknown in earlier times. In ***Stromberg v. California*** (1931), the Supreme Court acknowledged that at least some forms of expres-sive conduct (sometimes called symbolic speech) merit constitutional protection, when it reversed the convic-tion of a camp counselor who had raised a red flag in support of communism, an act that violated California law. Similarly, ***Thornhill v. Alabama*** (1940) struck down state laws that prohibited labor union picketing. For the Court, Justice Frank Murphy concluded, "In the circum-stances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." So, for example, conducting a silent sit-in at a public library to oppose racial segrega-tion, staging a play that includes nudity, holding a parade to protest violence by police, putting a bumper sticker with a Confederate flag on a car, and spending money to advocate for a candidate in an election are all forms of expressive conduct that may be protected by the First Amendment.

Recognizing a constitutional protection of expres-sive conduct does not mean, however, that the First Amendment shields from government regulation *any* act committed to express an idea or opinion. Suppose someone burned down the White House to pro-test the president's policies or shot at a mail truck to express displeasure with the postal service. No one

would seriously claim that these are protected forms of expressing political opposition. As the Court put it, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[9] For this reason, expressive conduct presents especially difficult questions of drawing constitutional boundaries over whether the conduct is, in fact, expressive and not just mere conduct, and, if the conduct is expressive, whether the government can regulate or suppress it.

In the 1960s and 1970s, the turbulence of the civil rights movement and the Vietnam War protests provided the Court an opportunity to answer these questions because they expanded the ways messages were communicated. Traditional forms of speech and press gave way to demonstrations, sit-ins, flag desecration, and other varieties of conduct designed to present the protesters' political messages in a graphic manner. The turbulence of the era brought a number of vexing symbolic expression issues before the Court.

One of those cases, ***Spence v. Washington*** (1974), supplied a vehicle for the Court to answer the first question above, on the types of conduct that could receive First Amendment protection. At issue was a Washington state law that prohibited flag desecration, defined as placing any "word, figure, mark, picture, design, drawing or advertisement" on an American flag. When Spence, a college student, used tape to make a peace sign on a flag and hung it upside down from his apartment, he was charged with violating the law. To determine whether Spence's conduct, and expressive conduct more generally, enjoyed First Amendment protection, the Court laid out what has become a two-part test: whether there was (1) an intent to convey a particularized message and (2) a reasonable likelihood that it would be understood as such by those who viewed it. Because Spence's expression met the standard, the Court ruled in his favor.

Although *Spence* answered the question of what type of symbolic speech came under the First Amendment, it did not specify when the government can regulate speech that meets the *Spence* test. That question moved front and center in *United States v. O'Brien* (1968), in which the defendants had expressed their opposition to the war in Southeast Asia by publicly and illegally burning their draft cards. The case presents a clash of values. The Warren Court had demonstrated a growing tolerance for First Amendment expression claims *(recall* Brandenburg v. Ohio, *excerpted in Chapter 5)*, but would this trend continue? Or would the fact that thousands of American troops were engaged in combat abroad influence the Court?

[9] *United States v. O'Brien* (1968).

United States v. O'Brien

391 U.S. 367 (1968)
http://caselaw.findlaw.com/us-supreme-court/391/367.html
Oral arguments are available at https://www.oyez.org/cases/1967/232.
Vote: 7 (Black, Brennan, Fortas, Harlan, Stewart, Warren, White)
1 (Douglas)

OPINION OF THE COURT: *Warren*
CONCURRING OPINION: *Harlan*
DISSENTING OPINION: *Douglas*
NOT PARTICIPATING: *Marshall*

FACTS:

On March 31, 1966, David Paul O'Brien and three others burned their draft cards on the steps of a South Boston courthouse. A sizable, hostile crowd gathered. Agents of the Federal Bureau of Investigation took the four into the courthouse to protect them and to question them. The agents told O'Brien that he had violated a 1965 amendment to the Selective Service Act of 1948 that made it illegal to "destroy or mutilate" draft cards (formally known as registration and classification certificates, two small white cards issued when someone registers with the local draft board).

O'Brien replied that he understood but had burned his card anyway because he was "a pacifist and as such [could not] kill." O'Brien was convicted and received a sentence of up to six years. A federal appeals court, however, reversed the conviction, finding that O'Brien's expressive actions were protected by the First Amendment. The United States asked the Supreme Court to hear the case.

ARGUMENTS:

For the petitioner, United States:

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

For the respondent, David Paul O'Brien:

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

MR. CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT.

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

We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers

Bettmann/Getty Images

On March 31, 1966, David O'Brien and three other antiwar protesters demonstrated their opposition to U.S. military action in Vietnam by burning their draft cards on the steps of a South Boston courthouse. Their convictions for violating the Selective Service Act were affirmed in *United States v. O'Brien.*

an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to §12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

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

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

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. [I]n a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board can make simpler the board's task in locating his file. . . .

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

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

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

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

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

O'Brien deliberately rendered unavailable his registration certificate, he willfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted. . . .

