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Cultivating Free Speech Culture

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Cultivating Free Speech Culture

Joseph A. Tomain

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CULTIVATING FREE SPEECH CULTURE

Joseph A. Tomain*

ABSTRACT

Defending dissent to safeguard speech and political opposition is a challenging and necessary task for a self-governing democracy. Moreover, it is a collective task. Succeeding in this endeavor sometimes requires defending speech with which one disagrees, especially in a nation as pluralistic as the United States. Although imperfect and inconsistent, there are numerous examples where strange bedfellows join together to achieve this goal. While First Amendment law helps us reach the goal, law alone is not enough. We also need a cultural commitment to defending dissent. This Essay argues that cultivating a culture that values robust free speech protection is an essential component to ensuring that our grand and wobbly experiment in democracy moves forward in a positive trajectory.

* Joseph A. Tomain is a Senior Lecturer at the Indiana University Maurer School of Law. The author would like to thank the following for helpful feedback on various parts of this project: Yvette Butler, Jay Krishnan, Susannah P. Mroz, Joseph P. Tomain, and participants at the Mauer summer research workshop, the *Washington and Lee Journal for Civil Rights and Social Justice* 2025 symposium on "Conflict in the Classroom and Beyond: Navigating Privacy, Censorship, and Expression in Education"; and the *Notre Dame Journal of Legislation* 2025 symposium on "The Regulation of Social Media." He would also like to thank Corway Chao, Alyssa Ruiz, and everyone at the *Washington University Journal of Law & Policy* for shepherding this Essay though the editorial process. The author would like to note all errors are his own.

Contents

Introduction ……..…….…….…... 2
I. The Non-Partisan Nature of Free Speech …… 2
II. The Civil Rights Movement and Free Speech ….…..… 11
III. Challenges in Embracing Free Speech ……....…. 13
IV. Pluralistic Democracy and Free Speech ……..…..… 17
V. Potential Objection ……...… 19
Conclusion ……..... 22

"I do not believe that it can be too often repeated that the freedoms of speech, press, petition, and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they be denied to the ideas we cherish."

- Justice Black (dissenting)[1]

INTRODUCTION

In 2025, Thomas Keck began his presentation at the Global Summit on Constitutionalism by stating that "[c]onstitutional democracy is in crisis, and threats to free speech are a substantial part of the story."[2] Thomas Keck continued by acknowledging that threats to free expression always exist in a democracy, "but they tend to be particularly acute under conditions of democratic backsliding."[3] In light of the United States' ongoing democratic backsliding and rising authoritarianism, law alone cannot save us from ourselves. Cultivating a culture that values robust free speech protection is an essential component to reversing this downward trend and defending the ability to dissent.[4] This Essay offers an argument for why everyone should embrace robust free speech principles and legal protections, even and especially when it requires defending speech they disdain.

Part I illustrates the non-partisan nature of free speech through several recent examples. Part II shows that free speech is integral to the civil rights movement. Part III acknowledges that embracing a free speech culture is challenging. Part IV explains why meeting that challenge is particularly necessary in a country as pluralistic as the United States. Part V addresses a potential objection to the case for cultivating a robust free speech culture.

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1. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting); *but see* Richard Delgado & David Yun, "*The Speech We Hate": First Amendment Totalism, the ACLU, and the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281, 1285–86 (1995) (rejecting the argument that the First Amendment must protect the "speech we hate . . . in order to protect the speech we hold dear.").

2. Thomas M. Keck, Free Speech, Constitutional Democracy, and Democratic Backsliding 1 (July 23, 2025) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5188067 [https://perma.cc/T9QR-ZRQ7].

3. *Id.*

4. *See also* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2225 (2018) ("Instead of fighting an uphill legal battle, why not put our efforts into changing the cultural and political landscape?").

I. THE NON-PARTISAN NATURE OF FREE SPEECH

We live in divisive times where it is growing increasingly difficult to speak to people who do not share similar ideological views,[5] let alone listen to them.[6] Free speech is one area that unites Americans across partisan divides, even in our current situation.[7] Several recent examples help illustrate this point, including times when legislative bodies unanimously voted in favor of bills that protect freedom of speech and when strange bedfellows join together.

A. Shield Laws

The Reporter's Privilege (also known as a shield law when in statutory form) allows journalists to protect the identity of confidential sources and/or confidential information or materials received as part of the newsgathering process. Because the Press Clause is a structural right (as opposed to an individual right),[8] the purpose of this protection is for the public's benefit.[9] In 1972, the Supreme Court had the opportunity to recognize that the First Amendment protects some form of a Reporter's Privilege in *Branzburg v. Hayes*. However, the Court held that the First

5. *See e.g.*, Mark Jurkowitz & Amy Mitchell, *A Sore Subject: Almost Half of Americans Have Stopped Talking Politics with Someone*, PEW RSCH. CTR. (Feb. 5, 2020), https://www.pewresearch.org/journalism/2020/02/05/a-sore-subject-almost-half-of-americans-have-stopped-talking-politics-with-someone/ [https://perma.cc/VC2F-X954]; *but see* Karl Vick, *The Growing Evidence That Americans Are Less Divided Than You May Think*, TIME (July 2, 2024), https://time.com/6990721/us-politics-polarization-myth/ [https://perma.cc/NM3M-ZYPW]; Catharine Richert, Annie Baxter & Nina Moini, *Americans Reconnect: Talking Across the Political Divide*, MPR NEWS (Apr. 22, 2025), https://www.mprnews.org/story/2025/04/22/americans-reconnect-talking-across-the-political-divide [https://perma.cc/6X3P-RYLJ].

6. *See generally* Ralph G. Nichols & Leonard A. Stevens, *Listening to People*, HARV. BUS. REV. MAG., Sep. 1957, https://hbr.org/1957/09/listening-to-people [https://perma.cc/NHP3-2DWP].

7. *See* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144 (2010) (arguing that "support for First Amendment values in fact cuts across conventional political allegiances . . . but to two very different visions of free speech.").

8. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633 (1975) ("the Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals . . . In contrast, the Free Press Clause extends protection to an institution.").

9. *See* New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors."); *id.* at 728 (Stewart, J., concurring) ("For without an informed and free press there cannot be an enlightened people.").

Amendment does not protect journalists from having to testify before a grand jury.[10] The Court was so closely divided that the opinion has been described as "four and a half to four and a half"[11] based on Justice Powell's "enigmatic concurring opinion."[12]

Before *Branzburg*, only seventeen states had shield laws.[13] In the wake of *Branzburg*, a "national consensus has emerged" that some protection for a journalist's confidential sources and/or information is desirable or even necessary for an effective Fourth Estate.[14] Today, Washington, D.C. and every state except Wyoming have some form of a state reporter's privilege or shield law.[15]

Despite multiple efforts, there is still no federal shield law. In 2005, then-Representative Mike Pence co-sponsored an attempt to pass a federal shield law. The *New York Times* described Pence as "a Midwestern Republican [who] has unexpectedly emerged as an ally of the Fourth Estate" in a "highly charged partisan atmosphere."[16] Pence explained that his support for the bill "reflects his conservative view that federal power should be limited" and that he "'really believe[s] the only check on government power is a free and independent press.'"[17] In 2024,

10. Branzburg v. Hayes, 408 U.S. 665, 667 (1972).

11. Stewart, *supra* note 8, at 635.

12. *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting).

13. Jane E. Kirtley, *Shield Laws*, FREE SPEECH CTR. (Mar. 31, 2025), https://firstamendment.mtsu.edu/article/shield-laws/ [https://perma.cc/WUR6-HW4P].

14. *Introduction to the Reporter's Privilege Compendium*, REPS. COMM. FOR FREEDOM OF THE PRESS (Nov. 5, 2021), https://www.rcfp.org/introduction-to-the-reporters-privilege-compendium/ [https://perma.cc/DKQ4-TXN3].

15. Kevin Goldberg, *Reporter's Privilege: Protecting Your Right to Know*, FREEDOM F., https://www.freedomforum.org/reporters-privilege/ [https://perma.cc/YN6C-Q7EV] (last visited Oct. 10, 2025).

16. Katharine Q. Seelye, *A Conservative Takes the Side of the Press on Shield Law*, N.Y. TIMES (Apr. 18, 2005), https://www.nytimes.com/2005/04/18/business/a-conservative-takes-the-side-of-the-press-on-shield-law.html [https://perma.cc/TU2F-S2YL].

17. *Id.* The Supreme Court has similarly acknowledged the fundamental role of the press as a check on government:

> [T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press. . . .

N.Y. Times Co. v. United States, 403 U.S. 713, 723 (1971) (Douglas, J., concurring) (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 719–20 (1931)).

the U.S. House of Representatives *unanimously* voted in favor of a federal shield bill.[18] Unfortunately, the bill died in the Senate, languishing in the Judiciary Committee without a hearing, even though the Senate bill had bipartisan co-sponsors.[19] Not a complete victory for free speech, but the near unanimous Reporter's Privilege protection in state law and a unanimous U.S. House of Representatives vote in 2024 are strong signs of the bipartisan support for journalist-source protection.

B. Anti-SLAPP Laws

SLAPP stands for "Strategic Lawsuit Against Public Participation."[20] Anti-SLAPP laws provide a way to dismiss a case at an early stage of litigation if it is determined that the real purpose of the lawsuit is to chill the defendant's speech by making them incur litigation costs (and risk possible damages) as opposed to bringing a legitimate legal claim.[21] Like efforts to pass a federal shield law, efforts to pass a federal anti-SLAPP law have bipartisan support but have been unsuccessful.[22] But most states have anti-SLAPP laws with broad bipartisan support. Although they vary in their scope of coverage and available remedies, thirty-eight states have an anti-SLAPP law.[23] In 2025, four state legislatures voted nearly unanimously in favor of adopting an anti-SLAPP law in their respective states. The combined

18. Charlie Savage, *Trump Tells Republicans to 'Kill' Reporter Shield Bill Passed Unanimously by House*, N.Y. TIMES (Nov. 20, 2024), https://www.nytimes.com/2024/11/20/us/politics/trump-press-act-freedom-reporters.html [https://perma.cc/KZV6-DQNS]; *see also* Seelye, *supra* note 16 (describing then-Congressman Mike Pence's support for a federal shield law).

