

The Fight for Free Speech

Ten Cases That Define Our First Amendment Freedoms

BY IAN ROSENBERG

Instructor's Guide

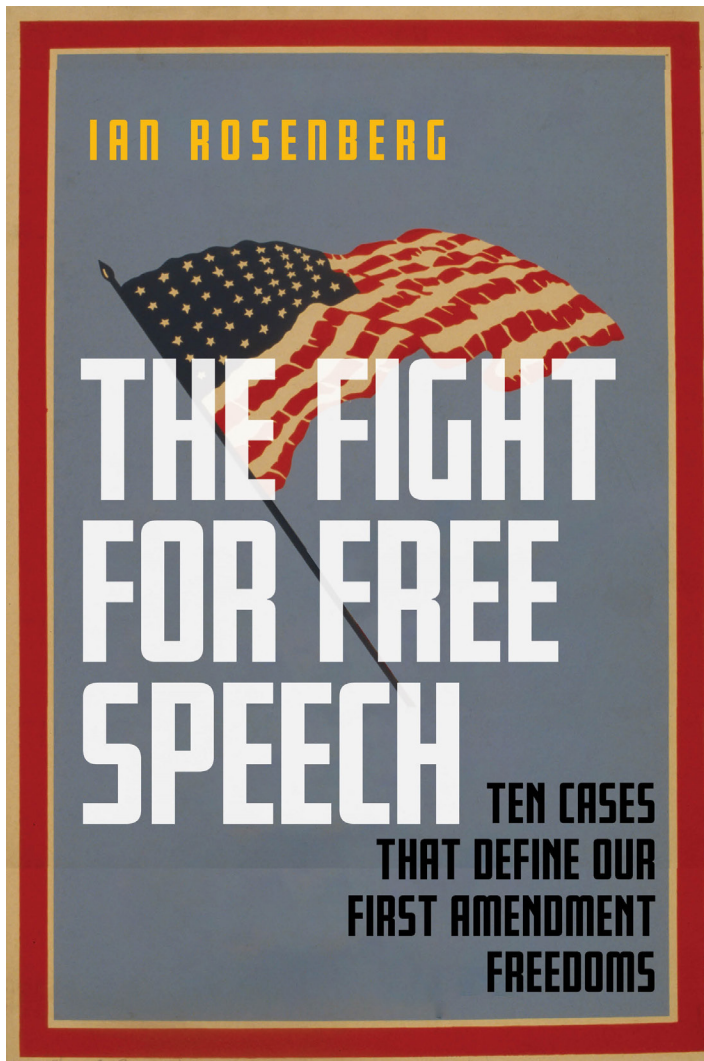
A user's guide to understanding contemporary free speech issues in the United States

Americans today are confronted by a barrage of questions relating to their free speech freedoms. What are libel laws, and do they need to be changed to stop the press from lying? Does Colin Kaepernick have the right to take a knee? Can *Saturday Night Live* be punished for parody? While citizens are grappling with these questions, they generally have nowhere to turn to learn about the extent of their First Amendment rights.

The Fight for Free Speech answers this call with an accessible, engaging user's guide to free speech. Media lawyer Ian Rosenberg distills the spectrum of free speech law down to ten critical issues. Each chapter in this book focuses on a contemporary free speech question—from student walkouts for gun safety to Samantha Bee's expletives, from Nazis marching in Charlottesville to the muting of adult film star Stormy Daniels—and then identifies, unpacks, and explains the key Supreme Court case that provides the answers. Together these fascinating stories create a practical framework for understanding where our free speech protections originated and how they can develop in the future. As people on all sides of the political spectrum are demanding their right to speak and be heard, *The Fight for Free Speech* is a handbook for combating authoritarianism, protecting our democracy, and bringing an understanding of free speech law to all.

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Ian Rosenberg has over twenty years of experience as a media lawyer, and has worked as legal counsel for ABC News since 2003. He graduated with distinction from the University of Wisconsin–Madison, and magna cum laude from Cornell Law School. Rosenberg began his legal career clerking in the Eastern District of New York, and then working as a litigation associate at Cahill Gordon & Reindel. He is also an Emmy-nominated documentary filmmaker, and teaches media law at Brooklyn College.



312 pages | Cloth | 9781479801565

Law | Politics | Current Events

“A deep dive into 10 precedent-setting legal actions that helped define the scope—and limits—of the First Amendment.... Essential reading for journalists, political activists, and ordinary citizens alike.”

—*Kirkus Reviews* (Starred Review)

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ADVANCE PRAISE

ADVANCE PRAISE

This book should be required reading for all engaged citizens. My colleague Ian Rosenberg puts vital information about the law in crisp, comprehensible language. You get a tour through history and a primer on your rights in this eminently useful and readable book.

—**Dan Harris**, co-anchor of the weekend edition of *Good Morning America* and *New York Times* bestselling author of *10% Happier*

The Fight For Free Speech is as clear as its title. In choosing ten areas of enormous conflict with respect to the scope of free expression and describing cases as to each in a manner that the widest range of readers can both understand and enjoy, Ian Rosenberg has done us all a great service. That this book should be released at a time when the First Amendment is under sustained attack makes it all the more valuable.

—**Floyd Abrams**, Senior Counsel, Cahill Gordon & Reindel, and author of *The Soul of the First Amendment*

The Fight for Free Speech is a perfect text for college courses in a variety of fields, including history, government, communication, and politics. It is also a challenging book for AP high school classes. Rosenberg beautifully combines the legal discussions with stories of contemporary examples, and leaves plenty of space to add new examples that will surely present themselves on a regular basis. It is guaranteed to start a discussion!

—**Randall Iden**, Faculty Director, Master of Science in Communication Program, Northwestern University

The Fight for Free Speech is a must read for anyone, of any age, to understand the stakes for the amendment America's founders chose to put first, because without it representative democracy dies aborning. The magic of this book is that it is written with the clarity, concision and dynamism vital to make its lessons stick. It is simply a great read, and a powerful one.

—**Brooke Gladstone**, co-host of WNYC's *On the Media*

The Fight for Free Speech is a wonderful guide to our free speech rights, serving as an engaging introduction for all readers, and as an illuminating source of insights even for those with expertise in First Amendment law.

—**Nadine Strossen**, Former President, American Civil Liberties Union, and author of *HATE: Why We Should Resist it With Free Speech, Not Censorship*

Using recent controversies about free expression as his starting point, Ian Rosenberg introduces general readers to classic problems that have defined the constitutional contours of freedom of expression. You don't need a legal background to learn a great deal from *The Fight for Free Speech*.

—**Mark Tushnet**, William Nelson Cromwell Professor of Law, Harvard Law School

Ian Rosenberg's captivating free speech stories, based on ten seminal cases, are crafted with the finesse of a gifted writer combined with the acumen of a learned lawyer. Forceful yet thoughtful, credible yet concise, historical yet modern, engaging yet erudite—they all tumble together in *The Fight for Free Speech*, a mind-opening book aptly fit for our times.

—**Ronald K. L. Collins**, editor of *First Amendment News* and co-author of *We Must Not be Afraid to be Free*

With verve and aplomb, *The Fight for Free Speech* reveals actual free speech conflicts on the ground along with the basic First Amendment law they engendered. It is a gift for citizenship.

—**Donald A. Downs**, Alexander Meiklejohn Professor of Political Science Emeritus, UW-Madison, and author of *Free Speech and Liberal Education*

Ian Rosenberg's riveting portrayal of ten of the Supreme Court's leading free speech cases is a page-turner! *The Fight for Free Speech* tells the gripping, behind-the-scenes stories of those whose visions and passion paved the way for their causes to be heard before our country's High Court.

—**Hon. Frederic Block**, United States District Judge, and author of *Crime & Punishments: Entering the Mind of a Sentencing Judge*

WHY CONSIDER THIS BOOK FOR YOUR CLASS

As a news lawyer and media law teacher to communications graduate students, most of my career has focused on explaining complicated legal concepts to smart people who are not lawyers. From these experiences I have distilled a wide spectrum of First Amendment law (focusing on the free speech and free press clauses) down to ten critical cases. Each chapter in this book will examine a contemporary free speech question—from Student Walkouts for gun safety to Samantha Bee’s expletives, from Nazis marching in Charlottesville to stopping Stormy Daniels from talk-show hopping— and then identify, unpack and explain the key Supreme Court case that provides the answers. The cases are presented chronologically, so that the nature of common law precedent building over time is demonstrated organically throughout the book as each chapter unfolds. Together they create a practical framework for viewing where our free speech protections have come from and how they can develop in the future.