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because the [1965 Amendment] is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

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

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

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

Although *O'Brien* is an important decision in the development of expressive conduct doctrine, the case did not seem to give the Court much trouble. Nor did *Tinker v. Des Moines* (1969), decided the following year, which upheld the right of public school children to wear black armbands to express their opposition to the Vietnam War *(excerpted later in this chapter)*. With only justices Hugo Black and William O. Douglas dissenting, the Court explained that wearing an armband "was closely akin to pure speech." In the absence of any indication that such expressive activity was disruptive, the state was not justified in limiting it.

Such consensus, however, did not emerge when it came to flag burning. As a national symbol, the American flag evokes intense emotional feelings, especially among those, like members of the Supreme Court, who have long histories of public service. Even the justices who were most committed to free speech indicated their discomfort in extending First Amendment protection to those who burned the flag as a method of political expression.

The justices had faced the general issue of flag desecration before, notably in *Spence*. But their most significant decision came in *Texas v. Johnson* (1989). Note that the decision brings together the two key questions in expressive conduct cases: what constitutes such conduct for purposes of the First Amendment (*Spence)* and under what circumstances can the government regulate even protected conduct (*O'Brien*).

Texas v. Johnson

491 U.S. 397 (1989)
http://caselaw.findlaw.com/us-supreme-court/491/397.html
Oral arguments are available at https://www.oyez.org/cases/1988/88-155.
Vote: 5 (Blackmun, Brennan, Kennedy, Marshall, Scalia)
4 (O'Connor, Rehnquist, Stevens, White)

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

FACTS:

In the summer of 1984, the Republican Party held its national convention in Dallas, Texas, and overwhelmingly supported President Ronald Reagan's reelection bid. While the party was meeting, a group of demonstrators marched through the city to protest the Reagan administration's policies. One of the demonstrators removed an American flag hanging in front of a bank building and gave it to

Gregory Lee Johnson, a leader of the march. As the march ended, Johnson unfurled the flag, doused it with kerosene, and set it on fire. As it burned, the protesters chanted, "America, the red, white, and blue, we spit on you." Authorities arrested Johnson, charging him with violating the Texas flag desecration law. He was convicted and sentenced to a one-year prison term and a $2,000 fine. A state court of appeals affirmed, but the Texas Court of Criminal Appeals reversed that holding.

ARGUMENTS:

For the petitioner, State of Texas:

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

For the respondent, Gregory Lee Johnson:

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

JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

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

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

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." [*Spence v. Washington*] Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam [*Tinker v. Des Moines Independent Community School Dist.*]. . . .

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

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

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

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. . . . "A law directed at communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

AP Photo/David Cantor

Gregory Johnson on June 28, 1989, holding an American flag given to him by a well-wisher. One week earlier the U.S. Supreme Court had reversed his conviction for violating the Texas flag desecration statute.

Thus, although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

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

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

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago* (1949).

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire* (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

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

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

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

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

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

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

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

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

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

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

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

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

Affirmed.

CHIEF JUSTICE REHNQUIST, WITH WHOM JUSTICE WHITE AND JUSTICE O'CONNOR JOIN, DISSENTING.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. . . .

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

. . . [T]he public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time

it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute. . . .

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

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

JUSTICE STEVENS, DISSENTING.

In my judgment, rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable. . . .

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably, that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States, as ultimate guarantor of that freedom, is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street v. New York* (1969)—be employed. . . .

I respectfully dissent.

The Court's decision in *Johnson* is intriguing for a number of reasons. From a constitutional standpoint, it fleshes out several strands of First Amendment doctrine, including on expressive conduct.[10] Note too the rather odd alignments: the conservative Antonin Scalia and the usually conservative Anthony Kennedy voted with the majority; John Paul Stevens, almost always found with the liberal wing of the Court, dissented. Commentators have long speculated that Stevens's service in the military as a cryptographer during World War II informed his take on the American flag.

[10]Notice the disagreement that existed over whether the flag law constituted content-based discrimination. To the majority, the Texas flag desecration law was a content-based restriction on the manner of speech, which could not survive strict scrutiny. To the dissenters, there was no regulation of content, since Johnson was perfectly free to express any ideas he wished about the United States; he was simply limited in his conduct. At the end of the chapter, we return to the difficulties sometimes presented in distinguishing content-neutral versus content-based regulations.

The Right Not to Speak (Compelled Speech)

The most common First Amendment speech case alleges that the government has unconstitutionally prohibited, regulated, or punished expression—such as imposing criminal penalties for burning a flag or forcing a club to "associate" with particular people. But the government may also attempt to regulate expression in the opposite way—by requiring us to speak or write. For example, we may be ordered to appear as witnesses before courts, grand juries, or legislative investigating committees. We may be required to take oaths when we become citizens, provide court testimony, or assume public office. Americans generally consider these regulations to be reasonable requirements relevant to legitimate government functions. But what if individuals do not want to comply with a regulation that requires the expression of ideas with which they disagree? Other than the Fifth Amendment's protection against compelled self-incrimination, is there any restraint on the government's authority to compel expression? To put it another way, does the First Amendment's guarantee of freedom of speech carry with it the freedom not to speak?