19. Shawn Musgrave, *Democrats Had a Shot at Protecting Journalists From Trump. They Blew It.*, THE INTERCEPT (Apr. 29, 2025), https://theintercept.com/2025/04/29/press-act-trump-doj-journalists-leaks-subpoenas/ [https://perma.cc/6JYX-U3KB].

20. Jack B. Harrison, Erie *SLAPP Back*, 95 WASH. L. REV. 1253, 1253 (2020).

21. *Id.*

22. *See e.g.*, *Federal Anti-SLAPP Legislation,* PUB. PARTICIPATION PROJECT, https://anti-slapp.org/federal-state-legislation [https://perma.cc/M7FC-K6KE] (last visited Oct. 14, 2025) (showing bipartisan co-sponsors for Anti-SLAPP bill in 2024); *Federal Anti-SLAPP Bill Introduced in the House,* REPS. COMM. FOR FREEDOM OF THE PRESS (May 15, 2015), https://www.rcfp.org/federal-anti-slapp-bill-introduced-house/ [https://perma.cc/BYG4-SEB9] (similar for 2015).

23. *Anti-SLAPP Legal Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/anti-slapp-legal-guide/ [https://perma.cc/T2MV-P6MY] (last visited Oct. 14, 2025).

votes of state legislators in Idaho,[24] Iowa,[25] Montana,[26] and Ohio[27] in favor of adopting state anti-SLAPP laws were 499-2. Even our Chief Executive who has called to "open up" libel laws has relied upon and benefited from an anti-SLAPP law to defeat a defamation claim.[28]

C. Gulf of ~~Mexico~~ America?

When the Associated Press (AP) refused to refer to the Gulf of Mexico as the Gulf of America, it lost access to various White House events otherwise open to the press (history and tradition show that the AP had long-standing access here).[29] The AP did change its style guide to reflect that the White House now refers to the Gulf

24. *Idaho Becomes the 36th State With an Anti-Slapp Law Providing Enhanced Free Speech Protections,* INST. FOR FREE SPEECH (Mar. 11, 2025), https://www.ifs.org/blog/idaho-becomes-the-36th-state-with-an-anti-slapp-law-providing-enhanced-free-speech-protections/ [https://perma.cc/JKC3-4VTV]. Governor Brad Little signed the bill. *Id.*

25. The Iowa House of Representatives voted 89-0 and the Iowa Senate voted 47-0 in favor of adopting the bill. *BillBook*, THE IOWA LEGISLATURE, https://www.legis.iowa.gov/legislation/BillBook?ga=91&ba=HF472 [https://perma.cc/9MQU-BHX7] (last visited Oct. 14, 2025). Governor Kim Reynolds signed the bill. *Id. See also*, Madeline Thompson, *Indiana Law Protected My Right to Free Speech. We Need this Protection in Iowa.*, DES MOINES REG. (Mar. 26, 2025, 12:48 PM), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2025/03/26/iowa-anti-slapp-bills-free-speech-protections/82671223007/ [https://perma.cc/9CP5-4WXM].

26. *The Montana Governor Signs Landmark Bill, as State Becomes the 37th to Enact Anti-SLAPP Protections*, INST. FOR FREE SPEECH (May 26, 2025), https://www.ifs.org/blog/montana-governor-signs-landmark-bill-as-state-becomes-the-37th-to-enact-anti-slapp-protections/ [https://perma.cc/3LAT-2TDU]. Governor Greg Gianforte signed the bill. *Id.*

27. The Ohio House of Representatives voted 84-0 and the Ohio Senate voted 31-0 in favor of adopting the bill. *Senate Bill 237 Votes,* THE OHIO LEGISLATURE, https://www.legislature.ohio.gov/legislation/135/sb237/votes. [https://perma.cc/B6P4-JNNP] (last visited Oct. 15, 2025). Governor Mike DeWine signed the bill. Jay Adkisson, *Ohio Adopts the Uniform Public Expression Protection Act as Its First Anti-SLAPP Law,* FORBES (Jan. 9, 2025, at 11:51 ET), https://www.forbes.com/sites/jayadkisson/2025/01/09/ohio-adopts-the-uniform-public-expression-protection-act-as-its-first-anti-slapp-law/ [https://perma.cc/R252-BW6U].

28. Brian Naylor, *Trump's Promise to 'Open Up' Libel Laws Unlikely to Be Kept*, NPR (Mar. 26, 2016, at 6:00 ET), https://www.npr.org/2016/03/26/471846238/trumps-promise-to-open-up-libel-laws-unlikely-to-be-kept [https://perma.cc/CFH8-X37Y]. *But see* Clifford v. Trump, 339 F. Supp. 3d 915, 918 (C.D. Cal. 2018); *aff'd*, 818 F. App'x. 746 (9th Cir. 2020) (dismissing Stormy Daniels's defamation claims against President Trump under Texas's anti-SLAPP law, the Texas Citizens Participation Act).

29. *See* Mem. of Points and Auths. in Support of Plaintiff the Associated Press's Amended Motion for a Preliminary Injunction at 6–7, Associated Press v. Budowich, 780 F. Supp 3d 32 (D.D.C. Mar. 3, 2025) (No. 1:25-cv-00532-TNM).

of America.[30] Next, the AP filed a lawsuit seeking to regain its access. To be clear, there are complicated and unanswered questions about press access rights in these settings.[31] But that is not the point here. Instead, the point is to show that even right-wing media supported the AP's editorial choice by opposing their exclusion. Newsmax issued the following statement:

> We can understand President Trump's frustration because the media has often been unfair to him, but Newsmax still supports the AP's right, as a private organization, to use the language it wants to use in its reporting.
>
> We fear a future administration may not like something Newsmax writes and seek to ban us. This is why news organizations like Newsmax and Fox News are supporting the AP's First Amendment rights though we may disagree with its editorial point of view from time to time.[32]

Newsmax is not the only conversative voice to lend support to the AP's editorial choice. A "bipartisan, nonprofit organization committed to upholding the rule of law and defending the Constitution . . . [and] a group of conservative or independent former government officials, including those who were elected as Republicans or served in Republican administrations" filed an amici brief in support of the AP.[33] At the time of writing, this litigation is ongoing, but the AP is not having much success. In July 2025, the United States Court of Appeals for the D.C. Circuit denied the AP's petition for an en banc rehearing thereby allowing the lower court order to stand, which

30. Amanda Barrett, *AP Style Guidance on Gulf of Mexico, Mount McKinley*, AP: ANNOUNCEMENTS (Jan. 23, 2025), https://www.ap.org/the-definitive-source/announcements/ap-style-guidance-on-gulf-of-mexico-mount-mckinley/ [https://perma.cc/Y694-KW5L].

31. Gene Policinski, *Does the White House Blocking AP From Press Events Violate the First Amendment?*, FREEDOM F. (July 24, 2025), https://www.freedomforum.org/trump-white-house-associated-press-first-amendment/ [https://perma.cc/C4VQ-HMVX] ("[A]n ultimate ruling in the AP's favor specifically on White House access would break new First Amendment ground. Legislative action is not likely to settle the matter, given the Constitution's separation of powers.").

32. Elizabeth Crisp, *Newsmax, Fox News Back AP in Trump Standoff Over 'Gulf of America'*, THE HILL (Feb. 20, 2025, at 17:05 ET), https://thehill.com/homenews/5155957-newsmax-fox-news-support-ap-first-amendment/ [https://perma.cc/Z8DZ-JMLH].

33. Brief of Amici Curiae State Democracy Defs. Fund and Former Public Offs. in Support of Plaintiff's Amended Motion for a Preliminary Injunction at 6, Associated Press v. Budowich, 780 F. Supp. 3d 32 (D.D.C. Mar. 12, 2025) (No. 1:25-cv-00532-TNM).

allows the President to prohibit the AP's access to most restricted spaces, including Air Force One and the Oval Office.[34]

D. Consumer Protection Laws & The FCC's "News Distortion" Policy

In 2024, President Trump filed two lawsuits against news outlets asserting claims under state consumer protection laws, one against CBS and *60 Minutes*, and the other against the *Des Moines Register* and election pollster Ann Selzer.

The use of state consumer protection laws to ground a lawsuit against the media is unusual, but is not the first instance of such a tactic.[35] Additionally, the Federal Communications Commission is conducting its own investigation against CBS and *60 Minutes* under its "news distortion" policy.[36] The non-partisan nature of free speech is illustrated in this context in two ways. First, a prior unsuccessful lawsuit against Fox News provides doctrinal support for dismissing President Trump's two consumer fraud claims. Second, a chorus of voices across the political spectrum have filed public comments requesting the FCC to drop its "news distortion" investigation against CBS and *60 Minutes*.

In October 2024, *60 Minutes* aired an interview with then-Vice President and presidential candidate, Kamala Harris. On Halloween, President Trump sued CBS and *60 Minutes* in Texas under the Texas Deceptive Trade Practices Act. He alleged that "[t]o paper over Kamala's 'word salad' weakness, CBS used its national platform on *60 Minutes* to cross the line from the exercise of judgment in reporting to deceitful, deceptive manipulation of news."[37] Fox News analyst and law professor Jonathan Turley found that lawsuit "legally groundless."[38] Nonetheless, in a legally questionable move, the parent

34. Zoe Tillman, *Appeals Court Lets White House Exclude Associated Press*, BLOOMBERG (July 23, 2025, at 11:06 CDT), https://www.bloomberg.com/news/articles/2025-07-22/white-house-wins-court-ruling-to-exclude-the-associated-press?embedded-checkout=true [https://perma.cc/967Z-W7B7].

35. *See e.g.*, *infra* notes 43–48; *infra* text accompanying notes 43–48.

36. Claiming news distortion is a common tactic to silence or undermine speech. *See also, e.g.*, Christopher W. Schmidt, New York Times v. Sullivan *and The Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 304–05 (2014) ("Prior to initiating his lawsuit against the *New York Times*, Commissioner Sullivan issued a statement condemning the 'prejudiced Northern press' and 'their program of racial strife and exploitation for financial gain and spectacular distorted news coverage.'").

