2020

Fixed Stars: Famous First Amendment Phrases and Their Indelible Impact

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FIXED STARS: FAMOUS FIRST AMENDMENT PHRASES AND THEIR INDELIBLE IMPACT

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Some passages in First Amendment law have taken on a life and legend of their own, entering our cultural lexicon for their particular power, precision or passion. Some phrases are just so beautifully written that they cannot escape notice.[3] Others aptly capture the essence of a key concept in a memorable way. Still others seemingly have grown in importance simply by the frequency for which they are cited in later court decisions.

In his book, *Point Taken: How to Write Like the World's Best*

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3. David L. Hudson, Jr., *5 Favorite First Amendment Passages*, FREEDOM F. INST. (Mar. 8, 2011), https://www.freedomforuminstitute.org/2011/03/08/5-favorite-first-amendment-passages.

Judges, Ross Guberman writes of "some of the most enduring passages in opinion-writing history."[4] Some of the most legendary U.S. Supreme Court Justices, such as Oliver Wendell Holmes[5] and Robert Jackson,[6] were wordsmiths who crafted time-honored passages. The following ten phrases from U.S. Supreme Court First Amendment decisions qualify as some of the most enduring passages in First Amendment jurisprudence.

"FIXED STAR"

Depending on if, when, and where you attended public school, you may have begun your days reciting the Pledge of Allegiance. Perhaps this filled you with a sense of pride. Perhaps not. Perhaps you thought, "This seems a bit totalitarian." Perhaps, like a proud patriot, you looked upon those cynical *free thinkers* with disgust. Whatever your reaction, it is worth remembering that the reactions of Americans in the World War II era led to two U.S. Supreme Court decisions. The Supreme Court's decision in *West Virginia State Board of Education v. Barnette*[7] was the culmination of a battle between government and school officials who sought to enforce conformity and patriotism on the one hand and Jehovah Witnesses and their religious beliefs on the other. The West Virginia legislature required its schools to conduct courses in history, civics, and constitutional studies.[8] West Virginia took this step with the express purpose of "teaching, fostering, and perpetuating the

4. ROSS GUBERMAN. POINT TAKEN: HOW TO WRITE LIKE THE WORLD'S BEST JUDGES xxiii (2015).

5. Nina Varsava, *Elements of Judicial Style: A Quantitative Guide to Neil Gorsuch's Opinion Writing*, 93 N.Y.U. L. REV. ONLINE 75, 82 (2018) (listing Holmes as one of three justices with a "diverse vocabular[y]" and a justice "recognized for [his] narrative skill.").

6. Gregory Chernak, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and Brown*, 72 TEMP. L. REV. 51, 57 n.26 (1999) ("Jackson was also one of the greatest writers to serve on the nation's highest court."); Charles Patrick Thomas, *A New Deal Approach to Statutory Interpretation: Selected Cases Authored by Justice Robert Jackson*, 44 J. LEGIS. 132, 133 (2017)) (noting that "Jackson is probably best remembered as an impressive advocate and wordsmith.").

7. 319 U.S. 624 (1943).

8. *Id.* at 624.

ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."[9] With the disastrous rise of socialism and fascism in Europe, it is easy to understand why American legislators felt compelled to inculcate strong national values in the American youth. But instead of filling them with American pride, some critics felt the expressly nationalist push in curriculum and—in particular—the recitation of the pledge of allegiance was inappropriately similar to tactics adopted by German leader Adolph Hitler (such as the Hitler Youth programs).[10]

Among the chorus of disapproving voices, some of the most resolute protesters were Jehovah's Witnesses.[11] The Jehovah's Witnesses based their opposition in biblical verses like Exodus 20:4–5: "Thou shalt not make unto thee any graven image or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them."[12] The Jehovah's Witnesses felt the flag of the United States of America was one such "image," and they believed it was a sin for their children to begin the school day saluting and pledging it their allegiance.[13] In the Jehovah's Witnesses' minds, this was tantamount to bowing themselves down.

Barnette appeared before the Court just three years after the Court's decision in *Minersville School District v. Gobitis*.[14] In that decision, the Court upheld a Minersville, Pennsylvania public school practice of compelling students to salute the flag and pledge it their allegiance; in spite of the Jehovah's Witnesses' protestations—and ruling during the uncertain World War II era—the Court reasoned the Minersville policy was a secular policy that furthered the legitimate goal of cultivating national unity.[15] Justice Felix Frankfurter explained, "[w]hat the school authorities are really asserting is the right to awaken in the

9. *Id.*
10. *Id.* at 627–28.
11. *Id.* at 629.
12. *Id.*
13. *Id.*
14. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).
15. *Id.* at 599–600.

child's mind considerations as to the significance of the flag contrary to those implanted by the parent."[16] Only Justice Harlan Fiske Stone dissented. After *Gobitis*, it was understandable that the West Virginia Board of Education in *Barnette* felt confident passing its own flag salute and pledge of allegiance policies in 1942.