Each case also reveals the compelling story of someone who spoke out and ended up fighting for their free speech rights all the way to our nation’s highest court. Moreover, the resulting Supreme Court decisions are the stories the justices tell us about the meaning of our Constitution and America. These surprising and enlightening tales deserve to be known by wider audiences than just lawyers.

Of course, in streamlining these concepts, this book deliberately sits in stark contrast to what many first year students are taught in school: that the law is like a “seamless web.” The idea is that you need to learn all aspects of the law, with as many details as possible, so that the threads of each decision are woven together in a tightly knit whole that won’t unravel. *The Fight for Free Speech* rejects that academic model as both misleading and impractical. This book is much more like buying a rug at Ikea. It may not be an intricately made tapestry, but it covers the floor just as well, and it comes a lot quicker and cheaper.

My hope in paring it down this way is that readers will gain an awareness of their rights, whether they are a high school student wondering if they can walk out of school, a citizen planning a protest, an organizer making a leaflet, or an agitator tweeting their ire. In our current cultural landscape, where people on all sides of the political spectrum are demanding their right to speak and be heard, *The Fight for Free Speech* is a user’s guide for combating ignorance, protecting our democracy, and bringing an understanding of free speech law to all.

HOW THE FIGHT FOR FREE SPEECH IS UNIQUE

The Fight for Free Speech is unlike other books on the First Amendment, in that it is specifically written to be understood by readers who are neither lawyers nor academics and takes a streamlined case-specific approach to answering today's most significant free speech questions.

Rather than starting with a presumption that the reader fully comprehends First Amendment case law and then problematizing those concepts in service of a particular theory, this book instead focuses on ten Supreme Court precedents as a way of explaining the development of major First Amendment principles and how they can clarify contemporary free speech issues. In this way, *The Fight for Free Speech* acts as an accessible guidebook for navigating current free speech challenges by providing a road map through the highlights of landmark First Amendment cases.

The strikingly contemporary focus of *The Fight for Free Speech* also sets it apart from other popular works on the First Amendment. Most classics in this field were written more than a decade ago, in a time before our speech landscape was radically altered by the internet and social media era in which we now live. In contrast, each chapter of *The Fight for Free Speech* begins with the exploration of a free speech dilemma that is plucked from the headlines of only the past few years. As a result, *The Fight for Free Speech* will not only cover new territory, but also convey the pressing urgency of why Americans need this book now.

By focusing on ten key cases in depth, rather than the over-inclusive method of standard law school case books, *The Fight for Free Speech* will more efficiently serve students outside of the law school environment. I have learned from teaching media law to graduate students in media studies and MFA programs that case books are not particularly interesting or well suited for students who are studying legal issues but are not law students. For students like these there are few other practical options to assign in lieu of a textbook, and none that are contemporary. *The Fight for Free Speech* is designed to provide a solution for teachers focusing on free speech and the First Amendment in graduate and undergraduate programs in journalism, media studies, communications and rhetoric, undergraduate programs in law and political science, and even high school civics classes.

THE FIGHT FOR FREE SPEECH CHAPTER OUTLINE

THE FIGHT FOR FREE SPEECH CHAPTER OUTLINE

Introduction

The reasons the author wrote this book and his goal: a user's guide for bringing an understanding of free speech law to all.

Chapter 1: **The Women's March and the Marketplace of Ideas** **(*Abrams v. U.S.*, 1919)**

How a decision jailing political protesters for leafleting against WWI ended up as a transformative victory for free speech and modern protest movements.

Chapter 2: **Take a Knee and the Pledge of Allegiance** **(*West Virginia v. Barnette*, 1943)**

Efforts to force students to say the Pledge of Allegiance provide lessons on restricting demonstrations at NFL games.

Chapter 3: **Libel, Actual Malice, and the Civil Rights Movement** **(*New York Times v. Sullivan*, 1964)**

Why civil rights activists expanded the rights of the press, and the media cannot lie and win a libel lawsuit.

Chapter 4: **Student Speech from the Vietnam War to the National School Walkout** **(*Tinker v. Des Moines Independent Community School District*, 1969)**

Freedom for non-disruptive student speech does not disappear at the schoolhouse door.

Chapter 5: **Stormy Daniels, Prior Restraints, and the Pentagon Papers** **(*New York Times v. U.S.*, 1971)**

You cannot stop the presses, since prior restraints are almost always unconstitutional, but you can go to jail for what you leak or publish.

Chapter 6: **Flipping Off the President and Fuck the Draft**
(Cohen v. California, 1971)

Flipping the bird at the President and wearing a jacket emblazoned with “Fuck the Draft” both show that “one man’s vulgarity is another’s lyric.”

Chapter 7: **Samantha Bee, Seven Dirty Words, and Indecency**
(F.C.C. v. Pacifica, 1978)

George Carlin’s dirty comic monologue still impacts what can be said on radio and television.

Chapter 8: **Saturday Night Live, Hustler, and the Power of Parody**
(Hustler Magazine v. Falwell, 1988)

Protecting even outrageously offensive jokes about public figures in SNL skits and satiric ads.

Chapter 9: **Nazis in Charlottesville, Funeral Protests, and Speakers We Hate**
(Snyder v. Phelps, 2011)

Nazi marches, tormenting military families and reasons for allowing despicable speech.

Chapter 10: **Social Media and the “Vast Democratic Forums of the Internet”**
(Packingham v. North Carolina, 2017)

The connection between social media and public parks, and what that means for the future of online speech.

Afterword

A summary of the ten free speech rights discussed in this book and five maxims for protecting free speech in the future.

CHAPTER SUMMARIES, QUESTIONS AND ONLINE LINKS

Introduction

The introduction describes the reasons the author wrote this book. “Contrary to the prevailing opinion in law schools, *everyone* can have a practical working knowledge of free speech law,” Rosenberg writes, “the trick is to ditch jargon and academic theory, and make an effort to describe how First Amendment law applies to the controversies of today.” In addition, the introduction explains how important this information is because we can’t hope to keep our democracy alive if citizens remain uninformed of our First Amendment rights and history. To that end, *The Fight for Free Speech* is a user’s guide for combating ignorance and bringing an understanding of free speech law to all.

Link:

[PBS NewsHour, “Former Supreme Court Justice Souter on the Danger of America’s ‘Pervasive Civic Ignorance,’” YouTube, September 17, 2012 \(video of Justice Souter, quoted in the introduction, discussing how “democracy dies” and what to “worry about at night”\)](#)

Chapter 1

Chapter 1 is launched with the question of how the government should handle antigovernment protests, which are increasingly visible on a number of fronts, from the Women’s March to Black Lives Matter. By examining *Abrams v. U.S.*, which in 1919 marked the start of the Supreme Court’s modern conception of free speech, we can begin to make sense of how best to approach this issue. The *Abrams* defendants were Russian immigrant anarchists who threw leaflets out of New York City windows that called for a strike to defeat the WWI “war program of the United States.” For their non-violent advocacy of illegal action they were sentenced to twenty years in prison. The chapter tells the story of how the Supreme Court’s decision to uphold their convictions ultimately lead to a transformative victory for free speech. The secret to this surprising outcome lies with “the most powerful dissent in American history,” in which the marketplace of ideas metaphor was introduced by Justice Oliver Wendell Holmes.

Discussion Questions:

1. Do you think the *Abrams* defendants deserved to be punished?

2. Constitutional issues aside, should anti-war speech be allowed during wartime? If so, do you agree with the Clear & Present Danger/*Brandenburg* Test (advocacy of illegal action can only be constitutionally prohibited if it is “*directed* to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action”)?
3. What role did anti-Semitism play in the *Abrams* trial?
4. Are you convinced by the Marketplace of Ideas metaphor? Why was it significant? Why is it problematic?
5. Do Black Lives Matter protests rely on the Marketplace of Ideas philosophy of *Abrams*? Why or why not?

Links:

For audio recordings of Supreme Court oral arguments, helpful case summaries, and links to the full texts of Supreme Court decisions, see [Oyez](#). Two additional useful, accurate and free resources for legal information are: the [Cornell Law School Legal Information Institute](#) and [The First Amendment Encyclopedia](#).