37. Complaint at ¶ 4, Trump v. CBS Broadcasting, Inc., No. 2:24-cv-00236-Z (N.D. Tex. Oct. 31, 2024).

38. Jonathan Turley, *No, Trump Should Not Sue CBS*, JONATHAN TURLEY (Oct. 20, 2024), https://jonathanturley.org/2024/10/20/no-trump-should-not-sue-cbs/ [https://perma.cc/V6ZW-UPMP].

company of CBS settled this baseless lawsuit for $16 million.[39]

In December 2024, President Trump sued the *Des Moines Register* and pollster Ann Selzer in Iowa under Iowa's Consumer Fraud Act. Days before the election, the *Des Moines Register* published Ann Selzer's poll showing that Harris had taken the lead in Iowa. As it turns out, Selzer's poll was a "spectacular miss."[40] President Trump alleged that the poll resulted from fraud by Ann Selzer for the "improper purpose of deceptively influencing the outcome of the 2024 Presidential Election."[41] At the time of writing, this litigation is ongoing.[42] But, there is a precedent that should guide the Court to dismiss the Iowa consumer fraud claim and could have been used had the *60 Minutes* case not settled—precedent that shows the non-partisan nature of this conclusion.

In 2020, the Washington League for Increased Transparency and Ethics (WASHLITE) sued Fox News under the State of Washington's Consumer Protection Act (CPA). WASHLITE alleged that Fox News harmed consumers because it "falsely described the coronavirus as a 'hoax' and falsely minimized the threat of the coronavirus and COVID-19."[43] The Washington state trial court granted Fox's motion to dismiss because the First Amendment bars WASHLITE's claim.[44] In doing so, the Court relied on a prior case where a CPA claim was brought against the *Seattle Times*. In that case, the Washington state appellate court affirmed dismissal of the claim because it was based on a "news article, and as such it [was] not published 'in the conduct of any trade or

39. Katie Fallow, *Paramount's Trump Lawsuit Settlement: Curtain Call for the First Amendment?*, KNIGHT FIRST AMEND. INST. AT COLUM. (July 9, 2025), https://knightcolumbia.org/blog/paramounts-trump-lawsuit-settlement-curtain-call-for-the-first-amendment [https://perma.cc/L6JY-68RM].

40. Jonathan Weisman, *A Famed Iowa Pollster's Career Ends With a 'Spectacular Miss' and a Trump Lawsuit*, N.Y. TIMES (Dec. 19, 2024), https://www.nytimes.com/2024/12/19/us/politics/ann-selzer-iowa-trump.html [https://perma.cc/D9FK-JJ2C].

41. Amended Complaint at ¶ 122, Trump v. Selzer, No. 122 4:24-cv-00449-RGE-WPK (D. Iowa Jan. 31, 2025).

42. William Morris, *Former Des Moines Register Pollster Calls Trump 'Vexatious' Litigant, Seeks Legal Fees*, DES MOINES REG. (Aug. 1, 2025), https://www.desmoinesregister.com/story/news/politics/2025/08/01/donald-trump-des-moines-register-pollster-selzer-frivolous-vexatious-litigant-iowa-poll/85443229007/?gnt-cfr=1&gca-cat=p&gca-uir=true&gca-epti=z11xx57p119650c119650e005400v11xx57b0048xxd004865&gca-ft=227&gca-ds=sophi&sltsgmt=0154_E [https://perma.cc/F2PS-URE5].

43. Order Granting Motion to Dismiss ¶ 3, Wash. League for Increased Transparency and Ethics v. Fox Corp., No. 20-2-07428-4_SEA (Wash. Super. Ct. May 27, 2020).

44. *Id.* at ¶ 17.

commerce.'"[45] In other words, not only does the First Amendment bar the claim, news articles simply do not fall under the scope of consumer fraud claims because news articles are not "conduct of any trade or commerce" under such statutes.[46]

The *WASHLITE* appellate court affirmed dismissal of the case.[47] The Court reasoned that even assuming Fox made false statements about the coronavirus, the First Amendment protects false statements and "none of the limited exceptions" to that general First Amendment rule apply.[48] The case involving Trump in Iowa should reach (and the one in Texas could have reached) the same result as the Fox News victory in *WASHLITE*. Even assuming the Iowa poll was misleading, and *60 Minutes* deceived the public by its editing of the Harris interview, the First Amendment protects these types of allegedly false claims. Such a result would also help ensure that free speech remains strongly protected and a shared cultural value, regardless of the ideological valence in play.[49]

In addition to Trump's now-settled lawsuit against CBS and *60 Minutes*, the Federal Communications Commission (FCC) investigated the same Kamala Harris interview under its "news distortion" policy that applies only to broadcast networks. Reactions to the FCC investigation also support the non-partisan nature of free speech. The "news distortion" policy is "a policy that has never been codified as a rule."[50] It has rarely been used, with a finding of liability in only eight cases between 1969–2019.[51] The FCC describes its

45. *Id.* at ¶ 15 (quoting Fid. Mort. Corp. v. Seattle Times Co., 128 P.3d 621 (Wash. Ct. App. 2005)).

46. *Id.*

47. *See generally* Wash. League for Increased Transparency and Ethics v. Fox News, No. 81512-1-I, 19 Wash. App. 2d 1006, 2021 WL 3910574 (Wash. Ct. App. Aug. 30, 2021).

48. *Id.* at *4.

49. A contrary result would raise questions about judicial legitimacy. *See* Keck, *supra* note 2, at 19 (discussing risks to free speech if courts fall under "autocratic capture," including an "autocrat's now-loyal courts [deference] to state restrictions on non-extremist political speech and journalism."). *See also* Lawrence Hurley, *In Rare Interviews, Lower Court Judges Criticize Handling of Trump's Cases*, NBC NEWS (Sep. 4, 2025), https://www.nbcnews.com/politics/supreme-court/supreme-court-trump-cases-federal-judges-criticize-rcna221775 [https://perma.cc/35W9-GJ7E].

50. Comments of Former Comm'rs Rachelle B. Chong et al., *In re* News Distortion Complaint Involving CBS Broad., Inc., No. 25-73, at 2 (F.C.C. Mar. 26, 2025) [hereinafter Comments of Former Commissioners].

51. *Id.* at 10 (citing Joel Timmer, *Potential FCC Actions against Fake News: The News Distortion Policy and the Broadcast Hoax Rule,* 24 COMM. L. & POL'Y 1, 20; Chad Raphael, *The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid,* 6 COMM. L. & POL'Y 485, 501 (2001)).

authority under the policy as "narrow" and states that it can take action only if it can substantiate complaints about the "accuracy or bias of news networks, stations, reporters or commentators in how they cover – or sometimes opt to not cover – events."[52]

In October 2024, the Center for American Rights filed a complaint with the FCC requesting the unedited footage of the *60 Minutes* Kamala Harris interview.[53] Four days before the 2025 inauguration, the FCC Enforcement Bureau denied the request.[54] Two days after the inauguration, the FCC reinstated the complaint, under the leadership of newly installed Chairman Brendan Carr.[55] Just like in the AP litigation, conservative organizations and individuals came to the defense of *60 Minutes* either independently or as part of bipartisan efforts.

A group of "traditional GOP allies" sent a letter to Chairman Carr asking him to drop the news distortion investigation into CBS and *60 Minutes*.[56] They described the investigation as "regulatory overreach" and part of a pattern at the FCC which could ultimately serve as precedent that could be "weaponized by future FCCs."[57] Also, a bipartisan group of former FCC commissioners filed a public comment requesting that Carr drop the

52. U.S. FED. COMMC'NS COMM'N, BROADCAST NEWS DISTORTION, https://www.fcc.gov/broadcast-news-distortion [https://perma.cc/JJ5B-2JFU] (last visited Oct. 23, 2025). One scholar states that the FCC has the authority to act under the news distortion policy when a broadcaster "intentionally engages in 'rigging' or 'slanting' of news." Philip M. Napoli, *News Distortion: The New Fake News*, TECH POL'Y PRESS (Apr. 21, 2025), https://www.techpolicy.press/news-distortion-the-new-fake-news/ [https://perma.cc/3NQM-CEXD]. Former FCC Commissioners state that the test for acting under the news distortion policy is "generally understood to have four elements[:]" (1) deliberate distortion; (2) evidence extrinsic to the broadcast shows that deliberate distortion; (3) it applies only to "significant events," not "minor inaccuracies or incidental aspects of the report[;]" and (4) evidence extrinsic to the broadcast shows it was the choice of upper level management, not lower level employees. Comments of Former Commissioners, *supra* note 50, at 8–9.

53. *See generally* Complaint for Center for American Rights, *In re* Complaint Against WCBS-TV (Oct. 16, 2024), https://drive.google.com/file/d/1kBqZo-10xBLE0Y1dhvBpzZnvcRUvH0H4/view [https://perma.cc/UG3U-J5GN].

54. Letter from Enforcement Bureau of the FCC to Daniel R. Suhr, Center for American Rights, GN Docket No. 25-11 (F.C.C. Jan. 16, 2025).

55. *See generally* Order, GN Docket No. 25-11 (F.C.C. Jan. 22, 2025).

56. Karl Bode, *Even Traditional GOP Allies Are Urging the FCC To End Its Baseless Attack On CBS, 60 Minutes*, TECHDIRT (Mar. 25, 2025), https://www.techdirt.com/2025/03/25/even-traditional-gop-allies-are-urging-the-fcc-to-end-its-baseless-attack-on-cbs-60-minutes/ [https://perma.cc/YJ7Y-K3KT] (identifying The Center for Individual Freedom, Americans for Tax Reform, and the Taxpayers Protection Alliance as some of the traditional GOP allies that signed on to the letter).

