

The Fight for Free Speech

Ten Cases That Define Our First Amendment Freedoms

BY IAN ROSENBERG

Reading Group Guide

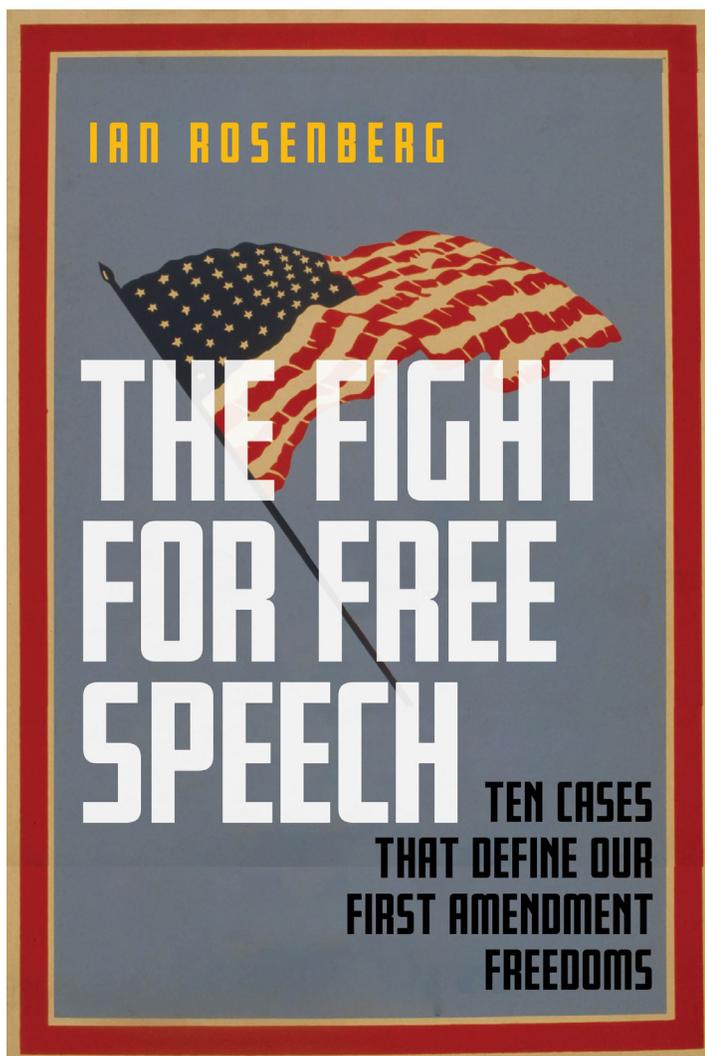
A user's guide to understanding contemporary free speech issues in the United States

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.



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“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

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 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 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 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

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 BOOK CLUB

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.

The Fight for Free Speech makes an excellent pick for book clubs, since the discussions can focus on individual chapters (members can each pick one to focus on) or the book as a whole. The book is designed to spark conversations and will hopefully lead readers to consider how they may want 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.

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.

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?

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?

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).

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*?

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?

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?

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?

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*.

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 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?

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?

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?

Contact Information

Ian Rosenberg is available to schedule with book clubs for a virtual/zoom author chat or question and answer session about *The Fight for Free Speech*. His contact information, social media platforms and website are listed below.

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