[CBS News, “Watch legendary activist Angela Davis rally Women’s March On Washington,” YouTube, January 21, 2017.](#)

[Associated Press, “Madonna: ‘Thought about Blowing Up White House,’” YouTube, January 22, 2017.](#)

[ACLU of Massachusetts/Rights Matter, “*United States v. Jacob Abrams Et Al.*, Exhibit A” \(the full text of both leaflets distributed by the Abrams defendants in English\)](#)

[National Archive, Yiddish Language Leaflet titled “Workers Wake Up!,” August, 1918 \(the full text of the leaflet shown in Yiddish\)](#)

[FIRE, “The History of the Alien, Sedition, Espionage, & Related Acts \(a timeline from 1798 to 2017\)”](#)

[So to Speak: The Free Speech Podcast, “‘The Great Dissent’ w/ Professor Thomas Healy,” January 11, 2018 \(podcast discussion with the author of the gripping intellectual history of the Abrams dissent, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*\)](#)

[Big Think, “The First Amendment in Five Minutes,” August 11, 2010 \(Floyd Abrams, “the legendary First Amendment lawyer gives a primer on what everyone needs to know about freedoms of religion, speech and press”\)](#)

[Anarchism in America, Joel Sucher and Steven Fischler, directors, Pacific Street Films, 1983 \(documentary featuring interview with Mollie Steimer, starting around 19 minutes into the film\)](#)

Chapter 2

Chapter 2 begins with the fierce debate surrounding the Take a Knee protests, led by Colin Kaepernick, during the National Anthem at National Football League games. The efforts by NFL Commissioner Roger Goodell to prohibit the players from protesting provides an opportunity to explain the limits of the First Amendment when it comes to private employees' speech. However, our analysis should not end there. Since the public outcry on both sides of this controversy focuses less on what the NFL *can* do, and more on what the teams *should* do as a matter of free speech principle, the Supreme Court's decision in *West Virginia State Board of Education v. Barnette* is particularly instructive. In *Barnette*, the Court held that forcing students to salute the flag and recite the Pledge of Allegiance in their public school was unconstitutional under the First Amendment since "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."

Discussion Questions:

1. How do the *Gobitis* and *Barnette* cases show the benefits and limitations of stare decisis?
2. How do the *Abrams* and Pledge of Allegiance cases demonstrate the nature of American common law?
3. How does the right not to speak (or the First Amendment prohibition on compelled speech in *Barnette*) apply in the Take a Knee context when there is, and is not, state action involved?
4. Do you think protest is patriotic or is criticism of America inherently un-American?
5. Has your opinion of the Take a Knee protests changed since the death of George Floyd and the resurgence of Black Lives Matter protests in this country?

Links:

[Colin Kaepernick's official website \(details on his mission, donations, Know Your Rights Camp, and more\).](#)

[Real Sports with Bryant Gumbel \(HBO\), "Nate Boyer & Colin Kaepernick: Real Sports Bonus Clip," YouTube, September 27, 2016 \(Boyer on the origins of Kaepernick's decision to kneel in protest\)](#)

[The Guardian, "Nike's 'Dream Crazy' advert starring Colin Kaepernick wins Emmy," September 16, 2019 \(including the full Nike ad featuring Kaepernick and other sports stars\)](#)

[Still Processing, "Kaepernick" \(podcast\), January 17, 2019 \(an insightful discussion of what it means "for Nike to align itself with Colin Kaepernick"\)](#)

[Ian Schwartz, "Trump: NFL Owners Should Fire the 'Son of a Bitch' Player Who 'Disrespects Our Flag' by Kneeling," RealClearPolitics, September 23, 2017 \(link contains the video and transcript of Trump's speech\)](#)

[Nightline, "The Legacy of Political Protest in Sports," ABC News, September 26, 2017](#)

[Nightline, "New NFL Mandate Requiring Players to Stand for National Anthem Sparks Debate," ABC News, May 25, 2018](#)

[Billy Gobitas to Minersville, Pennsylvania, School Directors, 5 November 1935, Manuscript Division, Library of Congress \(view Billy Gobitas's original letter to the school board\)](#)

[PBS Learning Media, "The Supreme Court: Minersville School District v. Gobitis" \(documentary video excerpt on the *Gobitis* case and its after-math\)](#)

[Robert H. Jackson Center, "Gathie Barnett Edmonds \(2003\) on the Barnette Case \(1943\)."; and "Marie Barnett Snodgrass \(2003\) on the Barnette Case \(1943\)."; YouTube, January 16, 2011 \(video interviews with the Barnett sisters about their case\)](#)

Chapter 3

Chapter 3 follows the lead of candidate and President Trump's repeated pledge "to take a strong look at our country's libel laws," so that journalists "can't say things that are false, knowingly false, and be able to smile as money pours into [their] bank account." Trump's fundamental misunderstanding of our current libel law (which does *not* protect the press from making *knowingly* false statements), can be revealed by looking back to the foundational case of *New York Times Company v. Sullivan*.

Sullivan is the source of the widely misunderstood actual malice standard, which extended First Amendment protection for the first time to even false statements criticizing public figures. Beyond clarifying the meaning of actual malice, taking a “strong” look at the case also provides an opportunity to examine its impact on a turning point in American history. *Sullivan* is ultimately the story of how a Southern libel judgment against Dr. Martin Luther King and other leaders of the civil rights movement almost bankrupted *The New York Times*, but resulted in a Supreme Court decision that redefined the power of the press to criticize government officials.

Discussion Questions:

1. Do you think the actual malice standard is a good one? Are you supportive of how it protects the press? Do you think Justice Brennan should have gone even further to protect the press?
2. Discuss how someone who believes in originalist or living constitutionalist theories of constitutional interpretation would support or challenge the *Sullivan* decision.
3. How do modern protest movements (Black Lives Matter, LGBTQIA rights, March for Our Lives, climate strikes, etc.) benefit from the *Sullivan* decision today?
4. Do you view the *Sullivan* decision as representing a free press victory worth celebrating, an example of the Supreme Court turning a blind eye to racist legal practices and substantive inequality, or some combination of the two viewpoints?
5. How does Justice Brennan’s statement in the *Sullivan* decision that there is “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” build on the foundation laid by Justice Holmes in his *Abrams* dissent (from Chapter 1).

Links:

[ABC News, “Trump Plans ‘Strong Look’ at Libel Laws,” January 10, 2018 \(video of Trump’s libel remarks\)](#)

[C-SPAN, “Originalism vs. Living Constitution”, November 15, 2016 \(short video in which Justice Sonia Sotomayor succinctly explains the differences between two central theories of constitutional interpretation\)](#)

[C-SPAN, “Make No Law: The Sullivan Case,” September 10, 1991 \(New York Times columnist and author Anthony Lewis giving an overview of the case and its context, in an interview about his seminal book *Make No Law: The Sullivan Case and the First Amendment*\)](#)

[National Archives, “Advertisement, ‘Heed Their Rising Voices,’ New York Times, March 29, 1960 \(view the original layout of the ad and a full transcript\)](#)

[Stanford University’s Martin Luther King, Jr. Papers Project, Martin Luther King, Jr. Research and Education Institute, “From John Malcolm Patterson” \(full retraction demand letter from Governor Patterson to MLK\)](#)

[C-SPAN, “African American Students and the First Amendment,” December 11, 2017 \(Harvard Law Professor Randall Kennedy talking about the *Dixon v. Alabama* plaintiffs and other African-American student First Amendment trail-blazers\)](#)

[Thurgood Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution,” 26 *Valparaiso University Law Review* 21 \(1991\) \(full text of Justice Marshall’s speech\)](#)

Chapter 4

Chapter 4 presents how the National School Walkout, where students across the nation left their classrooms to demonstrate in favor of gun control, placed young protesters “in defiance of school authorities, who,” according to *The New York Times*, “seemed divided and even flummoxed about how to handle their emptying classrooms.” For students, parents and educators, knowing the parameters of students’ speech rights has once again become a necessity. Thankfully, the case of *Tinker v. Des Moines Independent Community School District*, concerning middle and high school students suspended for wearing black armbands to protest the Vietnam War, decided that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” In a moving connection between the past and present, Mary Beth Tinker, the named plaintiff in the case, actually gave a talk at Stoneman Douglas High School in 2013 and laid the groundwork for the future activism of the March for Our Lives student movement to end gun violence.