57. *See generally id.*

investigation.[58] They asked the FCC to dismiss the complaint as "meritless" because "[a]ny other path contravenes the First Amendment and the great American free speech tradition."[59] This bipartisan group of former FCC Commissioners further stated that "viewing the Commission's action in its full context reveals" that its "true purpose is to suppress disfavored speech."[60] They closed their public comment filing by explaining that because of "our many combined years of experience as Commissioners, we cannot stay silent."[61] These Commissioners, of course, are not the only individuals who believed that silence is not an option in a moment where democratic backsliding is front of mind for many.[62]

E. Rümeysa Öztürk, the Tufts Community and Beyond

Even in the hottest of hot topics, the light of non-partisan support for free speech shines through. Rümeysa Öztürk is a Tufts University PhD student and Turkish national.[63] In March 2024, she co-authored an op-ed

58. Comments of Former Commissioners, *supra* note 50, at 1.

59. *Id.* at 3. Not only did these bipartisan former FCC commissioners raise concerns about the implications for free speech, but they also noted that the procedural process was unusual.

> The Commission initially applied that precedent here and properly dismissed this news distortion complaint. But it took the highly unusual steps of reopening the proceeding once a new President assumed office, acting *sua sponte* to secure the precise relief requested by the complaint, and only *then* opening the docket for public comment—without any real explanation for reconsidering the prior decision.

Id. at i-ii.

60. *Id.* at 13; *see* Robert Corn-Revere, *Brendan Carr's Bizarro World FCC*, FIRE (May 1, 2025) (concluding that since becoming Chairman, Carr has abandoned his previously expressed commitment to freedom of speech and that "doing the wrong thing is the point."); *see also* Napoli, *supra* note 52 (arguing that the "transition from fake news to news distortion opens the doors to a type of direct governmental attack on the press—and consequently on democracy—that even the first Trump administration did not pursue.").

61. Comments of Former Commissioners, *supra* note 50, at 16.

62. *See generally* Keck, *supra* note 2, at 16–17. *See also* A.G. Sulzberger, *How the Quiet War Against Press Freedom Could Come to America*, WASH. POST (Sep. 5, 2024), https://www.washingtonpost.com/opinions/2024/09/05/sulzberger-free-press-new-york-times/ [https://perma.cc/5SLC-M39Z]; Isaac Chotiner, *Is Turkey's Declining Democracy a Model for Trump's America?*, NEW YORKER (Mar. 25, 2025), https://www.newyorker.com/news/q-and-a/is-turkeys-declining-democracy-a-model-for-trumps-america [https://perma.cc/3YBA-TCA8].

63. Dalia Faheid & Gloria Pazmino, *A PhD Student was Snatched by Masked Officers in Broad Daylight. Then She Was Flown 1,500 Miles Away*, CNN (Mar. 29, 2025), https://www.cnn.com/2025/03/29/us/rumeysa-ozturk-tufts-university-arrest-saturday [https://perma.cc/64ZT-8XG9].

in *The Tufts Daily* that criticized the university president for not fully adopting undergraduate student resolutions in support of Palestine.[64] One year later, plainclothes and masked Department of Homeland Security (DHS) officials detained Rümeysa Öztürk when she was walking down the street in Sommerville, Massachusetts.[65] In violation of a court order, the government flew her out of Massachusetts to a Louisiana detention facility without providing notice to the Court.[66] A DHS spokesperson stated that federal investigations "found Ozturk engaged in activities in support of Hamas, a foreign terrorist organization that relishes the killing of Americans. A visa is a privilege, not a right."[67] An internal State Department memo written before her arrest, however, contradicts that statement, finding no links to terrorism.[68] In May 2025, a federal district court ordered her immediate release concluding that the only evidence for her arrest was writing the op-ed.[69]

Before her release, several individuals and organizations publicly supported her. The president of Tufts University, whom Rümeysa Öztürk criticized in the op-ed, issued a University Declaration "asking that she receive due process rights to which she is entitled" and that "[b]ased on everything we know and have shared here" she should be "released without delay so that she can return to complete her studies and finish her degree at

64. Rumeysa Ozturk et al., *Op-ed: Try again, President Kumar: Renewing Calls for Tufts to Adopt March 4 TCU Senate Resolutions*, TUFTS DAILY (Mar. 26, 2024), https://www.tuftsdaily.com/article/2024/03/4ftk27sm6jkj [https://perma.cc/H54N-D48T].

65. Faheid & Pazmino, *supra* note 63.

66. *Id.*

67. Chloe Atkins & Phil Helsel, *Video Shows Tufts Graduate Student Grabbed Off the Street by Federal Immigration Officials*, NBC NEWS (Mar. 26, 2025, at 10:17 CDT), https://www.nbcnews.com/news/us-news/federal-immigration-authorities-detain-international-tufts-graduate-st-rcna198158 [https://perma.cc/8KKY-CT5R].

68. John Hudson, *No Evidence Linking Tufts Student to Antisemitism or Terrorism*, *State Dept. Office Found*, WASH. POST (Apr. 13, 2025), https://www.washingtonpost.com/national-security/2025/04/13/tufts-student-rumeysa-ozturk-rubio-trump/ [https://perma.cc/6EM9-PFLJ].

69. As reported by NPR, Judge William K. Sessions III said the following at the hearing leading to her release:

> "I suggested to the government that they produce any additional information which would suggest that she posed a substantial risk," Sessions said. "And that was three weeks ago, and there has been no evidence introduced by the government other than the op-ed. That literally is the case. There is no evidence here."

Adrian Florido, *Tufts Student Rümeysa Öztürk Freed from Immigration Detention*, NPR (May 9, 2025), https://www.npr.org/2025/05/09/nx-s1-5393055/tufts-student-rumeysa-ozturk-ordered-freed-from-immigration-detention [https://perma.cc/NLV2-VDEW].

Tufts University."[70] The Tufts Democrat and Republican student organizations issued a joint op-ed in *The Tufts Daily* that included the following:

> Though our organizations do not agree on many issues, including the content of Öztürk's op-ed (Tufts Republicans strongly disagrees with the content of the op-ed in question, while members of Tufts Democrats have expressed varying viewpoints on the matter), we find commonality in our collective belief in the value of free speech and the right of Öztürk to due process under the law outlined by the 14th Amendment of the Constitution.[71]

Finally, more than two dozen Jewish organizations filed an amici brief supporting Rümeysa Öztürk.[72] The brief made clear that these organizations do not presume "to speak for all of Jewish America" and that many signatories disagree with the position in her op-ed "calling for divestment from Israel and characterizing Israel's military actions in Gaza as a genocide."[73] But all signatories believed that her op-ed "peacefully expressed dissent."[74] "Our foreign policy is not so fragile that an op-ed in a student newspaper could so easily compromise it, and our constitutional guarantees are not so feeble that they may be so easily discarded."[75]

In a variety of contexts, these five examples illustrate how protection for free speech has the power to draw together not only strange bedfellows, but even individuals and organizations who might share little else in common and vehemently disagree with speakers. Recognizing this component of free speech is as essential as ever because we live in a divided time and nation.

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70. Sunil Kumar, *Tufts University Declaration for Rümeysa Öztürk*, TUFTS UNIV.: OFF. OF THE PRES. (Apr. 2, 2025), https://www.tufts.edu/president/speeches-and-messages/04022025-university-declaration-for-rumeysa-ozturk [https://perma.cc/WV7E-NR4Z].

71. Tufts Republicans & Tufts Democrats, *Op-ed: A Bipartisan Statement on the Arrest of Rümeysa Öztürk*, TUFTS DAILY (Apr. 10, 2025), https://www.tuftsdaily.com/article/2025/04/op-ed-a-bipartisan-statement-on-the-arrest-of-rmeysa-ztrk [https://perma.cc/46CH-L3SE]; *see also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting).

72. *See generally* Amici Curiae Brief of 27 Am. Jewish Orgs. in Support of Petitioner Rümeysa Öztürk's Petition for Writ of Habeas Corpus and Motion for Release Under *Mapp v. Reno*, or in the Alt., for Return to Vermont, Öztürk v. Trump, No. 2:25-CV-00374-WKS, (D. Vt. Apr. 10, 2025).

73. *Id.* at 1–2.

74. *Id.* at 3.

75. *Id.* at 4.

Defending dissent and safeguarding speech sometimes calls for supporting one's political opposition's right to speak. Collectively, these examples illustrate that free speech is a shared cultural value that transcends ideological chasms and plays an essential role in defending democracy and dissent.

II. THE CIVIL RIGHTS MOVEMENT AND FREE SPEECH

Not only is free speech a shared cultural value, it has been, and remains integral to the civil rights movement.[76] Reva Siegel's concept of "preservation-through-transformation" helps tell the story here.[77] Oversimplifying her concept, "preservation-through-transformation" means that even though laws and language change, the "new boss is the same as the old boss,"[78] often to the detriment of marginalized individuals and communities. Reva Siegel's concept is exemplified by some Southern state actors who used laws of general applicability to maintain the status quo of Jim Crow in new garb.[79] In Christopher Schmidt's words: "The race-conscious use of race-neutral law became Jim Crow's front line of defense."[80] One example of this effort is defamation law, which censors used "to quiet the voices of the opposition."[81] But the Supreme Court helped limit the effectiveness of preservation-through-transformation in one of its foundational free speech cases, *New York Times v. Sullivan*.[82]

76. Samantha Barbas, New York Times v. Sullivan*: A Civil Rights Story*, 12 TEX. A&M L. REV. 1, 40 (2024) ("[C]ivil rights and freedom of speech have been intertwined in our history."). Schmidt, *supra* note 36, at 321–24 (highlighting cases where the First Amendment protected the civil rights movement including preventing required disclosure of membership lists, protecting the right of lawyers to solicit clients for public interest litigation, protecting protests on state house grounds, and protecting acts of civil disobedience like sit-ins); *but see* Seidman, *supra* note 4, at 2220 (contending that "free speech law cannot systematically and significantly advance the progressive program unless there is first a fundamental transformation of American political culture.").

77. Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy,* 105 YALE L.J. 2117, 2178–87 (1996); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action* 49 STAN. L. REV. 1111, 1113, 1119 (1997).

78. THE WHO, Won't Get Fooled Again, at 07:52–07:53 (Decca Records 1971).

79. Schmidt provides a clear example of this tactic by quoting an article in the *Montgomery Adviser* published after the trial verdict in *New York Times v. Sullivan*: "'State and city authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama.'" Schmidt, *supra* note 36, at 306–7.