Nonetheless, the Jehovah's Witnesses proved themselves stalwart in their continued fight against compelled speech. When the Jehovah's Witness students refused to salute and pledge allegiance to the flag, West Virginia responded with measures as drastic as expulsion, relocation to reformatory schools (typically reserved for students with criminal inclinations), and prosecution of parents for causing their children to become delinquents.[17] The Jehovah's Witnesses brought suit, and, believing the *Gobitis* decision clearly supported its actions, the West Virginia Board of Education moved for dismissal.[18] When the District Court refused dismissal, the Board of Education appealed directly to the United States Supreme Court.[19]

Justice Jackson authored the Court's eloquent opinion. First, he observed that the Jehovah's Witnesses did not claim rights which would interfere with the rights of others, that the case involved neither violent nor disruptive behavior but peaceable refusal to engage in compulsory behavior, and that "the sole conflict [was] between authority and rights of the individual" before the State.[20] Here, the Court faced the issue of the "compulsion of students to declare a belief."[21] Acknowledging the dynamic at play, Jackson then expounded upon the significance of the compulsion in question—he found it far from benign:

> There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality,

16. *Id.* at 599.
17. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943).
18. *Id.* at 630.
19. *Id.*
20. *Id.*
21. *Id.* at 631.

> is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee.[22]

Ultimately, the Court decided that the West Virginia Board of Education could not constitutionally compel students to participate in saluting and pledging the flag allegiance.[23] Jackson looked to the enduring Bill of Rights axiom that "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[24] Tracing and revivifying the First Amendment's *line in the sand,* Justice Jackson closed his opinion (in part) with the epic passage: "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."[25]

The Supreme Court has cited Jackson's "fixed star" language in numerous decisions, including those involving compelled speech,[26] political party free associational rights,[27] flag-burning,[28] school prayer,[29] library book censorship,[30] political patronage,[31]

22. *Id.* at 642.
23. *Id.*
24. *Id.* at 638.
25. *Id.* at 642 (emphasis added).
26. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. 205, 220 (2013).
27. Clingman v. Beaver, 544 U.S. 581, 616 (2005) (Stevens, J., dissenting).
28. Texas v. Johnson, 491 U.S. 397, 415 (1989).
29. Wallace v. Jaffree, 472 U.S. 38, 55 (1985).
30. Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982).
31. Branti v. Finkel, 445 U.S. 507, 514 n.9 (1980).

Communist Party cases,[32] and bar applicant cases.[33] All told, more than 250 judicial decisions have cited Justice Jackson's famous "fixed star" passage.

"SHOUTING FIRE"

Justice Oliver Wendell Holmes, Jr. is widely considered, along with Justice Louis Brandeis, to be one of the fathers of the First Amendment.[34] He authored many of the seminal decisions that explained why our country should protect freedom of speech. For example, he first used the terminology "clear and present danger" more than a hundred years ago to help draw the line between protected and unprotected speech in *Schenck v. United States*.[35]

But, Holmes produced another phrase in his *Schenck* opinion that may be even better known, a phrase deeply enmeshed in our culture—"shouting fire in a theatre." One scholar refers to it as "the most enduring analogy in constitutional law" that "has permeated popular discourse on the scope of individual rights."[36]

The case involved the prosecution of Charles T. Schenck and Elizabeth Baer for distributing leaflets urging people to refuse to comply with the draft. Schenck, the general secretary of the Socialist Party, opposed U.S. involvement in World War I and believed that conscription was akin to slavery.[37] In the leaflets, Schenck and Baer mentioned the Thirteenth Amendment of the Constitution, which outlawed slavery and involuntary servitude. In other words, the political dissidents believed that conscription into the armed forces amounted to a form of indentured servitude. The leaflets urged no violence and included the phrase

32. Scales v. United States, 367 U.S. 203, 268 (1961) (Douglas, J., dissenting).

33. Schware v. Bd. of Bar Exam'rs. of N. M., 353 U.S. 232, 244 n.15 (1957).

34. David Cole, *Agon at Agura: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 862 (1986) (referring to Holmes and Brandies "two strong fathers of the First Amendment").

35. Schenck v. United States, 249 U.S. 247, 52 (1919).

36. Carlton F.W. Larson, "*Shouting 'Fire' in a Theater*:" *The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 181 (2015).

37. *Schenck*, 249 U.S. at 49.

