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SYMBOLIC COUNTER-SPEECH

Howard M. Wasserman*

INTRODUCTION

The domestic¹ and military² events that followed the tragedy of September 11, 2001 in the United States included dramatic increases in government and public

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¹ See, e.g., *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (establishing provisions regarding law enforcement, investigation and prosecution of terrorist activities); *Oversight Hearing on the U.S. Dep't of Justice: Hearing Before the House Comm. on Judiciary*, 108th Cong. (2003) (statement of Attorney General John Ashcroft) (“[T]he Justice Department is using every Constitutional means to identify, disrupt, and dismantle terrorists, their supporters and financial networks, and to protect Americans from further acts of terrorism.”); *The War Against Terrorism: Working Together to Protect America: Hearing Before the Committee on the Senate Judiciary*, 108th Cong. (2003) (testimony of Attorney General John Ashcroft) (“I want to assure the Committee that, as was the case with the Congress and the USA-PATRIOT Act, we have carefully crafted our post-September 11 policies to foster prevention while protecting the privacy and civil liberties of Americans.”).

The controversy has been over whether those efforts have gone too far. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 152 (2d ed. 2002) (arguing that the PATRIOT Act “reflects an overreaction all too typical in American history”); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 2 (2003) (stating that approximately 2000 people were detained after 9/11, “mostly through administrative rather than criminal procedures, and largely because of their ethnic identity”); *id.* at 24–26 (describing federal government use of immigration authority to arrest and detain large numbers of people, without any showing of a connection to terrorism); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 95* (2003) [hereinafter *SEPTEMBER 11 DETAINEES*] (finding significant problems with the manner in which numerous immigrants were taken into custody and in the terms and conditions under which they were held following 9/11).

² The United States waged two major overseas military operations as part of the War on Terrorism — against the Taliban government in Afghanistan and against the government of dictator Saddam Hussein in Iraq. See *Authorization for Use of Military Force Against Iraq Resolution of 2002*, Pub. L. No. 107-243, 116 Stat. 1498 (2002); *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the president to use force against terrorist groups in response to the September 11 attacks, including the Taliban government that supported Al-Qaeda).

patriotic expression, particularly via symbols such as the American flag.³ The enduring image of America's immediate survival and recovery from the 9/11 attack is New York City firefighters hoisting an American flag on a steel beam amid the wreckage of the World Trade Center.⁴ Flags fly from houses and cars, adorn bumpers and windows, and hang from highway overpasses.⁵ The American flag as a symbol necessarily includes its complementary symbols, such as "The Star-Spangled Banner," Pledge of Allegiance, and patriotic songs, most notably "God Bless America," all of which have made a similar comeback. For example, several states have reinstated mandatory patriotic activities, such as reciting the Pledge or singing the national anthem, in public schools.⁶ This patriotic revival has been particularly evident in one unique context — professional and other high-profile sporting events; long a feature of such public gatherings, patriotic symbolism has taken on new meaning and new impact in sport since 9/11.⁷

Controversy arises from the fact that all speech, whether by private individual or government, leads inevitably and necessarily to counter-speech, speech responding to and dissenting from the approved and sanctioned original message.⁸

³ See *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("Government may create national symbols, promote them, and encourage their respectful treatment."); Calvin R. Massey, *Pure Symbols and the First Amendment*, 17 HASTINGS CONST. L.Q. 369, 369 (1990) (defining the American flag as "a symbol adopted by the nation's government for the purpose of sending some message to the community" about its meaning); see also *infra* notes 46–56 and accompanying text.

⁴ See 149 CONG. REC. H4828 (daily ed. June 3, 2003) (statement of Rep. Miller) ("[O]n September 11, every American witnessed those brave firefighters raising Old Glory out of the rubble of the World Trade Center. That was a symbol of America's resolve that our freedom will reign even in the face of unprecedented terror."). This is the modern counterpart of the image of United States Marines raising the flag atop Mount Suribachi after the capture of Iwo Jima during World War II. See *id.* at H4834 (statement of Rep. Skelton) ("In 1944, the most dramatic flag raising in American history, on a rocky Pacific island called Iwo Jima. When the sun rose the next day on that flag atop Mount Suribachi, the sun of Japanese Imperialism began to set."); see also *Texas v. Johnson*, 491 U.S. 397, 421–26 (1989) (Rehnquist, C.J., dissenting) (detailing the flag's significance in American history).