80. *Id.* at 295.

81. *Id.* at 304.

82. *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964). Although the Supreme Court helped, "[t]he failure of the segregationist legal attack on the Movement was primarily attributable

In *Sullivan*, the Court established the 'actual malice' standard as a constitutional requirement that some public officials must satisfy to succeed on a defamation claim. The term 'actual malice' is confusing, so much so that an experienced media law attorney advises against using that phrase with juries.[83] Prior to *Sullivan*, a plaintiff could win a defamation claim on a strict liability standard if the jury believed the statement to be false, without any consideration as to the speaker's knowledge about the truth or falsity of the statement. After *Sullivan* and to this day (so far),[84] a public official bringing a defamation claim must prove by clear and convincing evidence that the speaker made the statement knowing it was false or acted with reckless disregard as to its truth or falsity.[85] In other words, "actual malice" has nothing to do with ill-will, but what the speaker knows or believes about the truth of the statement.

At first glance, *Sullivan* is a free speech case; but, it is also a civil rights case.[86] *Sullivan* is a civil rights case because the Court consolidated defamation cases against the *New York Times* and four ministers who were leaders of the civil rights movement, including Ralph Abernathy. All were sued for defamation based on the same advertorial published in the *New York Times*.[87] At the time the cases were decided, they were viewed as civil rights

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to the strength of the Civil Rights Movement and only secondarily attributable to the saving interventions of the Supreme Court." Schmidt, *supra* note 36, at 296.

83. Steve Zansberg, *How Best to Explain "Actual Malice" to Juries? For Starters, Don't Use Those Words*, ABA COMM. LAWYER (June 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/how-best-explain-actual-malice-juries-starters-dont-use-those-words/ [https://perma.cc/6TKY-GWUS].

84. At least two sitting Justices, Justice Thomas and Justice Gorsuch, have expressed their desire to revisit and likely overturn *Sullivan*. *See generally* Berisha v. Lawson, 141 S. Ct. 2424 (2021) (Thomas, J. & Gorsuch, J., dissenting from denial of certiorari). But they are not the only ones who hold this view. *See* Dershowitz v. Cable News Network, Inc., No. 23-11270, 2025 WL 2585986 (11th Cir. Aug. 29, 2025) (Lago, J., concurring) (similar); *see generally* DAVID ENRICH, MURDER THE TRUTH: FEAR, THE FIRST AMENDMENT, AND A SECRET CAMPAIGN TO PROTECT THE POWERFUL (Harper Collins 2025). This movement, however, is short-sighted. "*Sullivan* not only protects the press, but also individual dissenters and critics, from liberal social movements to conservative pundits . . ." Barbas, *supra* note 76, at 5.

85. *Sullivan*, 376 U.S. at 279–80, 285–86.

86. *See e.g.*, Barbas, *supra* note 76, at 40; David Greene and Shahid Buttar, *The Inextricable Link Between Modern Free Speech Law and the Civil Rights Movement*, EFF (Mar. 8, 2019), https://www.eff.org/deeplinks/2019/03/inextricable-link-between-modern-free-speech-law-and-civil-rights-movement [https://perma.cc/985Y-7VLQ].

87. Originally, all the defendants were in the same case, but the *New York Times* was able to separate them so that it could pursue a jurisdictional argument not available to the ministers. Barbas, *supra* note 76, at 16.

cases, but that perspective was "lost over time."[88] As Samantha Barbas explains, there are several reasons that led to this shift including: (1) counsel for the *New York Times*, Columbia law professor Hebert Wechsler, made a strategic move to focus on the right to criticize the government, a "novel First Amendment argument that elided discussion of the civil rights context of the case";[89] (2) the civil rights movement was barely mentioned in the case, with explicit reference appearing only in Justice Black's concurring opinion;[90] (3) the *Times* interacted very little with the minister defendants during the trial;[91] and (4) Anthony Lewis's major book, *Sullivan*, *Make No Law*, "said little about the civil rights context."[92]

Samantha Barbas's article is one way that the civil rights context of this foundational First Amendment decision is being reintroduced to our collective conscience. David Greene, Civil Liberties Director at the Electronic Frontier Foundation, has another way to do so. When David Greene teaches his media law course, he uses one key pedagogical technique to highlight the importance of the civil rights movement in leading to the "actual malice" standard. David Greene provides students with an edited version of *New York Times v. Sullivan* that redacts all information about the press. His excerpt focuses on the civil rights leaders who were part of this combined case. David Greene uses the consolidated case name that is lost under the well-known case name, *Abernathy v. Sullivan*.[93]

Another case highlighting the "inextricable link"[94] between the First Amendment and the civil rights movement is *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*[95] Not only does this case relate to the Free Speech Clause, but it also reminds readers that there are other clauses in the First Amendment that play a

88. *Id.* at 3–4; *id.* at 38 (stating that "*Sullivan* facilitated the successes of the civil rights movement" and that the "SCLC recognized the significance of *Sullivan* to social justice movements more generally."); *id.* at 40 (observing and providing examples that "[c]ontemporary observers in 1964 nevertheless saw *Sullivan* as a 'civil rights case' more than a free speech case.").

89. *Id.* at 28. Abernathy and the other ministers made Equal Protection arguments putting the racial context squarely in the forefront, but the "Justices never passed judgment on these claims. By deciding the issue on First Amendment grounds, the Court avoided these sweeping equal protection arguments." Schmidt, *supra* note 36, at 317.

90. Barbas, *supra* note 76, at 35.

91. *Id.* at 20.

92. *Id.* at 40.

93. Greene's excerpted *Sullivan* case is on file with the author.

94. Greene & Buttar, *supra* note 86.

95. *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

role in our democracy. *Claiborne Hardware* held that the National Association for the Advancement of Colored People (NAACP) and Charles Evers could not be liable for the unlawful conduct of others who participated in an economic boycott against segregated businesses in Claiborne, Mississippi.[96] The Court stated that the "established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.'"[97] It then concluded that "[t]hrough speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens."[98]

Thus, *Clairborne Hardware* does more than provide support for speech protected by the First Amendment. It provides an entry way to understand that free speech culture involves more than words. Cultivating free speech culture means paying greater attention to the Press Clause, the Assembly Clause, and the Petition Clause (as well as the unenumerated, but well-established First Amendment right of association).[99] These clauses are largely underdeveloped, but scholars are bringing more attention to them. Here are a few examples.

A cadre of media law luminaries recently published *The Press Clause: The Forgotten First Amendment*.[100] John Inazu's 2012 book, *Liberty's Refuge: The Forgotten Freedom of Assembly* breathes life into the "right of the people to peaceably assemble" clause.[101] Despite John Inazu's effort to draw attention to the Assembly Clause, Tabatha Abu El-Haj concludes that in 2025 it still has "no independent significance in contemporary First Amendment doctrine."[102] Building off and expanding upon the work of John Inazu and others, Tabatha Abu El-Haj contends that there are strong reasons for developing an independent Assembly Clause doctrine, including its role

96. *Id.*
97. *Id.* at 911.
98. *Id.* at 912.
99. *See generally* NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021).
100. *See* Floyd Abrams et al., *The Press Clause: The Forgotten First Amendment*, 5 J. FREE SPEECH L. 561, 564, 568 (2024) (identifying the Press Clause as underdeveloped by the Supreme Court); *see also* Maru Smith Opabola, Recentering Receivers in the Press Clause 1 (Sep. 5, 2025) (unpublished manuscript) (on file with the *Washington University Journal of Law & Policy*) (bringing attention to an undertheorized component of the Press Clause, the public's right to receive information).
101. U.S. CONST. amend. I.
102. Tabatha Abu El-Haj, *A Right of Peaceable Assembly*, 128 COLUM. L. REV. 1001, 1002 (2025).

in protecting and developing civil rights.[103] Bringing attention to these other First Amendment clauses plays a significant role in cultivating free speech culture because they expand the conversation beyond speech to include action that serves expressive functions, such as gathering together to protest, pray, or petition the government.[104]

III. CHALLENGES IN EMBRACING FREE SPEECH

Justice Frankfurter noted decades ago that liberty, implicitly including the First Amendment, protects some "not very nice people."[105] More recently, Frederick Schauer questioned this common trope.[106] In any case, faithfully committing to free speech is challenging, particularly when it protects offensive speech that does not align with one's worldview. One way to meet that challenge is internalizing what Justice Brandeis wrote nearly a century ago: "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[107] *Village of Skokie v. National Socialist Party of America* is a poignant example that drives this point home in more ways than one.[108]

The American Nazi Party intentionally and antagonistically sought a permit to hold a demonstration in a community with many Jewish residents, including hundreds of Holocaust survivors.[109] Although the Village of Skokie eventually granted the permit, they were enjoined from displaying swastikas. The Illinois Supreme Court "reluctantly" held in

103. *See id.* at 1061.

104. *See generally* DeJonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

105. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

106. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1803–04 (2004) (suggesting that the common trope that First Amendment law is built from unsavory individuals and causes "may be a misleading oversimplification" and "may simply be false."). *See generally* Frederick Schauer, *The Heroes of the First Amendment*, 101 MICH. L. REV. 2118 (2003).

107. United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Brandeis, J., dissenting) (dissenting from the decision to deny citizenship to a pacifist who refused to answer the following question affirmatively: "If necessary, are you willing to take up arms in defense of this country?").

108. *See generally* Skokie v. Nat'l Socialist Party, 69 Ill. 2d 605 (Ill. 1978).

109. Joan Vennochi, *ACLU Lawyer Who Defended Nazis Sees Free Speech Retreat in America*, BOS. GLOBE (June 10, 2024), https://www.bostonglobe.com/2024/06/10/opinion/free-speech-david-goldberger-nazis-palestinians-israel/ [https://perma.cc/3EFW-T5GB].

favor of the nazis, allowing them to display swastikas.[110] The Court reasoned: "The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it."[111] The outcome of the case by itself helps show why one might join Brandeis in his imperative call for protecting "thought that we hate," including when that thought is spoken or displayed in imagery.