Discussion Questions:

1. Taking Greta Thunberg’s Fridays for Future climate strikes (in which students leave class on Fridays to protest inaction to prevent climate change) as an example of a proposed protest, use the *Tinker* decision (and its test) to argue for and against allowing such an action in school.

2. How does the message of the protest influence your view of *Tinker*, if at all? For example, what if the silent protest was a message you disagreed with? What if it hurt people's feelings because in your view it was racist or discriminatory? Should such factors play out in how the "substantial disruption" test is implemented in schools?
3. If students don't "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," what principles can be drawn from this First Amendment freedom. How should location of a protest, or who is doing the protest, factor in to a free speech analysis?
4. How does the *Tinker* decision build on the Pledge of Allegiance cases? How can you use *Tinker* to argue in favor of students having the right to Take a Knee during any school sponsored playing of the National Anthem?
5. Would student speech rights be different today if *Burnside v. Byars* went to the Supreme Court instead of *Tinker*?

Links:

[Mary Beth Tinker, "Primary Sources," \(includes images and documents from Mary Beth Tinker's archive on her Tinker Tour website, "empowering youth voices through First Amendment activism"\)](#)

[Mary Beth Tinker and John Tinker, "A Supreme Court Milestone for Students' Free Speech Rights," ACLU, February 20, 2019 \(short animated video narrated by Mary Beth Tinker and John Tinker\)](#)

[ACLU, "Students' Rights: Speech, Walkouts, and Other Protests," \(excellent summary of student speech rights inside and outside of school\)](#)

["A Conversation on the Constitution with Justices Stephen Breyer, Anthony Kennedy and Sandra Day O'Connor: Freedom of Speech," Annenberg Classroom, September 13, 2018 \(video of a discussion, with the Justices and students, of the issues raised by *Tinker*\)](#)

[Kai Texel, "Be Heard! Protecting Your Protest Rights," National Coalition against Censorship, 2018 \(six-page cartoon produced in conjunction with the Comic Book Legal Defense Fund\)](#)

Chapter 5

Chapter 5 takes on the question of whether anyone could have stopped *60 Minutes* from broadcasting its interview with Stormy Daniels, the adult film star who claims to

have had an affair with President Trump, speaking in violation of her confidentiality agreement. Two weeks before the interview aired CBS News President David Rhodes stated, "It has been reported there will be an injunction to prevent it from running. I haven't seen such an injunction, and I don't know what the basis of such an injunction would be." Rhodes was at a loss to think of a sufficient legal argument to support this restriction on the press. His confidence stemmed from what has become known as the Pentagon Papers case, which struck a decisive blow against prior restraints on the press, even when they involved disclosure of top secret military intelligence during war time. Although the official case name was *New York Times Company v. United States*, the real antagonists were President Nixon versus Daniel Ellsberg, the man who leaked the classified documents to the *Times* and was dubbed "the most dangerous man in America" by Henry Kissinger. Today we take for granted the right of the press to publish material obtained by leakers in violation of the law. However in 1971, the outcome of the fight between these two men on opposite sides of the Vietnam War was very much in doubt and set the stage for the most thrilling battle in First Amendment history. The stakes could not have been higher, the Supreme Court review occurred in record time (fifteen days from injunction to decision) and the result likely flipped on a single answer at oral argument.

Discussion Questions:

1. Do you believe that the Pentagon Papers case was rightly decided? What about the Stewart/White opinion's test that: prior restraints are presumptively unconstitutional unless: "surely result in direct, immediate and irreparable damage to our nation or its people"?
2. If you were arguing the Pentagon Papers on behalf of *The New York Times* before the Supreme Court, would you have conceded that a prior restraint could be constitutionally granted if the continued publication of the Pentagon Papers would obviously, directly, and immediately cause the death of one hundred American soldiers?
3. Are you comfortable with the current state of the law that leakers can be prosecuted for releasing classified information, but that the media can publish such information without being stopped? What are the pro/cons for this position or other options (leakers also protected; media not protected)?
4. Do you think Trump should have been able to stop Stormy Daniels from speaking on 60 Minutes (which he didn't attempt), or books by John Bolton (which he did attempt) and Mary Trump (which his family attempted) from being published?

5. Knowing what you know about the current law on prior restraints, under what if any hypothetical circumstances should the Court grant a prior restraint on the media?

Links:

[National Archives copy of the Pentagon Papers](#)

["The Complete Pentagon Papers," *New York Times*, June 7, 2011 \(interactive link to the complete text of the Pentagon Papers\)](#)

["Richard Nixon and Henry A. Kissinger on 13 June 1971," Conversation 005-059, *Presidential Recordings Digital Edition* \[Nixon Telephone Tapes: 1971, ed. Ken Hughes\] \(Charlottesville: University of Virginia Press, 2014\) \(audio and transcript of Nixon's first discussion about the Pentagon Papers with Kissinger\)](#)

["Richard Nixon, Henry A. Kissinger, and John N. Mitchell on 14 June 1971," Conversation 005-070, *Presidential Recordings Digital Edition* \[Nixon Telephone Tapes 1971, ed. Ken Hughes\] \(Charlottesville: University of Virginia Press, 2014\) \(audio and transcript of Nixon's discussion about stopping publication of the Pentagon Papers with Attorney General Mitchell\)](#)

["The Pentagon Papers: Secrets, Lies and Audiotapes: The Nixon Tapes and the Supreme Court Tapes," The National Security Archive, The George Washington University \(summary of audio tapes from the Nixon White House discussing the Pentagon Papers, with links and transcripts\)](#)

[*The New York Times*, June 13, 1971, \(image of front page on the first day of publication of the Pentagon Papers\)](#)

["Why the Pentagon Papers Still Matter Today," *New York Times*, March 26, 2017 \(short video documentary, "Taking a page from Nixon, President Trump is waging his own battle against leaks, which threatens to damage Americans' right to know"\)](#)

[Burns and Novick, "The Pentagon Papers," PBS Learning Media \(7 minute excerpt on the Pentagon Papers from their *The Vietnam War* documentary\)](#)

[C-SPAN, *Landmark Cases: New York Times v. United States* \(TV series, including interviews with Floyd Abrams, Daniel Ellsberg, and Katharine Graham\)](#)

[Supreme Court of the United States, "Oral Arguments,," C-SPAN, "Chief Justice Roberts on Oral Argument," October 6, 2009, \(Roberts discussing Supreme Court oral argument from his perspective as a former litigator and now as a member of the Court\)](#)

[First Amendment Watch, "First Amendment Watch Video Series: Floyd Abrams," YouTube, November 14, 2018 \(video of Abrams on the Pentagon Papers and *The Post* film\)](#)

Chapter 6

Chapter 6 jumps off from the moment in October when a photo of a woman on her bike flipping the bird at the President's motorcade went viral. Although she could not be easily identified as her back was to the camera, Juli Briskman was later fired and filed suit against her employer. While the speech element of this case may initially seem elusive, the issue of whether non-verbal expressive actions can be considered symbolic speech has already been addressed by the Court in *Cohen v. California*. As the Vietnam War raged on, Cohen wore a jacket emblazoned with the words, "Fuck the Draft," in a California courthouse and was arrested for disturbing the peace. The Court found that the "emotive" quality of the speech was as constitutionally significant as the message itself. Therefore, those who want to express the F-word, in gestural or fashion forms, are protected, not just despite the use of such language, but because of it. The majority opinion by Justice Harlan went on to include one of history's most elegant defenses of swearing: "While the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric."

Discussion Questions:

1. Do you agree that free *speech* rights should implicitly include the *visual* display of expressive content, as the majority held in *Cohen*?
2. Do you believe that the right to curse in public is a necessary component of free speech? Why or why not? Are there any words that should be outside the scope of the First Amendment protection?
3. Considering Justice Harlan's metaphor that the "constitutional right of free expression is powerful medicine in a society as diverse and populous as ours," do you agree that free expression rights are necessary and effective "medicine" in today's America?
4. What reasons articulated by the decision in *Cohen* support the idea that the First Amendment must protect a speaker's right to choose the language they feel is most effective to communicate their message?
5. Is flipping off the president different than a written message to "Fuck the

Draft"? Does the former arguably contain less expressive content than Cohen's message?