"Assert Your Rights."[38] Nevertheless, Justice Holmes affirmed the convictions for a unanimous Supreme Court. He explained:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic*. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is question of proximity and degree.[39]

In this passage, Holmes explained that in times of war the government can place greater restrictions on freedom of speech. He also gave what scholar Stephen Feldman has identified as "a prototypical example of unprotected expression."[40] Frederick Schauer has called it "a ubiquitous weapon in the speech restrictor's rhetorical arsenal."[41]

Holmes' classic "fire in a theatre" is perhaps the most-often quoted phrase from First Amendment jurisprudence. It has transcended the Supreme Court Reports into the normal cultural sphere. For example, years ago when asked by a reporter why used uttered mean things about an opponent, former world heavyweight boxing champion "Iron" Mike Tyson responded: "It's not like I yelled fire in a theater or something."[42]

Ironically, some of Holmes' contemporaries and friends were not pleased either with Holmes' opinion in *Schenck* or his "shouting fire in a theatre" language. For example, political

38. *Schenck*, 249 U.S. at 51.

39. *Id.* at 52 (emphasis added).

40. Stephen M. Feldmen, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, 6 FIRST AMEND. L. REV. 192, 208 (2011).

41. Frederick Schauer, *Every Possible Use of Language*, in THE FREE SPEECH CENTURY 33 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019)

42. David L. Hudson, Jr., *What a Phrase: "Falsely Shouting 'Fire' in a Theatre,"* FREEDOM F. INST. (Dec. 11. 2019), https://www.freedomforuminstitute.org/2019/12/11/what-a-phrase-falsely-shouting-fire-in-a-theatre.

scientist Ernst Freund objected to the analogy of "shouting fire in a theatre" to speech by political dissidents.[43]

Interestingly, many misquote Holmes' passage by adding in the adjective "crowded" to make it "shouting fire in a crowded theatre."[44] For example, Justice William O. Douglas added the adjective "crowded" before theatre when speaking of Holmes' favorite metaphor.[45] Holmes never used the adjective "crowded." Perhaps even more ominously, some omit the adverb "falsely" from Holmes' famous phrase. Obviously, the First Amendment would protect a speaker who truthfully warns of a fire.

The U.S. Supreme Court later cited Holmes' shouting fire phrase in decisions involving alleged true threats,[46] broadcast indecency,[47] civil rights marching,[48] prior restraints on public speakers,[49] and noise control ordinances.[50] More than 130 judicial opinions in all have cited Justice Holmes' famous "shouting fire" passage.

"MORE SPEECH, NOT ENFORCED SILENCE"

One of the most important doctrines in First Amendment jurisprudence is the counter-speech doctrine—the idea that when confronted with harmful or wrongheaded speech, the best alternative is not censorship but counter speech.[51] The doctrine is traced back to Justice Louis Brandeis' concurring opinion in *Whitney v. California*,[52] involving the prosecution of Charlotte

43. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHIC. L. REV. 1205, 1282 (1983) (writing that Freund was "horrified" that Holmes would compare shouting fire in a theater to speech by political dissidents); Brad Snyder, *The House That Built Holmes*, 30 LAW & HIST. REV. 661, 682 (2012).

44. Larson, *supra* note 36, at 182.

45. Brandenburg v. Ohio, 393 U.S. 444, 456 (Douglas, J., concurring).

46. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S 886, 927 n.70 (1982).

47. F.C.C. v. Pacifica Found., 438 U.S. 726, 744 (1978).

48. Cox v. La., 379 U.S. 559, 563 (1965).

49. Kunz v. N. Y., 340 U.S. 290, 298 (1951) (Jackson, J., dissenting).

50. Kovacs v. Cooper, 336 U.S. 77, 86 (1949).

51. David L. Hudson, Jr., *More Speech, Not Enforced Silence*, FREEDOM F. INST. (Feb. 7, 2020), https://www.freedomforuminstitute.org/2020/02/07/more-speech-not-enforced-silence [hereinafter Hudson, *More Speech*].

52. Whitney v. California, 274 U.S. 357, 372–81 (1927) (Brandeis, J.,

Anita Whitney under a California criminal syndicalism law. Her crime was assisting in facilitating a meeting of the Communist Labor Party in Oakland, California.[53]

Whitney was the daughter of a former California state senator and the niece of former U.S. Supreme Court Justice Stephen Field.[54] A peaceful political activist, Whitney nevertheless was arrested and charged for violating the state's criminal syndicalism law. She took her case all the way to the U.S. Supreme Court, which unanimously affirmed her conviction.

However, Justice Louis Brandeis—joined by Justice Holmes—penned a memorable concurring opinion that scholar Vincent Blasi has called "the most important essay ever written, on or off the bench, on the meaning of the first amendment."[55] The concurring opinion reads like a dissenting opinion, causing scholars Ronald K.L. Collins and David Skover to call it a "curious concurrence."[56] They explain that Brandeis' opinion in Whitney was a draft that he had originally written as a dissenting opinion in the case of Charles Ruthenburg, who died before the Supreme Court could issue an opinion.[57]

Brandeis famously authored the following passage that stands for the counter-speech principle: "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[58]

Time and again over the years, the U.S. Supreme Court and many lower courts have invoked the counter-speech doctrine as the preferred First Amendment remedy. For example, in *United States v. Alvarez*,[59] a case involving the federal prosecution of a

concurring).