To begin to develop answers, consider the 1940 case of *Minersville School District v. Gobitis.* The Court upheld flag salute regulations against claims that the school system was violating the children's right to free exercise of religion. Just three years later, in *West Virginia State Board of Education v. Barnette*, the Court again considered a challenge to the constitutionality of the compulsory flag salute laws brought by Jehovah's Witnesses.

(continued on the next page)

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

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

West Virginia State Board of Education v. Barnette

319 U.S. 624 (1943)
http://caselaw.findlaw.com/us-supreme-court/319/624.html
Vote: 6 (Black, Douglas, Jackson, Murphy, Rutledge, Stone)
3 (Frankfurter, Reed, Roberts)

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

FACTS:

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

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

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

ARGUMENTS:

For the appellant, West Virginia State Board of Education:

- All questions presented in this case have already been authoritatively answered by the Court in *Minersville School District v. Gobitis.*
- No relevant changes in federal law have occurred since *Gobitis.*
- The case should be settled by applying the *Gobitis* precedent and upholding the state's flag salute law.

For the appellees, Walter Barnette, et al.:

- The challenged regulations abridge freedom of speech, freedom to worship, and freedom of conscience.
- The conduct of the appellees does not constitute a clear and present danger of a substantive evil that the government has a right to prevent.
- The advantages said to flow from compulsory flag saluting are not so great as to justify depriving children of an education merely because they refuse to salute the flag.
- The *Gobitis* decision has encouraged widespread, violent attacks on Jehovah's Witnesses.

MR. JUSTICE JACKSON DELIVERED THE OPINION OF THE COURT.

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

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

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

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

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

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

The *Gobitis* decision, however, *assumed* as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power. . . .

. . . [At] the very heart of the *Gobitis* opinion [is the reasoning] that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence [the Court] reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

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

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own.

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

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

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

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

Affirmed.

MR. JUSTICE FRANKFURTER, DISSENTING.

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

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

Brandenburg v. Ohio

395 U.S. 444 (1969)
https://caselaw.findlaw.com/us-supreme-court/395/444.html
Oral arguments are available at https://www.oyez.org/cases/1968/492.
Vote: 8 (Black, Brennan, Douglas, Harlan~~d~~, Marshall, Stewart, Warren, White)

0

PER CURIAM OPINION
CONCURRING OPINIONS: *Black, Douglas*

FACTS:

Clarence Brandenburg, the leader of an Ohio affiliate of the Ku Klux Klan, sought to obtain publicity for the group's goals by inviting a television reporter and camera crew to attend a rally held on a farm, just outside of Cincinnati. Local and national television stations later aired some of the footage from the rally, which showed at least a dozen hooded Klansmen gathered around a burning cross. Some were carrying firearms. Brandenburg delivered a speech to the group in which he said, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." He also said, "Personally I believe the [N-word] should be returned to Africa, the Jew returned to Israel." Based on these films, Ohio authorities arrested Brandenburg for violating Ohio's criminal syndicalism law, which was passed in 1919 to prevent the spread of unpatriotic views. The Ohio act prohibited the advocacy of unlawful means of political reform. After his conviction was upheld by the state supreme court, Brandenburg appealed to the U.S. Supreme Court, arguing that the First Amendment protected his expression.

Anonymous/AP/Shutterstock

Clarence Brandenburg, who led a Ku Klux Klan rally in rural Ohio. He was prosecuted for advocating criminal behavior, but the Supreme Court ruled in his favor, since no lawbreaking resulted from his speech.

Note that the justices issued a per curiam opinion but, apparently, it did not start out that way. Justice Abe Fortas wrote the original draft. The justices changed it to a per curiam, with some revisions by Justice William J. Brennan Jr., because Fortas had resigned from the Court before *Brandenburg* was issued.[29]

PER CURIAM

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." . . .

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California* (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. But *Whitney* has been thoroughly discredited by later decisions. These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States* (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action." A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California* cannot be supported, and that decision is therefore overruled.

Reversed.

Note that the test the Court adopted in *Brandenburg* has two important elements, both of which must be satisfied in order to punish speech that advocates the "use of force or of a law violation": the advocacy must be "directed to inciting or producing imminent lawless action" and it is "likely to incite or produce such action."

The Court has not revisited the *Brandenburg* test in part because cases centering on advocacy of illegal activity are rare.[30]

[29]Stephen Wermiel, "Lessons from History for Rulings after Justice Scalia's Death," SCOTUSblog, March 15, 2016, https://www.scotusblog.com/2016/03/scotus-for-law-students-lessons-from-history-for-rulings-after-justice-scalias-death/.

[30]An exception is ***Holder v. Humanitarian Law Project*** (2010), involving a federal law that prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization." In upholding the law against a challenge brought by a group that provided aid to designated terrorist groups for nonviolent activities, the majority did not cite *Brandenburg.* But, in dissent, Justice Breyer wrote, "Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs speech to these organizations can be prohibited as incitement under *Brandenburg*."

Fighting Words. This doctrine is related to the hostile audience cases, but it tends to relate to direct personal insults—speech that is so inflammatory that it provokes a violent response from the listener. To the Court, as you will see in *Chaplinsky v. New Hampshire* (1942), such expression is not really speech at all. It does not involve a genuine discussion of ideas; it is instead a kind of verbal assault on another person that inflicts an injury. Do you find this logic persuasive? Also consider the Court's definition of fighting words. Does it strike a reasonable balance between protecting too much and too little speech?