Links:

[Steve Herman \(@W7VOA\), Twitter, October 28, 2017, 5:21 p.m. \("Lone cyclist responds to @POTUS motorcade shortly after departing Trump National Golf Club in Sterling, Va. \(Photo: @b_smialowski/@AFP\)"\) \(tweet containing photo of Briskman flipping off Trump's motorcade\)](#)

[Protect Democracy, "Briskman v. Akima Case Resources," April 4, 2018, \(includes link to Briskman's complaint, other legal documents and news coverage\)](#)

[CBS Evening News, "50 Years Ago: Walter Cronkite Calls for the U.S. to Get Out of Vietnam," YouTube, February 27, 2018 \(excerpts of the conclusion of Cronkite's report\)](#)

[Cohen v. California, Oyez, \(listen to Cohen's lawyer Nimmer utter the "f-word" before the Court during oral argument: "may it please the Court what this young man did was to walk through a courthouse corridor . . . wearing a jacket upon which were inscribed the words 'Fuck the draft.'"\)](#)

Chapter 7

Chapter 7 wades into the firestorm over Samantha Bee calling Ivanka Trump a "feckless cunt" on her cable TV show *Full Frontal*. This latest salvo in the war over what you can and can't say on television, is best understood by listening closely to another political comedian from an earlier time: George Carlin. His now infamous "Seven Dirty Words" monologue talked about the words you couldn't say on the public airwaves (for the record, "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits"). The radio broadcast of that monologue, and the subsequent complaint by an outraged father who said he heard it while driving with his young son, was the basis of *FCC v. Pacifica Foundation*. Although highly criticized by the media, the 5 to 4 *Pacifica* decision continues to define the limits of what can be said on radio and television (with an exception for cable) to this day.

Discussion Questions:

1. Is indecency and vulgarity on television and radio more like an "assault" (as Justice Steven says in *Pacifica*) or a nuisance that people can address by switching "stations or flick[ing] the 'off' button" (as Justice Brennan said in dissent)?

2. Stevens chose to view *Cohen* as a case demonstrating the importance of context in matters of indecency, and literally turned its most famous pro-expression line on its head, writing “one occasion’s lyric is another’s vulgarity.” Do you agree with Steven’s distinction, or are the *Cohen* and *Pacifica* decisions incompatible?
3. Does the FCC’s inability to regulate indecency on cable television undermine the justifications for their ability to regulate indecency on broadcast television? Argue both sides.
4. If you were an FCC Commissioner, how would you vote on whether the FCC should be able to sanction fleeting nudity/expletives and why?
5. Should the FCC choose to expand their definition of indecency to include racial slurs? Why or why not?

Links:

[George Carlin—Topic, “Filthy Words,” YouTube, April 29, 2016, \(hear Carlin’s “Filthy Words” recording that triggered the complaint and lead to the *Pacifica* decision\)](#)

[Grooveon39, “George Carlin – Seven Dirty Words,” YouTube, August 11, 2008 \(hear Carlin’s “Seven Words You Can Never Say on Television” monologue\)](#)

[Piet Levy, “From George Carlin’s Arrest to the Rolling Stones Show, Relive Summerfest’s 10 Most Memorable Milestones,” *Milwaukee Journal Sentinel*, June 1, 2017 \(see the Carlin arrest photo and hear an excerpt of his Summerfest performance\)](#)

[Phil92150, “Janet Jackson & Justin Timberlake Superbowl 2004,” YouTube, December 6, 2009, \(includes copy of the original, unblurred broadcast video of the incident\)](#)

[Bibien1, “U2’s Bono & Edge: ‘Fucking Brilliant,’” YouTube, June 9, 2007 \(see Bono win his Golden Globe and use the “f-word” — “That’s really fucking brilliant” — which became part of the *FCC v. Fox* \(2012\) case; the curse occurs around the 5:40 minute mark in the clip\)](#)

Chapter 8

Chapter 8 turns to President Trump’s ongoing rage against *Saturday Night Live*. While it’s debatable whether SNL’s mockery of Trump is any harsher than their portrayal of past presidents (some have argued that Chevy Chase’s portrayal of

President Ford as a bumbling fool cost him the election), Trump's tweet storms against the show and its cast does raise the serious question of whether parody can ever go so far that it is legally actionable. Unfortunately for Trump the would-be television critic, the Supreme Court has seen far more vicious humor before. In *Hustler Magazine, Inc. v. Falwell*, the pornographic publication created a parody ad about the fundamentalist preacher and founder of the Moral Majority, describing in a fake interview how he lost his virginity during a "drunken incestuous rendezvous with his mother in an outhouse." Ultimately the Court determined that allowing the recovery of damages for emotional harm from even such "gross and repugnant" parody, was not consistent with providing, "adequate 'breathing space' to the freedoms protected by the First Amendment."

Discussion Questions:

1. Should there be any limits, other than the Actual Malice standard for false statements of fact established in *Hustler*, on outrageous parodies of public figures? If you think there should be additional limits, where would you draw the line?
2. Do you think parody has any value or power beyond being shocking and/or amusing? How can parody be used for social justice purposes?
3. Besides possible emotional distress for those parodied, what, if any, are the societal drawbacks of almost unlimited parody of public figures? Do you think it deters people from entering public life or public service? Does it lead to a corrosive public discourse?
4. Jerry Falwell and Larry Flynt were both social and political lightning rods in their heydays, with each generating large numbers of admirers and detractors. How does having such problematic public figures as the parties to this litigation influence your feelings about the outcome of this case? And how may it have influenced the Supreme Court?
5. Discuss your favorite *Saturday Night Live* parody of a public figure, and then consider how you would advise the subject of that parody on their legal rights, based on *Hustler*.

Links:

[*Saturday Night Live* \(NBC\), "White House Tree Trimming Cold Open—SNL," YouTube, December 16, 2017 \(sketch that triggered Trump's call for SNL to be "tested in courts"\).](#)

[Saturday Night Live \(NBC\), "Trump Press Conference Cold Open—SNL," YouTube, February 16, 2019 \(sketch that triggered Trump's call for "retribution"\).](#)

[Douglas O. Linder, ed., *Famous Trials*, UMKC School of Law, "Ad Appearing in the November 1983 Issue of Hustler Magazine" \(view the Hustler Campari parody advertisement\)](#)

[C-SPAN, "*Hustler Magazine, Inc. v. Falwell* Satire Case", April 21, 2018 \(video discussion of the case at a University of Minnesota symposium on satire\)](#)

["Larry Flynt Wins First Amendment Case," ABC News, February 24, 1988, \(news coverage video of Falwell and Flynt speaking on the Supreme Court steps after oral argument\)](#)

[Museum of the City of New York, "Thomas Nast Takes Down Tammany: A Cartoonist's Crusade against a Political Boss" \(view Nast's anti-Tweed cartons in context\)](#)

[Ann Telnaes \(@AnnTelnaes\), Twitter, February 18, 2019 \("Trump is complaining about Saturday Night Live and tweets that the show 'should be looked into.' Somebody explain parody and the 1988 #SCOTUS Hustler Magazine v. Falwell decision to him."\) \(a cartoon homage to the Falwell parody by Pulitzer Prize-winning editorial cartoonist Telnaes features Trump, who is "interviewed" saying his "first time was in Putin's outhouse"\)](#)

["Larry Flynt, Jerry Falwell on Larry King Live, 1996 Interview," Daily Motion \(watch part of the Larry King interview with Falwell and Flynt\)](#)

Chapter 9

Chapter 9 confronts the free speech situation the author finds the most alarming—the return of Nazis and racist hate groups to our public squares and the popular discourse. Watching the white supremacists tiki torch lit march in Charlottesville at their "Unite the Right" rally, chanting "Jews will not replace us," culminating in the tragic death of counter-protester Heather Heyer, was so disturbing that it could shake the confidence of even the most stalwart First Amendment absolutist. However, the Supreme Court faced other horrific demonstrations ten years ago in *Snyder v. Phelps*. Fred Phelps founded the Westboro Baptist Church, which fervently believes that God hates the United States and its military for tolerating homosexuals. His church expressed those views by picketing at hundreds of funerals, particularly for members of the armed services. On public land near the funeral of Marine Lance Corporal Matthew Snyder, who was killed while serving in Iraq, Church members held signs that read: "Thank God for Dead Soldiers," "God Hates Fags," and "You're Going to Hell." Chief Justice Roberts, writing for

the eight member majority, protected the picketing because, “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.” “Freedom for the thought we hate,” from the Westboro Baptist Church to the streets of Charlottesville, continues to lie at the heart, and on the fault line, of free speech in America.