But *Village of Skokie* even more persuasively establishes support for that position because of the attorney representing the nazis. David Goldberger, a Jewish attorney, represented the nazis; not because he agreed with their views, but because he answered Justice Brandeis' imperative call.[112] Goldberger remains committed to robust protection for free speech[113] but laments that America is drifting away from hard-fought gains.[114]

A recent example of the drift from free speech protection comes out of Texas. In 2017, Texas A&M canceled a white nationalist rally citing safety concerns.[115] Partly in response to this cancellation, Texas passed a law in 2019 providing strong protection for the rights of free speech and assembly on college campuses. Echoing the language of *New York Times v. Sullivan*, the enacted legislative findings stated that "freedom of expression is of critical importance and requires each public institution of higher education to ensure free, robust, and uninhibited debate and deliberations by students enrolled at the institution."[116] To that end, the law required higher education

110. *Skokie*, 69 Ill. 2d at 619.

111. *Id.* at 615.

112. Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 6, 2021), https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html [https://perma.cc/2Q49-CLJ8] (describing Goldberger, as "a Jew who defended the free speech of those whose views he found repugnant"); Venocchi, *supra* note 109 ("Goldberger stood by the principle he still embraces — that maintaining those rights for everyone, regardless of political ideology, is key to maintaining a healthy democracy.").

113. Venocchi, *supra* note 109 ("If he had not retired from practicing law, he said he would be 'more than willing' to represent pro-Palestinian protesters 'with legitimate First Amendment claims' and 'peaceful . . . encampment protesters' facing school disciplinary proceedings.").

114. *Id.* ("When it comes to free speech in America, he sees a hugely disappointing retreat. 'We fought like hell to establish these rights and it seems like, frankly, they are really under siege,' he said. 'Here we go again.'").

115. Jessica Priest, *Lawmakers Approve Bill Limiting Protests at Public Universities*, TEX. TRIB. (May 27, 2025), https://www.texastribune.org/2025/05/27/texas-universities-protests-free-speech/ [https://perma.cc/HP5J-NLFF].

116. S.B. 18, 86th Leg., Reg. Sess. (Tex. 2019). In *Sullivan*, the Court wrote that America has a

institutions to "ensure that the common outdoor areas of the institution's campus are deemed traditional public forums" and "permit any person to engage in expressive activities in those areas of the institution's campus freely" with some modest limitations.[117]

In 2025, however, "times are strange" and "things have changed."[118] Texas reduced the speech and assembly rights that the 2019 bill affirmatively protected. For example, the 2025 law strikes the 2019 provision requiring higher education institutions to "ensure that the common outdoor areas of the institution's campus are deemed traditional public forums."[119] According to the *Texas Tribune*, "Republicans who support the measure say it will prevent disruption and unsafe behavior seen during the pro-Palestinian demonstrations last year."[120] The same lawmakers authoring the 2019 bill, including Texas Republican Senator Joan Huffman, interestingly supported the 2025 bill, which raises questions concerning inconsistent commitments to free speech.[121]

"profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." N.Y. Times v. Sullivan, 376 U.S. 254, 290 (1964).

117. *See* S.B. 18, 86th Leg., Reg. Sess. (Tex. 2019). The limitations are in TEX. EDUC. CODE ANN § 51.9315(d) (West 2024).

118. THINGS HAVE CHANGED, Bob Dylan (Spotify, May 1, 2000).

119. S.B. 2792, 89th Leg., Reg. Sess. (Tex. 2025). The *Texas Tribue* summarized restrictions on speech and assembly in the law.

> Under the new legislation, members of a university community would not be allowed to use microphones or any other device to amplify sound while protesting during class hours if it intimidates others or interferes with campus operations, a university employee or a peace officer doing their job. The bill prohibits protesting in the last two weeks of the semester in the common outdoor areas of a campus "in a manner that materially or substantially disrupts the function of the institution" by inviting speakers to speak, using a device to amplify sound or using drums or other percussive instruments. It prohibits protesting on campus between 10 p.m. and 8 a.m.
>
> Students would also be barred from erecting encampments, taking down an institution's U.S. flag to put up another nation's or organization's banner and wearing disguises to avoid being identified while protesting or to intimidate others.
>
> Finally, students and university employees at a campus protest would be required to present proof of their identity and status with the university when asked by a university official.

See Priest, *supra* note 115.

120. *Id.*

121. *Id.* ("Critics say it contradicts previous conservative efforts to protect free speech rights on Texas campuses . . . ."); Tim Cushing, *Texas Lawmakers Walk Back Campus Free Speech Law Because*

But it is not only conservatives who have a hard time remaining committed to free speech. "Liberals are leaving the First Amendment behind" according to David Goldberger.[122] In 2021, for example, the *New York Times* reported on an "identity crisis" at the ACLU.[123] David Goldberger, who worked for the ACLU when he represented the nazis in *Village of Skokie*, stated that he recently "got the sense it was more important for A.C.L.U. staff to identify with clients and progressive causes than to stand on principle."[124] Others share his concern. Former ACLU Director Ira Glasser said: "There are a lot of organizations fighting eloquently for racial justice and immigrant rights. But there's only one A.C.L.U. that is a content-neutral defender of free speech. I fear we're in danger of losing that."[125]

According to that *New York Times* article, the ACLU issued new guidelines "that suggested lawyers should balance taking a free speech case representing right-wing groups whose 'values are contrary to our values' against the potential such a case might give 'offense to marginalized groups.'"[126] Legendary First Amendment lawyer Floyd Abrams was "aghast" at these new guidelines: "The last thing they should be thinking about in a case is which ideological side profits. . . . The A.C.L.U. that used to exist would have said exactly the opposite."[127]

Recall the FCC's "news distortion" investigation into *60 Minutes*. The letter from traditional conservative allies highlighted that free speech advocates, who oppose the *60 Minutes* investigation because it threatens democracy, remained silent in other contexts that more closely aligned with their underlying ideological perspectives.[128] Thus, once again, demonstrating that supporting free speech is challenging when a speech suppressive act suppresses speech one might not be sad to support suppressing.

It's Letting Too Many Pro-Palestinian Students Protest, TECHDIRT (June 13, 2025), https://www.techdirt.com/2025/06/13/texas-lawmakers-walk-back-campus-free-speech-law-because-its-letting-too-many-pro-palestinian-students-protest/ [https://perma.cc/5BTA-QAQP].

122. Powell, *supra* note 112.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Bode, *supra* note 56 ("We note a striking asymmetry – while many pundits and free speech advocates have made breathless claims about this public comment period as a threat to democracy, many of those same commenters were silent when the politics of the parties involved were different.").

Both liberals and conservatives waiver on their commitment to free speech when confronted with views they do not share and find offensive (or worse).[129] This retreat is understandable because it is challenging to stay true to free speech principles in the face of "thought that we hate." But we must resist this retreat if we are to rise and meet Justice Brandeis' imperative call for tolerating the speech that we hate as a foundational constitutional principle. The next Part shows that facing the challenge is not an academic exercise—it is a way to help our democracy by cultivating a citizenry that can talk with each other with the grace of humility and the ability to adopt Ruth Simmons's belief "that learning at its best is the antithesis of comfort."[130]

IV. PLURALISTIC DEMOCRACY AND FREE SPEECH

Our pluralistic society demands tolerance for speech with which we disagree, including "vehement, caustic, and sometimes unpleasantly sharp attacks."[131] Otherwise we risk descending into violence.[132] Viewing free speech in the abstract provides an opportunity to rise above personal beliefs and understand that strong free speech protections benefit everyone across our society. One way to bring this position into relief is

129. *See e.g.*, Powell, *supra* note 112; Joseph Bernstein, *When Did Cancel Culture Become 'Consequence Culture'?*, N.Y. TIMES (Sep. 18, 2025), https://www.nytimes.com/2025/09/18/style/consequence-culture-kirk-kimmel.html [https://perma.cc/W2W8-Z97W] (noting a shift among some conservatives who previously opposed cancel culture now advocate for consequence culture, which seems quite similar to cancel culture); *see also* Sullivan, *supra* note 7, at 165–66 (demonstrating that liberal and conservative Supreme Court Justices' commitment to strong free protections varies depending on the substantive issues involved).

130. Ruth J. Simmons, *Text of the President's Opening Convocation Address*, BROWN UNIV. NEWS SERV. (Sep. 4, 2001), https://web.archive.org/web/20250425173458/https:/www.brown.edu/Administration/News_Bureau/2001-02/01-014t.html [https://perma.cc/FGF5-P42C].

131. *See* New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

132. As the Supreme Court wrote when reversing the conviction of someone charged with merely participating at a meeting of the Communist Party that was advertised as a labor protest:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

DeJonge v. Oregon, 299 U.S. 353, 365 (1937); *See* NAACP v. Claiborne Hardware Co., 485 U.S. 886, 912 (1982).

by juxtaposing controversial topics where both sides of an issue can see they each have something to gain from neutral application of speech-protective law.[133] Two examples illustrate this point. First, a real-life juxtaposition involving abortion protests. Second, juxtaposing *303 Creative LLC v. Elenis*[134] with a hypothetical scenario.

The first example involves protests in front of residential homes on the abortion issue. In 1988, the Supreme Court upheld a Wisconsin city ordinance that limited protests targeting an individual's home.[135] At issue in the case was the home of a physician who performed abortions. Fast forward to present times and the controversy surrounding protests in front of the homes of Justices who overturned *Roe v. Wade.*[136] Considered together, these events allow individuals to rise above their specific views on abortion rights and engage in a meaningful conversation about the right to protest in front of homes more generally.[137] This juxtaposition does not definitively answer whether there ought to be a right to protest in front of someone's home. That is a challenging question to consider where reasonable minds can disagree.[138] The juxtaposition does,

133. Juxtaposing highly controversial issues to bring more abstract and fundamental principles into relief is not limited to free speech. *See e.g.*, Jane R. Bambauer, *Filtered Dragnets and the Anti-Authoritarian Fourth Amendment*, 97 S. CAL. L. REV. 571, 616–17 (2024) (providing examples of criminal liability for abortions and guns "to illuminate the problem [of how overcriminalization could result in unnecessary social control] through opposite ideological lenses.").