Chaplinsky v. New Hampshire

315 U.S. 568 (1942)
http://caselaw.findlaw.com/us-supreme-court/315/568.html
Vote: 9 (Black, Byrnes, Douglas, Frankfurter, Jackson, Murphy, Reed, Roberts, Stone)
0

OPINION OF THE COURT: *Murphy*

FACTS:

On April 6, 1940, Jehovah's Witnesses member Walter Chaplinsky was selling religious pamphlets and literature, including *Watchtower* and *Consolation,* on a public street in New Hampshire. While he was announcing the sale of his pamphlets, a crowd of about fifty people began to gather. Several took offense at Chaplinsky's comments about organized religion and "racketeer" priests and complained to the city marshal. The marshal warned Chaplinsky that the people were getting into an ugly mood, but Chaplinsky continued to express his religious views and distribute his literature. After one person tried to attack Chaplinsky, the marshal and three of his men intervened and forcibly began to take Chaplinsky to city hall. When a

very agitated Chaplinsky demanded to know why they had arrested him and not those in the crowd, one of the officers replied, "Shut up, you damn bastard," and Chaplinsky in turn called the officer a "damned fascist" and "a God damned racketeer." For those words, the state charged him with breaking a law prohibiting the use of "any offensive, derisive, or annoying word to any other person who is lawfully in the street." Chaplinsky was convicted and received a fine. He appealed.

ARGUMENTS:

For the appellant, Walter Chaplinsky:

- The police unlawfully arrested Chaplinsky and violently removed him even though he was peacefully exercising his right to freedom of expression. The police should have arrested those who were taunting and assaulting him.
- Rather than physically resist his unlawful arrest, Chaplinsky chose to speak, boldly expressing his righteous indignation about the government's wrongful conduct toward him.
- The fact that speech is likely to cause violence is no grounds for suppressing it. Here, in any event, there is no reason to believe that Chaplinsky's words would lead to violence by the police officers to whom the words were directed.

For the appellee, State of New Hampshire:

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

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. . . .

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

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

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

Affirmed.

Written by the usually very liberal Justice Murphy, the majority opinion affirmed Chaplinsky's conviction, holding the government may prohibit fighting words, defined as words "which by their very utterance inflict injury or tend to incite an immediate breach of peace." Although this definition of "fighting words" may seem clear, the word "injury" could be interpreted to include not just physical injury but also emotional or psychological harm. If so, the fighting words doctrine, commentators suggest, could be used to suppress all kinds of speech. The mere expression of unpopular or offensive ideas, even if they do not provoke an immediate

violent reaction, could be restricted under such a broad definition of injury.

Perhaps not so surprisingly, then, the Court revisited fighting words doctrine in *Cohen v. California* (1971). How did the justices clarify *Chaplinsky*'s definition?

Cohen v. California

403 U.S. 15 (1971)
http://caselaw.findlaw.com/us-supreme-court/403/15.html
Oral arguments are available at https://www.oyez.org/cases/1970/299.
Vote: 5 (Brennan, Douglas, Harlan, Marshall, Stewart)
4 (Black, Blackmun, Burger, White)

OPINION OF THE COURT: *Harlan*
DISSENTING OPINION: *Blackmun*

FACTS:

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

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

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

Affirming Cohen's municipal court conviction, the California Court of Appeal found that it was "reasonably foreseeable that such conduct might cause others to rise up to commit a violent act." The California Supreme Court declined to review that decision, but Cohen's ACLU lawyers successfully petitioned the U.S. Supreme Court to consider the First Amendment issues at stake.[27]

ARGUMENTS:

For the appellant, Paul Robert Cohen:

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

For the appellee, State of California:

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

MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT.

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

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public.

[27]In addition to its constitutional ramifications, *Cohen* provides a unique opportunity to view intraorganizational politics. As Richard Cortner reports, the Southern California affiliate of the ACLU always felt the "key issue...and the one that arguments before the Court should focus on was the free expression issue." At the Supreme Court level, however, the ACLU's Northern California affiliate "urged the Court not to decide the case on the freedom of expression issue." The Southern California affiliate refused to give its consent to the filing of the brief, but the justices granted permission. See Richard C. Cortner, *The Supreme Court and Civil Liberties Policy* (Palo Alto, CA: Mayfield, 1975), 128–129.

The only "conduct" which the State sought to punish is the fact of communication. . . . Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

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

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

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

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizens, are, as a matter of common knowledge, inherently likely to provoke violent reaction. *Chaplinsky v. New Hampshire* (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer." No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. *Feiner v. New York* (1951); *Terminiello v. Chicago* (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

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

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

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

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

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

Reversed.

MR. JUSTICE BLACKMUN, WITH WHOM THE CHIEF JUSTICE AND MR. JUSTICE BLACK JOIN, DISSENTING.