Discussion Questions:

1. Chief Justice Roberts says that on matters of public concern in public places, the First Amendment prohibits reacting to the pain caused by hateful speech by punishing the speaker. Do you agree that the First Amendment requires such restraint?
2. Leading critical race theory scholars Richard Delgado and Jean Stefancic, in *Must We Defend Nazis?: Why the First Amendment Should Not Protect Hate Speech and White Supremacy* (New York: New York University Press, 2018) argue: “The First Amendment protects speech as a prime value and considers it democracy-enhancing instrument and protector of communal decision-making. Yet hateful speech, especially the racial kind, can shock and wound, rendering its victims speechless, afraid, and silent, less able to participate in public conversation than they were before being made to suffer it.” Discuss how this view contrasts with the Supreme Court’s view of hate speech in *Snyder*.
3. Chief Justice Roberts and Justice Alito strongly disagreed over the importance of the Westboro Baptist Church conducting their protests on public streets. Should some traditional areas for public expression be protected zones for free expression? Argue both sides as if you were Roberts and Alito.
4. Chief Justice Roberts in his decision wrote “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.” How does this principle apply to the other cases discussed in this book?
5. Can the protections for what is often called hate speech specifically, and free expression more generally, be used by progressive speakers, activists and movements?

Links:

[Vice News Tonight on HBO, "Charlottesville: Race and Terror," YouTube, August 14, 2017 \(watch the Peabody Award-winning report\)](#)

[Big Think, "Should You Defend the Free Speech Rights of Neo-Nazis?," YouTube, June 20, 2019 \(short video featuring former ACLU president Nadine Strossen defending the organization's role in the Skokie controversy\)](#)

[At Liberty, "Lessons from Charlottesville," ACLU, August 8, 2018 \(revealing podcast discussion of the ACLU's positions on their Charlottesville litigation and defending hate speech\)](#)

[ABC News, "Westboro Baptist Goes to the Supreme Court," YouTube, October 6, 2010 \(watch a *Nightline* report featuring interviews with Westboro Church members at the time of the Supreme Court oral argument\)](#)

[Megan Phelps-Roper, "I Grew Up in the Westboro Baptist Church. Here's Why I Left," TED, February 2017 \(TED Talk video by Phelps-Roper on the power of free speech\)](#)

[Unprecedented, "Middle Finger to God," WAMU, November 13, 2019 \(podcast focusing on *Snyder v. Phelps*, including interviews with Snyder, Margie Phelps and NPR's Nina Totenberg\)](#)

[Cady Lang, "President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement," *Time*, September 29, 2020](#)

[Kimberlé Crenshaw, "The urgency of intersectionality," TED, October 2016 \(TED Talk video by Crenshaw, professor of law at UCLA and Columbia Law School, and a cofounder of critical race theory, on "the double bind faced by victims of simultaneous racial and gender prejudice"\)](#)

Chapter 10

Chapter 10 brings us to the present with the problems of social media and what First Amendment protections should be afforded to online speech. In 2017, the Supreme Court for the first time directly addressed the issue of social media speech in the case of *Packingham v. North Carolina*. Packingham was a convicted sex offender, and a state law prohibited from him from accessing social media. The Court unanimously found the law unconstitutional, emphasizing how social media "offers relatively unlimited, low-cost capacity for communication of all kinds" and is now vital to modern life. Justice Kennedy wrote that "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights," and established that the government is prohibited from

placing blanket restrictions on social media. Although the decision leaves many social media questions unanswered, it does make clear that the future of free speech is certainly online. How we as Americans seek to chart that future can only begin by taking in and learning from our First Amendment stories of the past.

Discussion Questions:

1. Justice Kennedy wrote in his *Packingham* decision that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” Do you agree that the freedom to use social media is now a necessary component of free speech?
2. When considering questions about free speech on the internet, do you think online speech should be viewed from an “exceptionalist” or “unexceptionalist” position? (In other words, is online speech “unexceptional” and therefore receives the same protections accorded to speech in general; or “exceptional” and given its unique nature such speech can be regulated in ways that more traditional media is not.)
3. Do you agree with Justice Kennedy’s analysis that internet speech is like speech in a traditional public forum (for example, public streets or parks)? What are significant similarities and differences?
4. Section 230 of the Communications Decency Act has been called “the most important law protecting internet speech,” in that it provides social media platforms and other internet providers with immunity from liability for anything their users post. Do you think Section 230 should be changed or eliminated, and if so, what would be the consequences of any such changes?
5. What do you think are the biggest problems with social media speech today, and how do you think these problems can best be addressed? Would your solution increase or decrease free speech, and would it be permitted under the Supreme Court’s current thinking?

Links:

[ADL, “Sacha Baron Cohen’s Keynote Address at ADL’s 2019 Never is Now Summit on Anti-Semitism and Hate,” November 21, 2019 \(video of Cohen’s speech as recipient of ADL’s International Leadership Award\)](#)

[First Amendment Watch at New York University, “Hate Speech on Social Media: Is There a Way to a More Civil Discussion?”, May 21, 2019 \(video of hate speech panel discussion featuring Professor Nadine Strossen, Jacob Mchangama,](#)

[and Professor Irina Manta\)](#)

[National Constitution Center's *We the People*, "When Does Twitter-Blocking Violate the First Amendment," Knight First Amendment Institute, August 1, 2019 \(podcast discussion of the Second Circuit's decision in *Knight Institute v. Trump* with one of the lead attorneys for the plaintiffs, Katie Fallow\)](#)

[Patriot Act with Hasan Minhaj, "Content Moderation and Free Speech," YouTube, December 2, 2018 \(video on "how the growth of platforms like Facebook and Twitter have created social and political issues that our outdated internet laws cannot solve"\)](#).

[Late Night with Seth Meyers, "Leslie Jones on Her Twitter Trolls," YouTube, July 22, 2016 \(Jones discusses her response to her attacks on Twitter with Meyers\)](#)

Afterword

The Afterword distills the ten cases presented in this book to their essence, and lists the ten rights established by these Supreme Court decisions. In addition, the author sets forth five maxims for how to consider future free speech controversies: Protect Dissent; Defend the Press; Resist Government Speech Restrictions; Expand the Marketplace of Ideas; and Allow Speakers to Express Messages How They Choose. In conclusion, readers are encouraged to take up the fight for free speech as a personal grass roots activity, knowing that they now have the knowledge to speak freely with confidence.

Discussion Questions:

1. What right among those listed in the Afterword summary is most important to you to support? Is there one that you find particularly problematic or feel is most urgently in the need of change?
2. In the spirit of the author's "maxims", what free speech maxims would you create and advocate for?
3. What historical figure, and their free speech fight, featured in this book speak to you most?
4. How fundamental is freedom of speech and the press to representative democracy?
5. What do you see as the biggest threats to free speech today? And what can you do in this area?

Link:

[George Orwell, "Freedom of the Park," *Tribune*, December 7, 1945 \(read the full article\)](#)

Contact Information

Ian Rosenberg would welcome the opportunity to talk with you about *The Fight for Free Speech*, to discuss how he has incorporated it in his own teaching, or to schedule a virtual appearance to engage with your students. His contact information, social media platforms and website are listed below.

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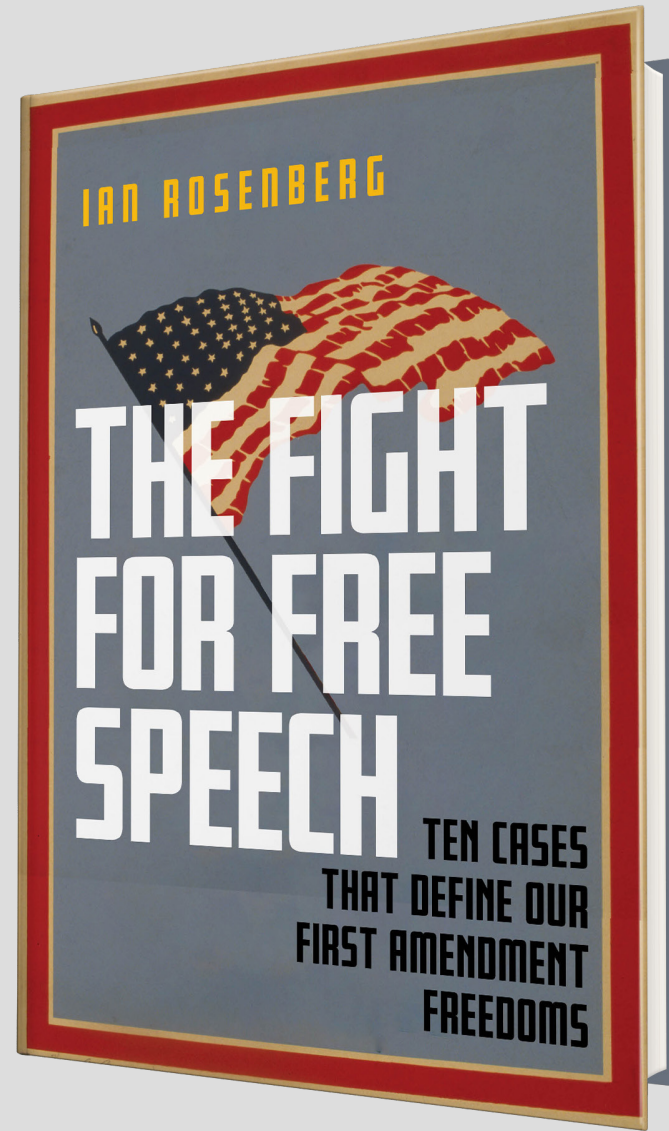
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Teaching Slides

The author has prepared the following teaching slides for you to incorporate into your own course!