53. *Whitney*, 274 U.S. at 372.

54. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 656 (1988).

55. *Id.* at 668.

56. Ronald K.L. Collins & David Skover, *Curious Concurrence: Justice Brandeis' Opinion in* Whitney v. California, 2005 SUP. CT. REV. 333, 335 (2005).

57. *Id.* at 371.

58. *Whitney*, 274 U.S. at 377.

59. 567 U.S. 709 (2012).

man who lied about receiving military medals, Justice Anthony Kennedy wrote that "[t]he remedy for speech that is false is speech that is true."[60]

Many judges through the years have invoked the counter-speech doctrine in First Amendment opinions. For example, Justice Thurgood Marshall—as ardent a defender of free speech who has ever sat on the High Court[61]—years earlier invoked the counter-speech doctrine in *Linmark Associates, Inc. v. Township of Willingboro*, invalidating a New Jersey municipal ordinance banning "for sale" signs in the midst of what city officials perceived to be white flight.[62] Justice Marshall quoted Justice Brandeis's famous passage in *Whitney* and added that the city could not ban the signs but could engage in the "processes of education" to promote integrated housing.[63]

At times, it is most tempting to censor speech or to call for the censorship of speech we don't like. But before engaging in those impulses, we should consider Justice Brandeis's time-honored message of "more speech, not enforced silence."[64]

"A PROFOUND NATIONAL COMMITMENT"

The essence of the First Amendment is the ability of citizens to criticize the government. Justice William Brennan captured this concept memorably in the landmark libel decision *New York Times Co. v. Sullivan*,[65] when he wrote:

> Thus we consider this case against the background of 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

60. *Id.* at 727.

61. David L. Hudson, Jr. *Justice Thurgood Marshall, Great Defender of First Amendment Free-Speech Rights for the Powerless*, 2 HOW. HUM. & C. R. L. REV. 167 (2018).

62. 431 U.S. 85 (1977).

63. *Id.* at 97.

64. Hudson, *More Speech*, *supra* note 51.

65. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (emphasis added).

officials.[66]

The case involved *The New York Times* publishing an editorial advertisement in March 1960 titled, "Heed Their Rising Voices."[67] The ad criticized "Southern violators" of the civil rights of African American students and accused these violators of a "wave of terror" against these civil rights protestors.[68] Some of the ad focused on the mistreatment of students and civil rights leader Dr. Martin Luther King Jr., in Montgomery, Ala.[69]

The commissioner in charge of the police department, L.B. Sullivan, sued *The New York Times* in an Alabama state court for defamation even though he was not named in the advertisement. An all-white Alabama jury awarded Sullivan $500,000 in damages—a verdict upheld by the Alabama state appellate courts.[70]

However, the U.S. Supreme Court unanimously reversed and issued a landmark First Amendment decision. The court noted that "libel can claim no talismanic immunity from constitutional limitations"[71] and instead such laws "must be measured by standards that satisfy the First Amendment."[72] The Court also noted that "erroneous statement[s] [are] inevitable in free debate"[73] and it would chill free speech to impose crushing liability for newspapers who made mistakes.[74]

The Court proceeded to find that public officials who sue for libel, like L.B. Sullivan, must meet a high standard of proof. They must show that the publisher printed the statements knowing they were false or acted with "reckless disregard." Such was born the "actual malice" standard.[75]

The essence of the ruling in *Times v. Sullivan* is that citizens have a First Amendment right to criticize government officials.

66. *Id.* at 270.
67. Editorial, *Heeding Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960.
68. *Sullivan*, 376 U.S. at 256–57.
69. *Id.* 257–58.
70. *Id.* 256.
71. *Id.* at 269.
72. *Id.*
73. *Id.* at 271.
74. *Id.* at 271–72.
75. *Id.* at 279–80.

This hallmark principle resonates throughout Justice Brennan's opinion but perhaps most forcefully in his beautiful language that talks about a "profound national commitment," "uninhibited, robust and wide open" debate" and "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[76]

The Supreme Court has cited Justice Brennan's famous phrase many times in the subsequent years. In 2011, for example, Chief Justice John Roberts quoted the phrase in multiple First Amendment cases—two involving restrictions on campaign expenditures or contributions[77] and another on a restriction on funeral protests.[78] Various justices would quote the passage in subsequent defamation opinions.[79] Still other decisions involving the free-speech rights of public employees refer to the "profound national commitment" to "robust" debate.[80] Court decisions on picketing also quoted Brennan's famous words.[81] All in all, more than 840 First Amendment decisions have cited Justice Brennan's memorable language.