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

In the process of reversing Cohen's jail sentence , the Court refined its approach to fighting words. In addition to meeting *Chaplinsky*'s definition (words "which by their very utterance inflict injury or tend to incite an immediate breach of peace"), the government must show that the speech was a "direct personal insult" intended to "violently arouse" the listener. To the majority, "no individual[s] actually or likely to be present could reasonably" have regarded Cohen's message was directed specifically at them, and so the message could not be considered fighting words. This narrower approach has made it far more difficult for the government to repress speech based on the fighting words doctrine. In fact, although the doctrine survives, the Court has not upheld a conviction based on fighting words since *Chaplinsky*.[28]

---

[28]Erwin Chemerinsky and Howard Gillman, *Free Speech on Campus* (New Haven, CT: Yale University Press).

Frisby v. Schultz
487 U.S. 474 (1988)

Justice O'CONNOR delivered the opinion of the Court.

Brookfield, Wisconsin, is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra C. Schultz and Robert C. Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who apparently performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20, 1985, and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its various ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board therefore resolved to enact an ordinance to restrict the picketing. … On May 15, 1985, [the town enacted a] flat ban on all residential picketing:

> It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and] has as its object the harassing of such occupants."

Faced with this threat of arrest and prosecution, appellees ceased picketing in Brookfield and filed this lawsuit in the United States District Court for the Eastern District of Wisconsin, [alleging that the] ordinance violated the First Amendment….

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny….

[W]e accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest"…

[Accordingly, we move] on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy.

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."…

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, cf. *Cohen v. California* (1971), the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Rowan v. Post Office Dept.* (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. See, *e.g., FCC v. Pacifica Foundation,* (1978) (offensive radio broadcasts); *Rowan,* (offensive mailings); *Kovacs v. Cooper* (1949) (sound trucks).

It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil—visual blight—[was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself.

The same is true here. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. [T]heir activity nonetheless inherently and offensively intrudes on residential privacy….

The First permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home." Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored….

Justice STEVENS, dissenting.

"GET WELL CHARLIE—OUR TEAM NEEDS YOU."

In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the period of time necessary to convey its friendly message to its intended audience.

[Although] I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected… the ordinance is unquestionably "overbroad" in that it prohibits some communication that is protected by the First Amendment…. My hunch is that the town will probably not enforce its ban against friendly, innocuous, or even brief unfriendly picketing….

The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; while we sit by and await further developments, potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose.

/

Government Speech

The Supreme Court has drawn a distinction between government regulating private speech and government speaking on its own behalf. When government actors regulate speech, they must abide by the restraints imposed by the First Amendment, such as the prohibition on viewpoint discrimination. As we noted earlier, a university cannot, for example, allow student demonstrations supporting its police department while disallowing those against it. But when government speaks, it may in fact present only one point of view, thus discriminating against others. If a city engages in a publicity campaign to recycle aluminum cans, it is supporting a particular viewpoint and is not constitutionally required to promote the opposite view as well.

Although the government speech doctrine is well established, it is often difficult to draw a clear distinction between private speech and government speech. To see the point, compare the majority and dissenting opinions in *Walker v. Texas Division, Sons of Confederate Veterans* (2015).

Walker v. Texas Division, Sons of Confederate Veterans

576 U.S. _____ (2015)
http://caselaw.findlaw.com/us-supreme-court/14-144.html
Oral arguments are available at https://www.oyez.org/cases/2014/14-144.
Vote: 5 (Breyer, Ginsburg, Kagan, Sotomayor, Thomas)
4 (Alito, Kennedy, Roberts, Scalia)

OPINION OF THE COURT: *Breyer*
DISSENTING OPINION: *Alito*

FACTS:

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

In 2009 and again in 2010, the Texas division of the Sons of Confederate Veterans (SCV) proposed a specialty license plate design that incorporated the Confederate battle flag. Both times the department rejected the design. SCV sued John Walker III and other members of the department's governing board, claiming that the denial was a violation of the freedom of speech provision of the First Amendment. The district court ruled in favor of the state, but a divided court of appeals reversed, holding that the state had engaged in constitutionally forbidden viewpoint discrimination.

ARGUMENTS:

For the petitioner, John Walker III, Board Chairman, Texas Department of Motor Vehicles:

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

For the respondent, Texas Division, Sons of Confederate Veterans:

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

JUSTICE BREYER DELIVERED THE OPINION OF THE COURT.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. . . .

SCV believes that Texas's specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. . . .

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message . . . . In *Summum,* private entities "financed and donated monuments that the government accept[ed] and display[ed] to the public." . . .

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

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

Reversed.

JUSTICE ALITO, WITH WHOM THE CHIEF JUSTICE, JUSTICE SCALIA, AND JUSTICE KENNEDY JOIN, DISSENTING.

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

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

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

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

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

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

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

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

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

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

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

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words "Choose Life," but the State of New York rejected such a plate because the message "[is] so incredibly divisive." Texas allows a specialty plate honoring the Boy Scouts, but the group's refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination. . . .

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

Garcetti v. Ceballos
547 U.S. 410 (2006)

Facts

Respondent Richard Ceballos, a supervising deputy district attorney for the Los Angeles County District Attorney's Office, was asked by defense counsel to review a case in which, counsel claimed, the affidavit police used to obtain a critical search warrant was inaccurate. Concluding after the review that the affidavit made serious misrepresentations, Ceballos relayed his findings to his supervisors, petitioners here, and followed up with a disposition memorandum recommending dismissal.