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THE FIGHT FOR FREE SPEECH

INTRODUCTION

PBS NewsHour, “Former Supreme Court Justice Souter on the Danger of America’s ‘Pervasive Civic Ignorance,’” YouTube, September 17, 2012 (video of Justice Souter, quoted in the introduction, discussing how “democracy dies” and what to “worry about at night”)

THE FIGHT FOR FREE SPEECH

CHAPTER I: THE WOMEN'S MARCH AND THE MARKETPLACE OF IDEAS (ABRAMS v. U.S., 1919)

[Oyez](#)

[Cornell Law School Legal Information Institute](#)

[The First Amendment Encyclopedia](#)

[CBS News, "Watch legendary activist Angela Davis rally Women's March On Washington," YouTube, January 21, 2017](#)

[Associated Press, "Madonna: 'Thought about Blowing Up White House,'" YouTube, January 22, 2017](#)

[ACLU of Massachusetts/Rights Matter, "*United States v. Jacob Abrams Et Al.*, Exhibit A" \(the full text of both leaflets distributed by the *Abrams* defendants in English\)](#)

[National Archive, Yiddish Language Leaflet titled "Workers Wake Up!," August, 1918 \(the full text of the leaflet shown in Yiddish\)](#)

[FIRE, "The History of the Alien, Sedition, Espionage, & Related Acts \(a timeline from 1798 to 2017\)"](#)

[So to Speak: The Free Speech Podcast, "'The Great Dissent' w/ Professor Thomas Healy," January 11, 2018 \(podcast discussion with the author of the gripping intellectual history of the *Abrams* dissent, *The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America*\)](#)

[Big Think, "The First Amendment in Five Minutes," August 11, 2010 \(Floyd Abrams, "the legendary First Amendment lawyer gives a primer on what everyone needs to know about freedoms of religion, speech and press"\)](#)

[Anarchism in America, Joel Sucher and Steven Fischler, directors, Pacific Street Films, 1983 \(documentary featuring interview with Mollie Steimer, starting around 19 minutes into the film\)](#)

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CHAPTER 2: TAKE A KNEE AND THE PLEDGE OF ALLEGIANCE

(WEST VIRGINIA v. BARNETTE, 1943)

[Colin Kaepernick's official website \(details on his mission, donations, Know Your Rights Camp, and more\)](#)

[Real Sports with Bryant Gumbel \(HBO\), "Nate Boyer & Colin Kaepernick: Real Sports Bonus Clip," YouTube, September 27, 2016 \(Boyer on the origins of Kaepernick's decision to kneel in protest\)](#)

[The Guardian, "Nike's 'Dream Crazy' advert starring Colin Kaepernick wins Emmy," September 16, 2019 \(including the full Nike ad featuring Kaepernick and other sports stars\)](#)

[Still Processing, "Kaepernick" \(podcast\), January 17, 2019 \(an insightful discussion of what it means "for Nike to align itself with Colin Kaepernick"\)](#)

[Ian Schwartz, "Trump: NFL Owners Should Fire the 'Son of a Bitch' Player Who 'Disrespects Our Flag' by Kneeling," RealClearPolitics, September 23, 2017 \(link contains the video and transcript of Trump's speech\)](#)

Nightline, “The Legacy of Political Protest in Sports,” ABC News, September 26, 2017

Nightline, “New NFL Mandate Requiring Players to Stand for National Anthem Sparks Debate,” ABC News, May 25, 2018

Billy Gobitas to Minersville, Pennsylvania, School Directors, 5 November 1935, Manuscript Division, Library of Congress (view Billy Gobitas’s original letter to the school board)

PBS Learning Media, “The Supreme Court: Minersville School District v. Gobitis” (documentary video excerpt on the *Gobitis* case and its after-math)

Robert H. Jackson Center, “Gathie Barnett Edmonds (2003) on the Barnette Case (1943)”

“Marie Barnett Snodgrass (2003) on the Barnette Case (1943),”; YouTube, January 16, 2011 (video interviews with the Barnett sisters about their case)

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CHAPTER 3: LIBEL, ACTUAL MALICE, AND THE CIVIL RIGHTS MOVEMENT (*NEW YORK TIMES* v. *SULLIVAN*, 1964)

ABC News, “Trump Plans ‘Strong Look’ at Libel Laws,” January 10, 2018 (video of Trump’s libel remarks)

C-SPAN, “Originalism vs. Living Constitution,” November 15, 2016 (short video in which Justice Sonia Sotomayor succinctly explains the differences between two central theories of constitutional interpretation)

C-SPAN, “Make No Law: The Sullivan Case,” September 10, 1991 (*New York Times* columnist and author Anthony Lewis giving an overview of the case and its context, in an interview about his seminal book *Make No Law: The Sullivan Case and the First Amendment*)

National Archives, “Advertisement, ‘Heed Their Rising Voices,’ New York Times, March 29, 1960 (view the original layout of the ad and a full transcript)

Stanford University’s Martin Luther King, Jr. Papers Project, Martin Luther King, Jr. Research and Education Institute, “From John Malcolm Patterson” (full retraction demand letter from Governor Patterson to MLK)

C-SPAN, “African American Students and the First Amendment,” December 11, 2017 (Harvard Law Professor Randall Kennedy talking about the *Dixon v. Alabama* plaintiffs and other African-American student First Amendment trail-blazers)

Thurgood Marshall, “Commentary: Reflections on the Bicentennial of the United States Constitution,” 26 *Valparaiso University Law Review* 21 (1991) (full text of Justice Marshall’s speech)

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CHAPTER 4: STUDENT SPEECH FROM THE VIETNAM WAR TO THE NATIONAL SCHOOL WALKOUT (*TINKER v. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*, 1969)

Mary Beth Tinker, “Primary Sources,” (includes images and documents from Mary Beth Tinker’s archive on her Tinker Tour website, “empowering youth voices through First Amendment activism”)

Mary Beth Tinker and John Tinker, “A Supreme Court Milestone for Students’ Free Speech Rights,” ACLU, February 20, 2019 (short animated video narrated by Mary Beth Tinker and John Tinker)

ACLU, “Students’ Rights: Speech, Walkouts, and Other Protests,” (excellent summary of student speech rights inside and outside of school)

“A Conversation on the Constitution with Justices Stephen Breyer, Anthony Kennedy and Sandra Day O’Connor: Freedom of Speech,” Annenberg Classroom, September 13, 2018 (video of a discussion, with the Justices and students, of the issues raised by *Tinker*)

Kai Texel, “Be Heard! Protecting Your Protest Rights,” National Coalition against Censorship, 2018 (six-page cartoon produced in conjunction with the Comic Book Legal Defense Fund)

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CHAPTER 5: STORMY DANIELS, PRIOR RESTRAINTS, AND THE PENTAGON PAPERS (*NEW YORK TIMES* v. U.S., 1971)

National Archives copy of the Pentagon Papers

“The Complete Pentagon Papers,” *New York Times*, June 7, 2011 (interactive link to the complete text of the Pentagon Papers)

“Richard Nixon and Henry A. Kissinger on 13 June 1971,” Conversation 005-059, *Presidential Recordings Digital Edition* [Nixon Telephone Tapes: 1971, ed. Ken Hughes] (Charlottesville: University of Virginia Press, 2014) (audio and transcript of Nixon’s first discussion about the Pentagon Papers with Kissinger)