134. *See generally* 600 U.S. 570 (2023).

135. *See generally* Frisby v. Schultz, 487 U.S. 474 (1988).

136. Joe Schoffstall, *Left-Wing Protesters Return to Supreme Court Justices' Homes as Democrats Target Clarence Thomas*, FOX NEWS (May 5, 2023), https://www.foxnews.com/politics/left-wing-protesters-return-supreme-court-justices-homes-democrats-target-clarence-thomas [https://perma.cc/R9XA-CZ5R].

137. *See also* Jocelyn Benson, *An Angry Crowd Came to My House. I Still Support the Right to Protest*, N.Y. TIMES (May 25, 2022), https://www.nytimes.com/2022/05/25/opinion/jocelyn-benson-protests-judges-homes.html [https://perma.cc/2WQ9-CUKZ] (an op-ed by the Michigan Secretary of State describing the armed protestors in front of her home who objected to her certifying the 2020 election results in Michigan).

138. Tabatha El-Haj contends that *Frisby* "carefully limited" the restriction on the right to protest in front of someone's residence by limiting application of the ordinance to targeting a specific residence. El-Haj, *supra* note 102, at 1090. But Justices Brennan and Marshall do not agree who concluded that the ordinance banned "significantly more speech than necessary. . . ." *Frisby*, 487 U.S. at 491 (Brennan, J., dissenting). They also expressed a concern that aligns with cultivating a free speech culture. *Id.* at 496 ("[T]he discomfort to which the Court must refer is merely that of knowing there is a person outside who disagrees with someone inside. This may indeed be uncomfortable, but it does not implicate the town's interest in residential privacy and therefore does not warrant silencing speech."). Michael Dorf helpfully complicates matters further by introducing other considerations that come into play with bans on protesting in front of someone's residence. Namely, not everyone lives in residential neighborhoods

however, allow for a more abstract conversation about such a right where both pro-choice and anti-abortion advocates have something to gain (or lose) depending on the speech rule chosen.

The second example involves compelling someone to create speech that the creator finds offensive. In 2023, the Court decided *303 Creative*, holding that a website designer could not be compelled to create a website announcing the wedding of a same-sex couple under Colorado's Anti-Discrimination Act because doing so would violate her First Amendment right not to speak.[139] This case raises challenging questions regarding the interplay between the First Amendment and anti-discrimination laws.[140] While I am not certain where to draw the line on the right to protest in front of someone's residence, I do think that *303 Creative* reached the right result. A hypothetical helps make the case, kind of like the semi-hypothetical case that served as the platform for the Court to assert jurisdiction in *303 Creative*.[141]

Recall the Westboro Baptist Church (WBC) from *Synder v. Phelps*.[142] In *Snyder*, an 8-1 Court held that the First Amendment protected the WBC's right to picket across the street from a military funeral and espouse their belief "that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military."[143] Imagine the WBC solicits a gay website designer to create a website for announcing its upcoming events. The WBC asks the gay website designer to include some of the slogans it puts on protest signs, such as the signs listed in *Snyder*: "Fag Troops," "Semper Fi Fags," "God Hates Fags," and "Fags Doom

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and thus those who live in urban or mixed-use neighborhoods could receive less protection than those who live in the suburbs with white picket fences. *See* Michael C. Dorf, *As a Matter of First Impression, Should Free Speech Protect the Right to Protest at Homes?*, DORF ON L. (May 18, 2022), https://www.dorfonlaw.org/2022/05/as-matter-of-first-impression-should.html [https://perma.cc/369F-AT8J].

139. 303 Creative LLC v. Elenis, 600 U.S. 570, 602–03 (2023).

140. Robert Post, *Public Accommodations and the First Amendment: 303 Creative and "Pure Speech"*, 2023 S. CT. REV. 251, 251–52 (2023) (noting that in *303 Creative* "the Court confronted the challenging problem of reconciling First Amendment speech rights with laws that forbid discrimination in public accommodations.").

141. *See* Adam Liptak, *What to Know About a Seemingly Fake Document in a Gay Rights Case*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/us/politics/same-sex-marriage-document-supreme-court.html [https://perma.cc/3NNG-PRZV] (Phil Weiser: "We raised the fact it was not a real request."); *see also* David S. Schwartz, *Making Sense of 303 Creative: A Free Speech Solution in Search of a Problem*, 39 CONST. COMMENT. 49 (2025).

142. *See generally* Snyder v. Phelps, 562 U.S. 443 (2011).

143. *Id.* at 448.

Nations."[144] Also, the gay website designer will be working on the WBC's existing website, whose URL address is "http://www.godhatesfags.com/."[145] The law should not require the gay website designer to engage in this kind of compelled speech, even though one could make the claim that refusing to do so violates an anti-discrimination law because the WBC is simply expressing its ostensibly sincerely held religious beliefs. But that could very well be the outcome if *303 Creative* came out the other way. We should reject compelling speech in both instances.

Juxtaposing the semi-hypothetical *303 Creative* case with the hypothetical here allows one to extract the abstract free speech principle regarding compelled speech. If the law ought not require the gay website designer to make a website for a distasteful (at least to me) organization like the WBC, it similarly ought not require the plaintiff in *303 Creative* to make a website announcing a same-sex wedding because the government should not draw speech lines based on agreement with the message.[146] Reaching this conclusion is not a statement about the underlying values and beliefs regarding homosexuality any more than reaching a conclusion about the right to protest in front of someone's home is a statement about one's views on the abortion issue. Instead, it is a statement about how compelling speech is different than compelling diners, hotels, and trains to provide services in an anti-discriminatory manner because those categories are not at the core of freedom of expression. There is something fundamentally different about making a person say something compared to doing something.[147] Although I would not characterize *303 Creative* as involving so-called "pure speech,"[148] creating a website is closer

144. *Id.* at 454.

145. *Id.* at 467 n.11.

146. *See also* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("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.").

147. *But see* Amy J. Sepinwall, Uncompelling: The Specious Case Against Compelled Speech 52 (June 1, 2025) (unpublished research paper) (on file with University of Pennsylvania Wharton School of Business) (arguing that the "Constitution should treat compelled speech and conduct equally" and that means weakening First Amendment protection for compelled speech as opposed to increasing Constitutional protection against compelled conduct); FARA DABHOIWALA, WHAT IS FREE SPEECH? THE HISTORY OF A DANGEROUS IDEA 18 (2025) ("[O]ur modern distinction between words and actions, and their supposedly different potency, is just a convenient myth. . . . [I]t makes the ideology of free speech possible, but it's also an inherently unstable fiction.").

148. 303 Creative LLC v. Elenis, 600 U.S. 570, 587. "'Pure speech' is not a technical or well-

to the core of speech, than eating at a diner, sleeping at a hotel, or riding a train car. Providing these juxtaposed examples makes speech-protective arguments accessible to people with widely different worldviews and therefore offers a way to weave free speech protections into our pluralistic cultural fabric.

V. POTENTIAL OBJECTION

One lesson I carry with me from law school is to never be more than 80% certain about your beliefs, at least in the realm of law.[149] The positions set forth here are contestable and contested.[150] I am open to different perspectives, which exist, perhaps particularly with the *303 Creative* and gay website designer hypothetical juxtaposition.[151]

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defined term of First Amendment jurisprudence." Post, *supra* note 140, at 263–64. But I would argue that *303 Creative* does not involve "pure speech" for at least two reasons. First, it is commercial speech, which receives less First Amendment protection than other types of speech. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770–71 (1976); *but see* Post, *supra* note 140, at 298 (stating that determining whether the website in *303 Creative* "should be categorized as commercial speech or as public discourse is a complex question. . . ."). Second, the speech is created through the conduct of computer coding. To be clear, conduct used to create speech deserves some First Amendment protection. *See generally* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029 (2015) (contending that the *process* of creating speech deserves some First Amendment protection in addition to the speech itself). But using computer code to create speech is not "pure speech." *See also* Luke A. Boso, *Exclusionary Expressive Conduct*, 66 B.C. L. REV. 295, 320 (2025) (stating that the *303 Creative* Court's choice to view the case as involving "pure speech" "unnecessarily blur[ed] the line between speech and expressive conduct.").

149. I owe this lesson to Professor Conrad Kellenberg at the University of Notre Dame Law School who inspired law students for fifty years. Neil Jessup Newton, *Notre Dame Law School Mourns the Loss of Professor Emeritus Conrad Kellenberg*, UNIV. OF NOTRE DAME, https://law.nd.edu/news-events/news/notre-dame-law-school-mourns-the-loss-of-professor-emeritus-conrad-kellenberg/ [https://perma.cc/PBN8-GTMF] (last visited Feb. 24, 2026). *See also* Viktoriya Sus, *5 Quotes by Socrates Explained*, THE COLLECTOR (Sep. 18, 2025), https://www.thecollector.com/quotes-by-socrates-explained/ [https://perma.cc/PWW9-9T2Z] ("The only true wisdom is in knowing you know nothing.").

150. *See e.g.*, Delgado & Yun, *supra* note 1, at 1282 ("In general, we believe that traditional defenders of free speech must beware of the tendency to light upon a single solution to a complex problem.").

151. *See e.g.*, David Cole, *"We Do No Such Thing*": 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J. FORUM 499, 502 (2024) ("The majority opinion erroneously asserted that Colorado's interest was the elimination of disfavored ideas, when in fact the state sought merely to prohibit identity-based discrimination in sales."); Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of* 303 Creative, 84 LA. L. REV. 566, 589 (2024) ("With no principled limitation to the scope of its holding, there is little in *303 Creative* that suggests any meaningful barrier to private business decisions to refuse service for people based on their sex or nationality."); *see also*, Osamudia James, *Superior Status:*

For example, one could reject the notion that the *303 Creative* website designer and my hypothetical gay website designer must be treated the same under the law. Rather, the law could treat them differently because one can make reasonable normative distinctions between the *303 Creative* website designer who was asked to create a message of inclusion whereas the message in my hypothetical was one of exclusion. Although Justice Stevens believed tolerance is embedded in the words of the First Amendment, he also cautioned that "[w]e should at least consider the possibility that racial, religious, and gender-based objectives can cause distinct and especially grievous injury, particular when used by members of a powerful group against an individual already disadvantaged by a hostile environment."[152] Thus, objecting to my argument that both should be treated the same is a reasonable position and one that can be defended on normative grounds. However, there are at least two reasons why I continue to believe they should be treated the same (and that means neither ought to be compelled to create the speech).