Petitioners nevertheless proceeded with the prosecution. At a hearing on a defense motion to challenge the warrant, Ceballos recounted his observations about the affidavit, but the trial court rejected the challenge.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the U.S. District Court for the Central District of California, asserting, as relevant here that petitioners violated the First and Fourteenth Amendments

The District Court granted petitioners summary judgment, ruling that the memo was not protected speech because Ceballos wrote it pursuant to his employment duties. Reversing, the Ninth Circuit held that the memo's allegations were protected under the First Amendment analysis.

Justice Kennedy delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick* v. *Myers* (1983) . The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

Pickering v. *Board of Ed.* (1968) provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest

of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. … The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively….

With these principles in mind we turn to the instant case. The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements

pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline….

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance….

Justice Souter's [dissenting opinion] suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Justice Souter, with whom Justice Stevens and Justice Ginsburg join, dissenting.

…I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

[Under the majority's view, the] ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter* v. *Bollinger* (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian* v. *Board of Regents of Univ. of State of N.* (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'"; *Sweezy* v. *New Hampshire* (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

Student Speech

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

Tinker v. Des Moines Independent Community School District

393 U.S. 503 (1969)
http://caselaw.findlaw.com/us-supreme-court/393/503.html
Oral arguments are available at https://www.oyez.org/cases/1968/21.
Vote: 7 (Brennan, Douglas, Fortas, Marshall, Stewart, Warren, White)
2 (Black, Harlan)

OPINION OF THE COURT: *Fortas*
CONCURRING OPINIONS: *Stewart, White*
DISSENTING OPINIONS: *Black, Harlan*

FACTS:

In December 1965 a group of adults and secondary school students in Des Moines, Iowa, devised two strategies to demonstrate their opposition to the Vietnam War: they would fast on December 16 and New Year's Day and would wear black armbands every day in between. Principals of the students' schools learned of the plan and feared the demonstration would be disruptive. As a consequence, they announced that students wearing the armbands to school would be suspended. Of the eighteen thousand children in the school district, all but five complied with the policy. Among those five were John Tinker, Mary Beth Tinker, and Christopher Eckhardt, whose parents allowed them to wear black armbands to school. The three students had a history of participating in other civil rights and antiwar protests. All three were suspended. ACLU attorneys represented the students in their appeal to the Supreme Court.

ARGUMENTS:

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

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

- The prohibition against wearing the armbands was an unconstitutional prior restraint on freedom of speech.
- Wearing the armbands caused no disturbance or disruption of the school day.

For the respondent, Des Moines Independent Community School District:

- School officials should be given wide discretion to carry out their responsibility to maintain a scholarly, disciplined atmosphere in the classroom. The school policy at issue here was reasonably calculated to promote that goal.
- Des Moines school officials properly allowed full classroom discussion of public issues, such as the Vietnam War, but demonstrations are inappropriate inside the school.
- Disturbances at school cannot be measured by the same standards used for adults in other environments.

MR. JUSTICE FORTAS DELIVERED THE OPINION OF THE COURT.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska* (1923), this Court held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent

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

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

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

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

Bettmann/Getty Images

Mary Beth Tinker, pictured here with her mother, Lorena Tinker, and younger brother Paul, took part in a Vietnam War protest by wearing a black armband in school—an action that got Mary Beth and her older brother, John, suspended in 1965. In *Tinker v. Des Moines* (1969), the Supreme Court ruled that the suspensions violated the students' First Amendment rights.

concern speech or action that intrudes upon the work of the schools or the rights of other students.

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

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

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

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

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

Reversed and remanded.

MR. JUSTICE BLACK, DISSENTING.

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—"symbolic" or "pure"—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. . . .

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

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

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

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

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

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

Morse v. Frederick

551 U. S. 393 (2007)
http://caselaw.findlaw.com/us-supreme-court/551/393.html
Oral arguments are available at https://www.oyez.org/cases/2006/06-278.
Vote: 5 (Alito, Kennedy, Roberts, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stephens)

OPINION OF THE COURT: *Roberts*
CONCURRING OPINION: *Alito, Thomas*
OPINION CONCURRING IN JUDGMENT IN PART AND DISSENTING IN PART: *Breyer*
DISSENTING OPINION: *Stevens*

FACTS:

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

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

The school superintendent upheld the suspension, holding that it was an appropriate enforcement of school policy at a school-sponsored event. The message portrayed on the banner was not political expression and could be reasonably interpreted

Mischafer at en.wikipedia, Public domain, via Wikimedia Commons

In *Morse v. Frederick* (2007), the Supreme Court upheld the Juneau School District's suspension of Joseph Frederick for displaying a banner perceived as supportive of illegal drug use. Here Frederick's attorney stands alongside the banner that ignited the dispute.

as supportive of illegal drug use. Frederick sued in federal district court for unspecified monetary damages, claiming that his First Amendment rights had been violated. The district judge held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity." The Court of Appeals for the Ninth Circuit, however, reversed on the grounds that student speech cannot be restricted without a showing that it poses a substantial risk of disruption. The school system requested Supreme Court review.