“Richard Nixon, Henry A. Kissinger, and John N. Mitchell on 14 June 1971,” Conversation 005-070, *Presidential Recordings Digital Edition* [Nixon Telephone Tapes 1971, ed. Ken Hughes] (Charlottesville: University of Virginia Press, 2014) (audio and transcript of Nixon’s discussion about stopping publication of the Pentagon Papers with Attorney General Mitchell)

“The Pentagon Papers: Secrets, Lies and Audiotapes: The Nixon Tapes and the Supreme Court Tapes,” The National Security Archive, The George Washington University (summary of audio tapes from the Nixon White House discussing the Pentagon Papers, with links and transcripts)

The New York Times, June 13, 1971, (image of front page on the first day of publication of the Pentagon Papers)

“Why the Pentagon Papers Still Matter Today,” *New York Times*, March 26, 2017 (short video documentary, “Taking a page from Nixon, President Trump is waging his own battle against leaks, which threatens to damage Americans’ right to know”)

Burns and Novick, “The Pentagon Papers,” PBS Learning Media (7 minute excerpt on the Pentagon Papers from their *The Vietnam War* documentary)

C-SPAN, *Landmark Cases: New York Times v. United States* (TV series, including interviews with Floyd Abrams, Daniel Ellsberg, and Katharine Graham)

Supreme Court of the United States, “Oral Arguments,” www.supremecourt.gov; C-SPAN, “Chief Justice Roberts on Oral Argument,” October 6, 2009, (Roberts discussing Supreme Court oral argument from his perspective as a former litigator and now as a member of the Court)

First Amendment Watch, “First Amendment Watch Video Series: Floyd Abrams,” YouTube, November 14, 2018 (video of Abrams on the Pentagon Papers and *The Post* film)

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CHAPTER 6: FLIPPING OFF THE PRESIDENT AND FUCK THE DRAFT

(*COHEN v. CALIFORNIA*, 1971)

Steve Herman (@W7VOA), Twitter, October 28, 2017, 5:21 p.m. (“Lone cyclist responds to @POTUS motorcade shortly after departing Trump National Golf Club in Sterling, Va. (Photo: @b_smialowski/@AFP)”) (tweet containing photo of Briskman flipping off Trump’s motorcade)

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CBS Evening News, “50 Years Ago: Walter Cronkite Calls for the U.S. to Get Out of Vietnam,” YouTube, February 27, 2018 (excerpts of the conclusion of Cronkite’s report)

Cohen v. California, Oyez, (listen to Cohen’s lawyer Nimmer utter the “f-word” before the Court during oral argument: “may it please the Court what this young man did was to walk through a courthouse corridor . . . wearing a jacket upon which were inscribed the words ‘Fuck the draft.’”)

THE FIGHT FOR FREE SPEECH

CHAPTER 7: SAMANTHA BEE, SEVEN DIRTY WORDS, AND INDECENCY (*F.C.C. v. PACIFICA*, 1978)

George Carlin—Topic, “Filthy Words,” YouTube, April 29, 2016, (hear Carlin’s “Filthy Words” recording that triggered the complaint and lead to the *Pacifica* decision)

Grooveon39, “George Carlin – Seven Dirty Words,” YouTube, August 11, 2008 (hear Carlin's "Seven Words You Can Never Say on Television" monologue)

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CHAPTER 8: SATURDAY NIGHT LIVE, HUSTLER, AND THE POWER OF PARODY (*HUSTLER MAGAZINE* v. *FALWELL*, 1988)

Saturday Night Live (NBC), “White House Tree Trimming Cold Open—SNL,” YouTube, December 16, 2017 (sketch that triggered Trump’s call for SNL to be “tested in courts”)

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Douglas O. Linder, ed., *Famous Trials*, UMKC School of Law, “Ad Appearing in the November 1983 Issue of *Hustler* Magazine” (view the *Hustler* Campari parody advertisement)

C-SPAN, “*Hustler Magazine, Inc. v. Falwell* Satire Case”, April 21, 2018 (video discussion of the case at a University of Minnesota symposium on satire)

“Larry Flynt Wins First Amendment Case,” ABC News, February 24, 1988, (news coverage video of Falwell and Flynt speaking on the Supreme Court steps after oral argument)

Museum of the City of New York, “Thomas Nast Takes Down Tammany: A Cartoonist’s Crusade against a Political Boss” (view Nast’s anti-Tweed cartons in context)

Ann Telnaes (@AnnTelnaes), Twitter, February 18, 2019 (“Trump is complaining about Saturday Night Live and tweets that the show ‘should be looked into.’ Somebody explain parody and the 1988 #SCOTUS *Hustler Magazine* v. Falwell decision to him.”) (a cartoon homage to the Falwell parody by Pulitzer Prize–winning editorial cartoonist Telnaes features Trump, who is “interviewed” saying his “first time was in Putin’s outhouse”)

“Larry Flynt, Jerry Falwell on Larry King Live, 1996 Interview,” Daily Motion (watch part of the Larry King interview with Falwell and Flynt)

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CHAPTER 9: NAZIS IN CHARLOTTESVILLE, FUNERAL PROTESTS, AND SPEAKERS WE HATE (SNYDER v. PHELPS, 2011)

Vice News Tonight on HBO, “Charlottesville: Race and Terror,” YouTube, August 14, 2017 (watch the Peabody Award-winning report)

Big Think, “Should You Defend the Free Speech Rights of Neo-Nazis?,” YouTube, June 20, 2019 (short video featuring former ACLU president Nadine Strossen defending the organization’s role in the Skokie controversy)

At Liberty, “Lessons from Charlottesville,” ACLU, August 8, 2018 (revealing podcast discussion of the ACLU’s positions on their Charlottesville litigation and defending hate speech)

ABC News, “Westboro Baptist Goes to the Supreme Court,” YouTube, October 6, 2010 (watch a *Nightline* report featuring interviews with Westboro Church members at the time of the Supreme Court oral argument)

Megan Phelps-Roper, “I Grew Up in the Westboro Baptist Church. Here’s Why I Left,” TED, February 2017 (TED Talk video by Phelps-Roper on the power of free speech)

Unprecedented, “Middle Finger to God,” WAMU, November 13, 2019 (podcast focusing on *Snyder v. Phelps*, including interviews with Snyder, Margie Phelps and NPR’s Nina Totenberg)

Cady Lang, “President Trump Has Attacked Critical Race Theory. Here's What to Know About the Intellectual Movement,” *Time*, September 29, 2020

Kimberlé Crenshaw, “The urgency of intersectionality,” TED, October 2016 (TED Talk video by Crenshaw, professor of law at UCLA and Columbia Law School, and a cofounder of critical race theory, on “the double bind faced by victims of simultaneous racial and gender prejudice”)

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CHAPTER 10: SOCIAL MEDIA AND THE “VAST DEMOCRATIC FORUMS OF THE INTERNET” (*PACKINGHAM v. NORTH CAROLINA*, 2017)

ADL, “Sacha Baron Cohen’s Keynote Address at ADL’s 2019 Never is Now Summit on Anti-Semitism and Hate,” November 21, 2019 (video of Cohen’s speech as recipient of ADL’s International Leadership Award)

First Amendment Watch at New York University, “Hate Speech on Social Media: Is There a Way to a More Civil Discussion?”, May 21, 2019 (video of hate speech panel discussion featuring Professor Nadine Strossen, Jacob Mchangama, and Professor Irina Manta)

National Constitution Center’s *We the People*, “When Does Twitter-Blocking Violate the First Amendment,” Knight First Amendment Institute, August 1, 2019 (podcast discussion of the Second Circuit’s decision in *Knight Institute v. Trump* with one of the lead attorneys for the plaintiffs, Katie Fallow)

Patriot Act with Hasan Minhaj, “Content Moderation and Free Speech,” YouTube, December 2, 2018 (video on “how the growth of platforms like Facebook and Twitter have created social and political issues that our outdated internet laws cannot solve”).

Late Night with Seth Meyers, “Leslie Jones on Her Twitter Trolls,” YouTube, July 22, 2016 (Jones discusses her response to her attacks on Twitter with Meyers)

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AFTERWORD

George Orwell, “Freedom of the Park,” *Tribune*, December 7, 1945 (read the full article)