⁵ See *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1220 (9th Cir. 2003); see also Mary L. Dudziak, *Introduction*, in *SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 4 (Mary L. Dudziak ed., 2004) (describing the marketing of American patriotism, from flags to patriotic trading cards); Mark A. Graber, *Antebellum Perspectives on Free Speech*, 10 WM. & MARY BILL RTS. J. 779, 810 (2002) ("Americans are subject to constant 'United We Stand' messages whenever they watch television, listen to the radio, read a newspaper, or even drive down the highway.").

⁶ See *infra* notes 185–92 and accompanying text.

⁷ See *infra* notes 107–18 and accompanying text.

⁸ See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 61 (Lee C. Bollinger &

Symbolic speech, such as the flag and its complements, in turn gives rise to one particular form of counter-speech — symbolic counter-speech, a direct response to the symbol on its own terms, employing the symbol itself as the vehicle for the counter-message.⁹ The most extreme version of symbolic counter-speech is flag burning, attacking and destroying one particular simulation of that symbol.¹⁰ But there are other, less extreme forms of symbolic counter-speech such as nonparticipation in a symbolic ceremony such as the Pledge or national anthem¹¹ or a symbolic response within the ceremony itself.¹²

Thus, at the same time that flags are flown and patriotic songs are sung at games, dissenting fans and athletes have used those very songs and ceremonies to put forward a different, conflicting message,¹³ by turning away from the flag¹⁴ or, more dramatically, by booing or jeering the anthem itself.¹⁵ This symbolic counter-

Geoffrey R. Stone eds., 2002); Michael Kent Curtis, *“Free Speech” and its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKEFOREST L. REV. 419, 423 (1996) (arguing that certain ideas, such as bigotry, can cause harm and produce a bigoted society, but should be addressed by counter-speech, including serious education about tolerance and nonviolent confrontation); see also *infra* notes 77–79, 86–96 and accompanying text.

⁹ See *infra* notes 97–106, 119–58 and accompanying text.

¹⁰ See Frank Michelman, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337, 1346–47 & n.36 (1990); see also *United States v. Eichman*, 496 U.S. 310 (1990) (striking down a federal statute outlawing the defiling or burning of the American flag); *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a Texas statute outlawing the burning of the American flag); *Spence v. Washington*, 418 U.S. 405 (1974) (overturning a conviction for violating state law prohibiting flag misuse); John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1507 & n.101 (1975) (describing constitutional problems with law prohibiting misuse of a flag); see also *infra* notes 126–33 and accompanying text.

¹¹ See *infra* notes 119–25 and accompanying text.

¹² See *infra* notes 126–39 and accompanying text.

¹³ See Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511, 543 (1991) (arguing that one can use a flag to communicate a contrary view that the flag’s “conventionally accepted message of patriotism and unity does not necessarily reflect unanimity or satisfaction in the political community”).

¹⁴ See Bill Pennington, *College Basketball; Player’s Protest Over the Flag Divides Fans*, N.Y. TIMES, Feb. 26, 2003, at D1 (describing spectators’ angry reactions when a college basketball player turned her back to the flag during “The Star-Spangled Banner”); Doug Hartmann, *Race & Sport* (2003), at <http://www.johnCarlos.com/issue.html> (last accessed Oct. 29, 2003) (describing the actions of Olympians Tommie Smith and John Carlos, who gave the “Black Power” salute while standing on the medal podium during the national anthem at the 1968 Summer Olympics).

¹⁵ See *Baker Wins Chilly Debut At Wrigley*, N.Y. TIMES, Apr. 9, 2003, at S7 (describing baseball fans at Wrigley Field in Chicago booing the Canadian national anthem prior to the game) [hereinafter *Chilly Debut*]; Dave Caldwell, *Canadiens Issue Apology for Fans’ Booing Anthem*, N.Y. TIMES, Mar. 22, 2003, at S7 (describing professional hockey team’s apologies after Montreal fans booed “The Star-Spangled Banner” in protest of the U.S.-led war with Iraq).

speech has been met with strong public (albeit generally not legal) disapproval, popular outcries over the disrespect such expression shows to America, the flag, and soldiers who have fought or died overseas in past and present wars. These expressive counter-acts widely and publicly are viewed as no different than burning a flag — as acts of disrespect and desecration of flag and nation. There is an underlying sense that such symbolic counter-speech is, or should be, proscribable and the symbolic counter-speaker formally silenced or punished.