First, while I reject the view that homosexuality is an affront to God, there are people who hold a good faith belief otherwise. The law should not treat them differently when it comes to creating websites. Giving this ground does not portend that diners, hotels, and train cars are now fair game too.[153] Eugene Volokh's position is instructive. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[154] Volokh sided with the State of Colorado because simply baking a cake, even for a same-sex wedding, does not involve the concern about freedom of expression at play when creating a website.[155] Similarly, counsel for the website designer in *303 Creative* "conceded in oral argument that she would not

Relational Obstacles in Law to Racial Justice and LGBTQ Equality, 63 B.C. L. REV. 199, 240 (2022) ("As one in a series of claims justifying discrimination against LGBTQ individuals as expressions of religious beliefs, *Masterpiece Cakeshop* might signal an early surge in pushback to the most recent gains in LGBTQ equality."); *cf.* Khiara M. Bridges, *Evaluating Pressures on Academic Freedom*, 59 HOU. L. REV. 803, 804 (2022) (acknowledging that threats to academic freedom come from the left and the right, but concluding that "because these threats to academic freedom are so dissimilar, they deserve different responses.").

152. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1311 (1993).

153. *But see generally* Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1240 (2014) (contending that the conflict over how the application and scope of antidiscrimination laws "will remain for the foreseeable future.").

154. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

155. *See* Dale Carpenter, *The Volokh Briefs: Drawing the Line Against Compelled Speech in Public Accommodations*, 39 CONST. COMMENT. 143, 166 (2024).

make a First Amendment speech claim on behalf of a caterer."[156]

I cannot predict how Justice Breyer would have voted in *303 Creative*, but he did vote with the majority in the 7-2 *Masterpiece Cakeshop* decision where the Court did not require a baker to make a wedding cake for a same-sex couple. The Court "famously avoided answering the central question"[157] because it found that the actions of Colorado's Civil Rights Commission exhibited "some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[158] For that reason, *Masterpiece Cake* limits the tea leaf reading on what Breyer would do in *303 Creative*. But I introduce Breyer for another reason, which I come to in a moment.

Second, there is a risk that forcing the website designer in *303 Creative* to make the website, but not forcing the hypothetical gay website designer to make a website for the WBC would undermine respect for the rule of law in ways that treating them the same would not. If the law treated them differently, one could reasonably argue that the Court is allowing the government to treat speech differently based on the viewpoint expressed. And this is where Justice Breyer comes in. [159] Not because I can guess his vote in *303 Creative* but because his pragmatic approach to judicial decision-making is worth following.

In his recent book and law review article, Justice Breyer explains why he "chose pragmatism, not textualism."[160] His pragmatic approach—which he sometimes refers to as the "traditional" approach because "courts have asked purpose-oriented questions for hundreds, perhaps thousands, of years"[161]—"promises to make our democracy more workable."[162] Under this approach, "legal interpretation is an activity that is basically pragmatic, undogmatic, and adaptive. It sees law, including

156. Post, *supra* note 140, at 266.

157. Boso, *supra* note 148, at 301.

158. *Masterpiece Cakeshop*, 584 U.S. at 634.

159. *See also* Stephen Breyer, *Pragmatism or Textualism*, 138 HARV. L. REV. 717, 773 (2025) (stating his belief that "an understanding of how law works, and an understanding of how it *can* work to protect basic values, as well as to allow members of communities to live together and prosper, is essential to the rule of law itself."). *Cf.* Sullivan, *supra* note 7, at 175 ("[L]iberal critics of *Citizens United* should be careful what they wish for; endorsing speech-restrictive conditions in this context may lower the barrier to conditions in other contexts as well.").

160. *See generally* STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM (2024).

161. Breyer, *supra* note 159, at 737.

162. *Id.* at 736.

constitutional law, as an untidy body of understandings among groups and institutions, inherited from the past and open to changes, mostly at the edges."[163] Importantly, "public opinion will likely continue to play a role in the Court's business."[164] Applying this approach supports the conclusion that the *303 Creative* website designer and the hypothetical gay website designer should be treated the same. Here are two reasons why.

First, precedent supports that conclusion because the government is not treating different messages differently. In *Texas v. Johnson*, the Court held that the First Amendment protects burning the American flag for expressive purposes (despite this precedent, the President issued an Executive Order in 2025 declaring that flag burners should be prosecuted).[165] The Court did not reach this conclusion because it supported flag burning.[166] Rather, it reminded readers that the First Amendment does not allow the government to pick winners and losers based on 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."[167] Also consider Justice Brandeis's *Whitney v. California* concurrence where he concluded that the Founders "eschewed silence coerced by law-the argument of force in its worst form."[168] That principle extends to compelled speech. Indeed, compelling someone to speak may be even worse than silencing them.[169]

Second, helping maintain and restore respect for the rule of law also supports treating both scenarios the same. Reaching the opposite conclusion

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163. BREYER, *supra* note 160, at xxvi.

164. Breyer, *supra* note 159, at 771; *see also* HARRY KALVEN, A WORTHY TRADITION xviii (1988) (viewing the First Amendment "as something more than a body of legal precedent" because it is also a "tradition of the society").

165. *See generally* Texas v. Johnson, 491 U.S. 397 (1989). Exec. Order No. 14341, 90 Fed. Reg. 42127 (2025). *See also* Adam Liptak, *He Burned a Flag and Won an American Right. He Worries It's at Risk*, N.Y. TIMES (Sep. 1, 2025), https://www.nytimes.com/2025/09/01/us/politics/flag-burning-trump-johnson-supreme-court.html [https://perma.cc/3Y72-EPD3].

166. *See* Texas v. Johnson, 491 U.S. at 418–19 ("It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation. . . .").

167. *Id.* at 414.

168. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

169. *See* Carpenter, *supra* note 155, at 152; *see also* Sullivan, *supra* note 7, at 159 ("[E]ven if antidiscrimination laws may alter racially discriminatory *conduct*, a similar leveling approach is not permissible with respect to *expression* of racists views or ideas." (emphasis added)); *but see* Sepinwall, *supra* note 147, at 1 ("[P]roposing that law equalize its treatment of compelled speech and conduct—not by enhancing protection from compelled conduct but by weakening protections from compelled speech.").

risks undermining the goal of cultivating free speech culture. Recall the examples in Part I establishing the non-partisan nature of free speech. If the law forces the *303 Creative* website designer to create the website, but not the hypothetical gay website designer, then the law is subject to the reasonable critique of being hypocritical and choosing sides based on the expressed viewpoint. Such a result weakens the claim that free speech law is non-partisan, thereby making it easier for that principle to be violated when power changes hands.

As Part III notes, faithfully committing to free speech is challenging, exemplified by this juxtaposition. But it is a challenge that we should meet. Not because of agreement or disagreement with the viewpoints expressed but because such a conclusion helps create stability in free speech jurisprudence and makes it easier for strange bedfellows to continue joining together to counter efforts when government actors chip away at the "bedrock principle" set forth in the flag burning case.[170] To borrow a phrase from the Amici Curiae Brief of 27 American Jewish Organizations in Support of Rümeysa Öztürk: "Our [democracy] is not so fragile that [a refusal to create a website] could so easily compromise it, and our constitutional guarantees are not so feeble that they may be so easily discarded."

CONCLUSION

Defending dissent is not easy, especially because part of that defense requires defending those one opposes. Cultivating free speech culture is not only wise, but also a necessary part of our grand and wobbly experiment in a self-governing democracy. Constitutional doctrine and judicial decisions can only take us so far. As Potter Stewart noted over 50 years ago: "The Constitution … establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. *For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society*."[171]

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170. *See also*, Stevens, *supra* note 152, at 1313 ("Let us hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance – a value protected by every clause in the single sentence called the First Amendment.").

171. Stewart, *supra* note 8, at 636 (emphasis added). Jud Campbell reached a similar conclusion when showing that free speech is one of our natural rights, the scope of which is not determined by the

As illustrated above, there are current threats to free speech today including some that evidence democratic backsliding, such as the FCC's "news distortion" investigation into CBS and *60 Minutes*, the Executive Order declaring a mission to prosecute flag burners, and the ACLU's movement away from defending free speech rights regardless of ideological alignment with the speakers or issues.[172] But there are reasons for optimism.

Time and again, organizations and individuals who disagree politically have collectively voiced support for free speech. Historically, it's hard to imagine where the civil rights movement would be without strong First Amendment protections. To be sure, bipartisan support is not by everyone nor is all the time. Even for those who genuinely believe in free speech, it can be challenging to remain faithfully committed, particularly when confronted with speech that conflicts with their steadfast convictions and fundamental values. In a pluralistic nation with around 340 million people, however, strong protections for freedom of speech are an essential cornerstone of our ability to coexist peacefully.[173] But law alone cannot safeguard speech and political opposition. A shared cultural commitment to robust free speech values is the part of the glue that binds our contentious nation together. To maintain the civic bargain, we must reinforce why one might "loathe"[174] another person's words, but "will defend to the death your right to say it."[175]

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text of the First Amendment. Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017) ("Recognition of natural rights . . . simply sets the terms of political debate, not the outcomes.").

172. *See also* Sulzberger, *supra* note 62; *and* Chotiner, *supra* note 62.

173. Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring) ("Those who won our independence . . . knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . .").

174. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[W]e should be eternally vigilant against attempts to check the expression of opinions we loathe. . . .").

175. EVELYN BEATRICE HALL, THE FRIENDS OF VOLTAIRE 199 (1906). Hall published this work under the pseudonym, S. G. Tallentyre. *See* Matt Hardigree, *Commenter Of The Day: S. G. Tallentyre Edition*, JALOPNIK (May 12, 2009, at 16:00 ET), https://www.jalopnik.com/commenter-of-the-day-s-g-tallentyre-edition-5251202/ [https://perma.cc/JS7T-M44E].