"BEDROCK PRINCIPLE"

Many people support free speech as an ideal but when confronted with the reality of ugly speech their commitment to free expression dissipates. The late great Nat Hentoff captured this censorial impulse in his book *Free Speech for Me—But Not for Thee*.[82]

76. David L. Hudson, Jr., *'A Profound National Commitment' to 'Robust' Debate*, FREEDOM F. INST. (Dec. 16, 2019), https://www.freedomforuminstitute.org/2019/12/16/a-profound-national-commitment-to-robust-debate.

77. Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 755 (2011); FEC v. Wisconsin Right to Life, 551 U.S. 449, 468 (2007).

78. Snyder v. Phelps, 562 U.S. 443, 452 (2011).

79. *See, e.g.,* Harte Hank Comm's v. Connaughton, 491 U.S. 657, 686 (1989); Philadelphia Newspapers v. Hepps, 475 U.S. 767, 772 (1986).

80. Connick v. Myers, 461 U.S. 138, 162 (1983) (J. Brennan, dissenting); Elrod v. Burns, 427 U.S. 347, 357 (1976).

81. Carey v. Brown, 447 U.S. 455, 462-63 (1980); Chicago Police Dept. v. Mosley, 408 U.S. 92, 96 (1972).

82. NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER (1992).

But the reality is that the First Amendment protects much speech that is obnoxious, offensive and repugnant. Justice William Brennan expressed this principle eloquently in his majority opinion in the flag-burning decision *Texas v. Johnson*.[83] Brennan 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.[84]

Gregory Johnson participated in a "Republican War Chest Tour" protest in Dallas, Texas—the site of the 1984 Republican National Convention.[85] While Johnson doused the flag with kerosene, others chanted, "America, red, white and blue, we spit on you."[86] No one was physically harmed by the protest activities, but several witnesses were offended greatly by the burning of the flag.[87] Authorities arrested only Johnson of all the protestors.[88] They charged him under a Texas law criminalizing the desecration of the American flag, a "venerated object."[89]

The Supreme Court narrowly ruled 5-4 in favor of Johnson. Writing for the majority, Justice Brennan reasoned that the law was unconstitutional because it suppressed Johnson's speech because of the offensiveness of his message.[90] Justice Brennan explained that "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters" and "to persuade them that they are wrong."[91]

The Supreme Court has quoted or paraphrased Justice Brennan's "bedrock principle" quote many times in subsequent First Amendment decisions, including ones involving disparaging trademarks,[92] funeral protests,[93] cross-burning,[94] art

83. 491 U.S. 397 (1989).
84. *Id.* at 414 (emphasis added).
85. *Id.* at 399.
86. *Id.* at 399.
87. *Id.* at 399.
88. *Id.* at 400.
89. *Id.*
90. *Id.* at 407–08.
91. *Id.* at 419.
92. Matal v. Tam, 137 S. Ct. 1744, 1751 (2017).

censorship,[95] and anonymous campaign speech.[96] Nearly 200 other court decisions have quoted or paraphrased Justice Brennan's "bedrock principle" language.

A lasting legacy of Justice Brennan's opinion in *Texas v. Johnson* is his "bedrock principle" phrase, which has become a cardinal First Amendment concept—that the First Amendment protects much offensive, obnoxious and even repugnant speech.[97]

"ONE MAN'S VULGARITY IS ANOTHER'S LYRIC"

"One man's vulgarity is another's lyric" is one of the more notable First Amendment phrases in history. Its author was Justice John Marshall Harlan II, a man who was not a left-leaning liberal or supporter of offensive behavior. In fact, Harlan II—the grandson of his namesake known as "the Great Dissenter"—was often regarded as one of the most conservative members of the Warren Court.[98] He was known primarily as a proponent of the doctrine of judicial restraint. However, during his last year on the bench, he issued a majority opinion in *Cohen v. California*,[99] a rather remarkable First Amendment opinion involving vulgar expression on a jacket.

The case began in April 1968, when Paul Robert Cohen wore a jacket to a Los Angeles County Courthouse bearing the words "Fuck the Draft" in a Los Angeles courtroom.[100] A police officer passed a note to the judge, asking that Cohen be held in

93. *Snyder*, 562 U.S. at 458.

94. Virginia v. Black, 538 U.S. 343, 358 (2003); R.A.V. v. St. Paul, 505 U.S. 377, 430 (1992) (Stevens, J., concurring).

95. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 601 (1998) (Souter, J., dissenting).

96. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378 (1995) (Scalia, J., dissenting).

97. David L. Hudson, Jr., *The 'Bedrock Principle' of the First Amendment*, FREEDOM F. INST. (Dec. 20, 2019), https://www.freedomforuminstitute.org/2019/12/20/the-bedrock-principle-of-the-first-amendment.