The examples of flag-related symbolic counter-speech that are the focus of this Article, although limited in number, occurred at a unique time from a free speech standpoint.¹⁶ The 9/11 attacks plunged the nation into what Vincent Blasi has labeled a “pathological period,” defined as a “historical period[] when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically.”¹⁷ The “defining feature of [such] a . . . period is a shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the first amendment.”¹⁸ Put differently, pathological periods are those in which the powerful instinct to be intolerant of unorthodox, dissenting, disrespectful, or potentially disruptive ideas breaks free of normal constraints, when the practical wisdom and moral propriety of such tolerance is called into question.¹⁹ Pathology arises during some real or perceived crisis²⁰ and is marked primarily by an increase in government suppression (or attempted suppression) of dissenting or unorthodox expression.²¹

¹⁶ See Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 2 (2003) (“The post-September 11 era is a propitious, if deeply unfortunate, one in which to reexamine the landscape of the First Amendment’s protection of free speech.”).

¹⁷ Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985); see also *id.* at 462 (defining pathology “as a period during which the . . . core propositions [of free expression] are denied”); Cole, *supra* note 1, at 2–3.

¹⁸ Blasi, *supra* note 17, at 467.

¹⁹ *Id.* at 462; see also LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 10 (1986) (“[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings invoked by a host of social encounters.”); Massey, *supra* note 3, at 375 (“Paradoxically, societal growth and even transformation are accomplished by tolerating the conduct we seek to extirpate.”).

²⁰ See MICHAEL KENT CURTIS, *FREE SPEECH, “THE PEOPLE’S DARLING PRIVILEGE”*: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 116 (2000) (“At times of real and imagined crisis, elites and members of the general public continued to treat some subjects as too important to be trusted to the democratic process.”).

²¹ See Cole, *supra* note 1, at 3 (“[I]n times of fear, government often looks for ways to engage in [crime] prevention without being subject to the rigors of the criminal process.”); Lyrisa Barnett Lidsky, *Brandenburg and the United States’ War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1026 (2002) (“[T]he United States’ commitment to broad protection of inciting propaganda in . . . times of national crisis has proved embarrassingly limited.”); see *infra* notes 159–84 and accompanying text.

The last such period arguably arose in the 1960s, with the twin fears of the anti-war²² and American Civil Rights movements.²³

Three pathological periods are most prominent in American history. The first occurred from 1798–1800, when the Federalist administration of John Adams enforced the Alien and Sedition Acts of 1798 against newspapers and speakers critical of the president, Congress, and Federalist policies.²⁴ The second occurred during and after World War I, when the Espionage Act directly targeted the spoken and written word and more than 2,000 people were arrested and prosecuted and more than 1,000 were convicted — essentially for speaking out against the United States government and the war.²⁵ The third was the McCarthy Era and the Cold War. Congress targeted members, affiliates, or associates of the Communist Party,

²² Compare *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (upholding a federal statute prohibiting destruction of draft cards) with *Cohen v. California*, 403 U.S. 15, 26 (1971) (striking down a state law conviction for displaying a message using profanity to state opposition to the draft); see also Ely, *supra* note 10, at 1492–93 (comparing the Court's approaches in *O'Brien* and *Cohen* and noting the absence of any balancing in the *Cohen* Court's analysis).

²³ See Lillian R. BeVier, *Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment*, 59 WASH. & LEE L. REV. 1075, 1092 (2002) (arguing that the Warren Court's First Amendment jurisprudence sought to "advance the cause of the civil rights movement by strengthening the First Amendment shield that protected the movement's activities from unfriendly regulation"); Blasi, *supra* note 17, at 508–09 (citing numerous landmark Supreme Court decisions striking down state government restrictions on civil rights activists in the 1960s).

²⁴ See CURTIS, *supra* note 20, at 93–94; Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 358–59 (2003); Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 547–53 (2003).