ARGUMENTS:

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

- *Tinker v. Des Moines* and *Bethel School District No. 403 v. Fraser* allow regulation of student speech that disrupts or undermines the school's educational mission.
- Discouraging use of illegal substances is part of the school's mission.
- Frederick's pro-drug banner interfered with decorum by radically changing the focus of the school activity.
- Principal Morse properly disassociated the school from Frederick's pro-drug banner.

For the respondent, Joseph Frederick:

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

CHIEF JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

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

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

We agree with Morse. . . .

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

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." But that is a description of Frederick's motive for displaying the banner; it is not an interpretation of what the banner says. The way Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

. . . [T]his is plainly not a case about political debate over the criminalization of drug use or possession.

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

Tinker [*v. Des Moines Independent Community School District* (1969)] held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in

political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." Political speech, of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black* (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

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

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

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

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

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

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

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

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

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

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

It is so ordered.

JUSTICE THOMAS, CONCURRING.

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

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

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

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

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order. . . .

Tinker effected a sea change in students' speech rights, extending them well beyond traditional bounds: [unless] a student's speech would disrupt the educational process, students had a fundamental right to speak their minds (or wear their armbands)—even on matters the school disagreed with or found objectionable…

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

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

Justice Black['s] dissent in *Tinker* has proved prophetic. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools . . . . We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either "[g]ibberish" or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to "surrender control of the American public school system to public school students."

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

JUSTICE ALITO, WITH WHOM JUSTICE KENNEDY JOINS, CONCURRING.

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

JUSTICE STEVENS, WITH WHOM JUSTICE SOUTER AND JUSTICE GINSBURG JOIN, DISSENTING.

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

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

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

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

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

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

I respectfully dissent.

.

PRIOR RESTRAINT

Note to students: The material to follow focuses on freedom of the press but it also applies to speech.

No concept is more important to an understanding of freedom of the press than *prior restraint*, which occurs when the government reviews material to determine whether its publication will be permitted. As a form of government censorship, prior restraint is antithetical to a free press. As Justice Lewis F. Powell Jr. explained, "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."[3] In other words, the government may punish press activity that violates legitimate civil or criminal laws, but such government sanctions may take place only *after* publication, not before.

Near v. Minnesota

283 U.S. 697 (1931)
http://caselaw.findlaw.com/us-supreme-court/283/697.html
Vote: 5 (Brandeis, Holmes, Hughes, Roberts, Stone)
4 (Butler, McReynolds, Sutherland, Van Devanter)

OPINION OF THE COURT: *Hughes*
DISSENTING OPINION: *Butler*

[3]*Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* (1973).

FACTS:

A 1925 Minnesota law provided for "the abatement, as a public nuisance, of a 'malicious, scandalous, and defamatory newspaper, magazine, or other periodical.'" In the fall of 1927, Floyd B. Nelson, a county attorney, asked a state judge to issue a restraining order banning publication of the *Saturday Press.* In the attorney's view, the newspaper, partly owned by Jay Near, was the epitome of a malicious, scandalous, and defamatory publication.[4] The *Saturday Press* committed itself to exposing corruption, bribery, gambling, and prostitution in Minneapolis, which Near often connected to Jews. The paper attacked specific city officials for being in league with gangsters and chided the established press for refusing to uncover the corruption. Near's racist, anti-Semitic attitudes colored these attacks. In one issue, Near wrote:

> I simply state a fact when I say that ninety per cent of the crimes committed against society in this city are committed by Jew gangsters. . . . It is Jew, Jew, Jew, as long as one cares to comb over the records. I am launching no attack against the Jewish people AS A RACE. I am merely calling attention to a FACT. And if people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews.

Based on the paper's past record, a judge issued a temporary restraining order prohibiting the sale of printed and future editions. Believing that this action violated his rights, Near contacted the American Civil Liberties Union (ACLU), which agreed to take his case. He grew uncomfortable with the organization, however, and instead obtained assistance from the publisher of the *Chicago Tribune.* Together, they challenged the Minnesota law as a violation of the First Amendment freedom of press guarantee, arguing that the law was tantamount to censorship.

Bettmann/Contributor/Getty Images

Floyd B. Olson, the attorney for Hennepin County, Minnesota. He used a nuisance law to seek a restraining order against the *Saturday Press* after it criticized him, the mayor, and the chief of police for not taking action against organized crime. The Supreme Court invalidated the statute, marking the first time the Court employed the First Amendment to strike a state law that imposed a prior restraint on a newspaper. Olson was later elected governor.

ARGUMENTS:

For the appellant, Jay Near:

- The Minnesota law violates freedom of the press by imposing restraints prior to publication. Prior restraints violate traditional notions of a free press, which allow publication of any material, regardless of its nature. Any abuses should be punished only after publication.
- The state does not have the power to prevent publication of any material unless it advocates violent overthrow of the government or breach of law. General concern for the public welfare is insufficient to overcome the right to a free press.