98. Clay Calvert, *Revisiting the Right to Offend Forty Years After Cohen v. California: One Case's Legacy on First Amendment Jurisprudence*, 10 FIRST AMEND. L. REV. 1, 8–9 (2011).

99. Cohen v. California, 403 U.S. 315 (1971).

100. *Id.* at 316.

contempt for the message on his jacket.[101] However, the judge refused to find Cohen in contempt.[102]

The police officer then waited until Cohen left the courtroom and then arrested him in the lobby for breach of the peace.[103] The state law prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct. . . ."[104]A Los Angeles Municipal Court judge found Cohen guilty and sentenced him to 30 days imprisonment.[105] Cohen appealed his conviction, because—as he told one of the authors of this article—"I did not want to serve 30 days in jail."[106]

The Court of Appeals affirmed his conviction, finding that it was foreseeable that the offensive conduct of wearing a jacket with that message could lead someone to react with violence.[107] His attorneys appealed to the California Supreme Court, which declined to hear the case.[108]

The last chance for young Mr. Cohen stood before the U.S. Supreme Court, which now only takes less than 80 cases a year out of thousands of petitions. Surprisingly, the Court took the case and ruled in favor of Mr. Cohen by a slim 5-4 margin. Justice Harlan began his opinion by noting that "[t]his case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance."[109]

The conservative Justice noted that the conviction rested upon the content of the words.[110] The state argued that the words "Fuck the Draft" was a form of obscenity, an unprotected

101. *Id.* at 319 n.3.
102. *Id.*
103. *Id.* at 316.
104. *Id.* at 316.
105. *Id.* at 316.
106. David L. Hudson, Jr., *Paul Robert Cohen and His Famous Free Speech Case*, FREEDOM F. INST. (May 4, 2016), https://www.freedomforuminstitute.org/2016/05/04/paul-robert-cohen-and-his-famous-free-speech-case [hereinafter Hudson, *Cohen Free Speech Case*].
107. *Id.* at 317.
108. *Id.* at 317.
109. *Id.* at 316.
110. *Id.* at 418.

category of expression in First Amendment law.[111] Harlan rejected the notion that the jacket was legally obscene, writing that "such expression must be, in some significant way, erotic."[112]

The state also argued that Cohen's profane message amounted to fighting words, defined by the U.S. Supreme Court as "words which by their very utterance inflict injury or cause an immediate breach of the peace."[113] The Court had created the fighting words exception in *Chaplinsky*, a case involving a Jehovah Witness who had cursed at a local marshal.[114]

But, Justice Harlan rejected the fighting-words argument, saying that the words were not directed at a specific individual. He explained:

> First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, 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.* Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.[115]

This important passage—particularly the words "one man's vulgarity is another's lyric" —indicates that Justice Harlan recognized the eye-of-the-beholder aspect of offensiveness. What is offensive to one may not be offensive to another. What one person may consider highly offensive, another may consider a high form of art. Often, distasteful expression is in the eye of the beholder. As prolific First Amendment scholar Clay Calvert explains, the phrase is consonant with the modern void-for-

111. *Id.* at 420.
112. *Id.*
113. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).
114. *Chaplinsky*, 315 U.S. at 571.
115. *Cohen*, 403 U.S. at 420 (emphasis added).

vagueness doctrine.[116]

Harlan's phrase has found its way into other volumes of the United States Reports, most often in dissenting opinions. Justice Harry Blackmun, who dissented in *Cohen*, cited it with no great pleasure in his dissenting opinion in the fighting words decision *Lewis v. New Orleans*.[117] Justice John Paul Stevens quoted the phrase in his partial dissenting opinion in the obscenity case *Pope v. Illinois*.[118] Justice Sonia Sotomayor quoted Harlan's famous phrase in her separate concurring in part and dissenting in part opinion in the vulgar trademark decision *Iancu v. Brunetti*.[119]

Many lower courts cited the phrase in finding that profanity by itself does not equate to fighting words.[120] Suffice it to say, the *Cohen* case has been cited countless times in judicial opinions, many times specifically for Harlan's wondrous little phrase.

"One man's vulgarity is another's lyric" captures the essence of freedom and the First Amendment. In the words of Cohen himself, "the government shouldn't be able to decide what speech an individual can or cannot speak[.]"[121]

"WE ARE A RELIGIOUS PEOPLE WHOSE INSTITUTIONS PRESUPPOSE A SUPREME BEING"

Justice William O. Douglas wrote this famous phrase in *Zorach v. Clauson*,[122] a case involving a New York student release program that allowed students to leave class—and

116. Calvert, *supra* note 98, at 12.

117. Lewis v. New Orleans, 415 U.S. 130, 140 (1974) (Blackmun, J., dissenting).

118. Pope v. Illinois, 481 U.S. 497, 514–15 (1987) (Stevens, J., dissenting in part).

119. 139 S. Ct. 2294, 2315 (2019) (Sotomayor, J., concurring in part and dissenting in part).

120. *See, e.g.*, Johnson v. Campbell, 332 F.3d 199, 212 (3d. Cir. 2003) (citing Harlan's passage in noting that police officer did not have probable cause to arrest a defendant for disorderly conduct merely because he uttered profanity); State v. McKenna, 415 A. 2d 729, 731 (R.I. 1980) (ruling that a juvenile's profanities directed at police officers standing more than 10 feet away were not fighting words)

121. Hudson, *Cohen Free Speech Case*, *supra* note 106.

122. 343 U.S. 306, 308 (1952).

campus—to attend religious education. In *Zorach*, unlike *McCollum v. Bd. of Educ.*,[123] no public-school classrooms were utilized and all costs relating to these programs were borne by the religious organizations involved.[124] New York taxpayers who disapproved of the program raised Establishment and Free Exercise Clause challenges against the program.[125]

Declining to engage in judicial legislation by ruling on the wisdom of the program, the majority explained the real issue was "whether New York . . . either prohibited the 'free exercise' of religion or . . . made a law 'respecting an establishment of religion' within the meaning of the First Amendment."[126] In so doing, the Court weighed the upholding of the Establishment Clause against the integral importance religion played in both the founding and the continuing existence of the United States.[127] While "[t]here is much talk of separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment,"[128] it is simultaneously true that the First Amendment "does not say that in every and all respects there shall be a separation of Church and State."[129] Justice Douglas artfully wrote:

> *We are a religious people whose institutions presuppose a Supreme Being.* We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its

123. 333 U.S. 203 (1948)

124. *Zorach*, 343 U.S. at 308–09.

125. *Id.* at 309–10 ("[T]he weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this "released time" program, like the one in the McCollum case, would be futile and ineffective.").

126. *Id.* at 310.

127. *Id.* at 312–13.

128. *Id.* at 312.

129. *Id.*

> dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[130]

Douglas's language has been cited in numerous landmark freedom of religion cases. In *Marsh v. Chambers*, Chief Justice Warren Burger cited Douglas' language in ruling constitutional Nebraska's practice of opening its legislative days with prayer by a state-paid chaplain.[131] Burger found particularly significant the "unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states."[132] The next year, in *Lynch v. Donnelly*, Burger cited the phrase again in his opinion upholding the constitutionality of a Nativity crèche in a municipality's annual Christmas display.[133]

More recently, the Court cited Douglas' famous phrase in *Van Orden v. Perry*, a decision involving an Establishment Clause challenge to a Ten Commandments monument in a Texas public park.[134] Thomas Van Orden, an offended observer raised an Establishment Clause challenge to the monument which had been in place for decades.[135] Chief Justice William H. Rehnquist observed: "Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens."[136] In *Van Orden*, that the monument was a part of a long tradition of observing the presupposition of a Supreme Being—coupled with its definitively passive, non-oppressive nature—was enough to defeat the Establishment Clause challenge.[137]

Justice Douglas' words have found their way into numerous lower court opinions as well. Among the words' most bold

130. *Id.* at 313–14 (emphasis added).
131. Marsh v. Chambers, 463 U.S. 783 (1983).
132. *Id.* at 795.
133. Lynch v. Donnelly, 465 U.S. 668, 675 (1984).
134. Van Orden v. Perry, 545 U.S. 677, 683–84 (2005).
135. *Id.*
136. *Id.* at 683.
137. *Id.* at 687–90.

invocations is their inclusion in a 2019 Third Circuit opinion upholding a Pennsylvania House of Representatives policy limiting its pre-legislative session prayers to theists only.[138] Judge Thomas L. Ambro further underscored the significance of the presumption of a Supreme Being by pointing to the then-recent words of Justice Samuel Alito: "prayer is by definition religious."[139] The presupposition of a Supreme Being is a component of American cultural, governmental, and judicial history that has found and will likely continue to find its way into state and federal opinions at all levels.

"OUR WHOLE CONSTITUTIONAL HERITAGE REBELS AT THE THOUGHT OF GIVING GOVERNMENT THE POWER TO CONTROL MEN'S MINDS"

Justice Thurgood Marshall wrote this famous sentence in *Stanley v. Georgia*, a case involving the execution of a search warrant by federal and state officers upon the residence of a Georgia man suspected of illegal bookmaking.[140] While "very little evidence of bookmaking activity" was found, the officers discovered several reels of eight-millimeter film containing obscene material.[141] The officers arrested the man, and he was subsequently convicted of violating a Georgia law prohibiting the possession of "obscene matter."[142]

Of the defendant's several challenges to his conviction, the Supreme Court only found it necessary to discuss one: "[I]nsofar as [Georgia] punishes mere private possession of obscene matter, [the State] violates the First Amendment."[143] Writing on behalf of the Court, Justice Marshall wrote:

> [The convicted Georgia man] is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is

138. Fields v. Speaker of the Pa. H.R., 963 F.3d 142, 152 (2019).

139. *Id.* (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019)).