For the appellee, State of Minnesota:

- The right to a free press does not extend to press that is obscene, scandalous, or defamatory. The Minnesota law is narrow, applying only to irresponsible press that is "malicious, scandalous, or defamatory" and, therefore, not protected by the First Amendment.
- The state has the power to restrict press that is injurious to public health, safety, and morals; the law promotes public peace by prohibiting dangerous press.

[4]For an in-depth account of this case, see Fred W. Friendly, *Minnesota Rag* (New York: Random House, 1981). The quotes in this and the next paragraph come from this account.

- Publications can demonstrate that the material to be published is true and published in good faith; therefore, lawful publications will not be affected by the statute.

MR. CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT.

[The Minnesota] statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. . . .

. . . The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. . . .

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." . . .

The objection has . . . been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. . . . These limitations are not applicable here. . . .

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remains open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. . . .

. . . The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege. . . .

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court . . . and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. . . .

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. . . . As was said in *New Yorker Staats-Zeitung v. Nolan,* "If the township may

prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and, if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action . . . , to be an infringement of the liberty of the press. . . .

Judgment reversed.

Coates v. City of Cincinnati
402 U.S. 611 (1971)

Mr. Justice STEWART delivered the opinion of the Court.

A Cincinnati, Ohio, ordinance makes it a criminal offense for 'three or more persons to assemble on any of the sidewalks and there conduct themselves in a manner annoying to persons passing by. The issue before us is whether this ordinance is unconstitutional on its face.

The record … tells us no more than that the appellant Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute. For throughout this litigation it has been the appellants' position that the ordinance on its face violates the First Amendment…

[T]he only construction put upon the ordinance by the state court was its unexplained conclusion that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity." But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.

We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unasertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. … Terminiello v.

Chicago. The First Amendment [does] not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. …

The judgment is reversed.

Boos v. Barry
485 U.S. 312 (1988)

A provision of the District of Columbia code, aimed at protecting the representatives of foreign governments, made it unlawful to:

> to display any [sign] designed or adapted to intimidate, coerce, or bring into public odium any foreign government…or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government …within 500 feet of any building… used by any foreign government as an embassy… consulate, or for other official purposes. *

This is known as the "display clause."

Petitioners wished to carry signs critical of the Governments of the Soviet Union and Nicaragua on the public sidewalks within 500 feet of the embassies of those Governments in Washington, D.C. Petitioners Bridget M. Brooker and Michael Boos, for example, wish to display signs stating "RELEASE SAKHAROV" and "SOLIDARITY" in front of the Soviet Embassy. Petitioner J. Michael Waller wishes to display a sign reading "STOP THE KILLING" within 500 feet of the Nicaraguan Embassy.

Asserting that D.C. Code prohibited them from engaging in these expressive activities, they brought a First Amendment challenge.

Justice O'CONNOR delivered the opinion of the Court…

Analysis of the display clause must begin with several important features of that provision. First, the display clause operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech. We… have consistently commented on the central importance of protecting speech on public issues.

Second, the display clause bars such speech on public streets and sidewalks, traditional public fora that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In such places, which occupy a "special position in terms of First Amendment protection," the government's ability to restrict expressive activity "is very limited."

Third, [the display clause] is content based. Whether individuals may picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not. One category of speech has been completely prohibited within 500 feet of embassies. Other categories of speech, however, such as favorable

* The code also prohibits any congregation of three or more persons within 500 feet of a foreign embassy. The excerpt below deals only with the "display" clause.

speech about a foreign government or speech concerning a labor dispute with a foreign government, are permitted…

[The U.S. government] contends that the statute is not content based because the government is not itself selecting between viewpoints; the permissible message on a picket sign is determined solely by the policies of a foreign government.

We reject this contention, although we agree the provision is not viewpoint based. The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments. While this prevents the display clause from being directly viewpoint based… it does not render the statute content neutral. Rather, we have held that a regulation that "does not favor either side of a political controversy" is nonetheless impermissible because the First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." Here the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted….

Our cases indicate that as a *content-based* restriction on *political speech* in a *public forum* must be subjected to the most exacting scrutiny. Thus, we have required the State to show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."…

[The government argues that] the display clause serves a compelling governmental interest in protecting the dignity of foreign diplomatic personnel. Since the dignity of foreign officials will be affronted by signs critical of their governments or governmental policies, we are told, these foreign diplomats must be shielded from such insults in order to fulfill our country's obligations under international law…

Even if we assume that international law recognizes a dignity interest and that it should be considered sufficiently "compelling" to support a content-based restriction on speech, we conclude that the [display clause] is not narrowly tailored to serve that interest.

[That's because "of the availability of a significantly less restrictive alternative."] A statute adopted by Congress, which is the body primarily responsible for implementing our [international] obligations, prohibit[s] willful acts or attempts to "intimidate, coerce, threaten, or harass a foreign official." [This law is] considerably less restrictive than the display clause. [The congressional law] is not narrowly directed at the content of speech but at any activity, including speech, that has the prohibited effects. …

Relying on congressional judgment in this delicate area, we conclude that the availability of alternatives amply demonstrates that the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it is not narrowly tailored; a less restrictive alternative is readily available.