140. Stanley v. Georgia, 394 U.S. 557 (1969).

141. *Id.* at 558.

142. *Id.* at 558–59.

143. *Id.* at 559.

> asserting the right to be free from state inquiry into the contents of his library. . . .Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. *Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.*[144]

Stanley set the precedent that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime."[145] Justice John Paul Stevens loved Marshall's words, citing it in not only a later obscenity decision[146]—but also in cases involving abortion[147] and the drugging of inmates.[148] More than 50 subsequent decisions have cited the passage.

"THE HUMAN SPIRIT"

Justice Marshall—ever the eloquent First Amendment defender[149]—waxed eloquently about the importance of freedom of expression a few years after *Stanley v. Georgia* in a case involving prison inmates. *Procunier v Martinez* involved California Department of Corrections' rules limiting inmate correspondence.[150] Under the restrictive rules, inmates could not write letters in which they "unduly complained," "magnified grievances," or "express[ed] inflammatory political, racial, religious or other views or beliefs."[151]

The Court ruled against the rules, writing that prison

144. *Id.* at 565 (emphasis added).

145. *Id.* at 568.

146. Pope v. Illinois, 481 U.S. 497, 517–18 (1987) (Stevens, J., dissenting).

147. Planned Parenthood v. Casey, 505 U.S. 833, 915 (1992) (Stevens, J., dissenting).

148. Washington v. Harper, 494 U.S. 210, 238 n.3 (1990) (Stevens, J., dissenting).

149. David L. Hudson, Jr., *Justice Marshall: Eloquent First Amendment Defender*, FREEDOM F. INST. (Feb. 4, 2013), https://www.freedomforuminstitute.org/2013/02/04/justice-marshall-eloquent-first-amendment-defender.

150. Procunier v. Martinez, 416 U.S. 396 (1974).

151. *Id.* at 399.

officials "failed to show that these broad restrictions on prisoner mail were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression."[152]

Justice Marshall concurred but went further in his separate opinion, reasoning that prison officials should not be able to read inmate mail.[153] He then explained in beautiful language why the First Amendment was important to prisoners who are shut off from the rest of the world:

> The First Amendment serves not only the needs of the polity, but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.[154]

He further explained that prisoners need a "medium for self-expression" and that the First Amendment satisfies the yearnings of the human spirit.[155]

The Court's opinion in *Procunier v. Martinez* represented the Court's "high water mark" for protecting prisoner rights.[156] Unfortunately, the waters have receded since then, as the Court has gradually lowered the standard of review for prisoner regulations and sanctioned more and more forms of censorship.[157]

"UNDIFFERENTIATED FEAR"

In 1969, the U.S. Supreme Court famously ruled that public school students possess First Amendment free-speech rights and that they don't "shed their constitutional rights to freedom of

152. *Id.* at 415.

153. *Id.* at 422 (Marshall, J., concurring).

154. *Id.* at 427.

155. *Id.* at 428.

156. David L. Hudson, Jr., *Remembering the High Point of Prisoner Rights*, PRISON LEGAL NEWS (June 15, 2011), https://www.prisonlegalnews.org/news/2011/jun/15/remembering-the-high-point-of-prisoner-rights.

157. Turner v. Safley, 482 U.S. 78 (1987); *see also* Beard v. Banks, 548 U.S. 521 (2006).

speech or expression at the schoolhouse gate."[158] School officials in Des Moines, Iowa, banned students from wearing black peace armbands for fear that the armbands might arouse feelings and lead to possible problems at school. But, Justice Abe Fortas, memorably wrote: "[b]ut, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[159] He explained that school officials needed to show that the student expression would cause a substantial disruption of school activities in order to censor the student expression.[160]

Justice Fortas' language of "undifferentiated fear" not outweighing the freedom of expression appropriately recognizes the value of freedom of expression and that school officials must be able to point to actual evidence of disruption or at the very least a reasonable forecast of disruption rather than a generalized fear or speculation.

The Court has used the phrase in a variety of First Amendment cases other than school cases, including profanity and fighting words[161] and picketing.[162] Justice Brennan quoted the phrase in dissenting opinions involving obscenity[163] and public employee speech.[164] Approximately, 350 First Amendment decisions have quoted Justice Fortas' famous warning about "undifferentiated fear" from *Tinker*.

158. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

159. *Id.* at 508.

160. *Id.* at 509.

161. Cohen v. California, 403 U.S. 15, 23 (1971).

162. Chicago Police Dep't v. Mosley, 408 U.S. 92, 101 (1972).

163. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 112, n. 28 (1973) (Brennan, J., dissenting).

164. Connick v. Myers, 461 U.S. 138, 169 (Brennan, J., dissenting).