²⁵ See, e.g., COLE & DEMPSEY, *supra* note 1, at 71 (describing investigations during World War I and the 1920s for "un-American activities," including the Palmer Raids targeting more than 10,000 people as anarchists or revolutionary immigrants); *id.* at 150 (describing imprisonment and deportation of people for political affiliations and for speaking out against World War I); CURTIS, *supra* note 20, at 390 (describing some of the speech for which people were prosecuted for, among other things, telling a woman who was knitting socks for soldiers, that no soldier would ever see them); Blasi, *supra* note 17, at 464–65 ("Tolerance seems to be a somewhat cyclical phenomenon in politics."); Cole, *supra* note 1, at 4; Neal Devins, *Congress, Civil Liberties, and the War on Terrorism*, 11 WM. & MARY BILL RTS. J. 1139, 1141 (2003); Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 (2003); see also *Abrams v. United States*, 250 U.S. 616, 623–24 (1919) (affirming convictions under the Espionage Act for distributing leaflets and other written materials); *Debs v. United States*, 249 U.S. 211, 212, 217 (1919) (affirming conviction under the Espionage Act for speech advocating socialism); *Schenck v. United States*, 249 U.S. 47, 51–52 (1919) (affirming a conspiracy conviction under the Espionage Act, in part because time of war required a restriction on speech that might not be proscribable at any other time). See generally ZACHARIAH CHAFFEE JR., *FREE SPEECH IN THE UNITED STATES* (2001).

through laws prohibiting the advocacy of overthrowing of the United States government by force or violence²⁶ and through the workings of the Committee on Un-American Activities of the House of Representatives (commonly known as HUAC), which called before it hundreds of people — on pain of Contempt of Congress — demanding to know of the witnesses' Communist affiliations, as well as the affiliations of their acquaintances and associates.²⁷ Governmental targeting of expressive and associative activities that defined previous periods, and the Supreme Court decisions ratifying such targeting, have come to be seen as error.²⁸ Indeed, it has been suggested that the government should be hailed in the present period for not repeating the mistakes of the past, particularly with regard to prohibitions on expression.²⁹

But the absence of government suppression does not necessarily mean that we are not dealing with pathology. Government suppression is, in fact, only one of three defining features of pathological periods; the presence of other elements makes

²⁶ See Blasi, *supra* note 17, at 464–65; Cole, *supra* note 1, at 6 & n.21; see also, Dennis v. United States, 341 U.S. 494, 516–17 (1951) (upholding convictions of members of the Communist Party for conspiring to overthrow the United States government); David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in *ETERNALLY VIGILANT*, *supra* note 8, at 33, 54–57.

²⁷ See HAIG BOSMAJIAN, *THE FREEDOM NOT TO SPEAK* 119 (1999); Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1678–79 (2001); see also COLE & DEMPSEY, *supra* note 1, at 73 (describing the link between HUAC investigations and FBI investigations of suspected Communists).

²⁸ See Blasi, *supra* note 17, at 456 (“The most serious lapses in toleration of dissent, such as the Alien and Sedition Acts, the Red Scare, and the McCarthy Era, have acquired an aura of ignominy that says much about the importance of free speech in the pantheon of national ideals.”); Cole, *supra* note 1, at 7 (“[T]he punishment of dissent during World War I and of political association during the Cold War is seen as a grave error.”); Curtis, *supra* note 24, at 354 (“[O]ne could argue that the Court has simply and finally rejected its past repressive decisions. . . . [T]hese past repressive decisions can reasonably be seen as relics of a bygone age”); Robert F. Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 337 (1984) (“[T]he Court has struck down many restrictive laws and practices in the last sixty years; it is this record to which proponents of the modern judicial role point as justification for their high regard for judges as protectors of free speech.”); Wood, *supra* note 25, at 463 (arguing that these now are remembered as “shameful” episodes); *id.* at 470 (“[M]any of the lapses from the rule of law . . . are now widely regarded as shameful episodes that should never be repeated.”).

²⁹ See Cole, *supra* note 1, at 1. *But see id.* at 1–2 (arguing that “we have adapted the mistakes of the past, substituting new forms of political repression for old ones” and that “historical comparison reveals not so much a *repudiation* as an *evolution* of political repression”). See also COLE & DEMPSEY, *supra* note 1, at 151 (“[W]hile the post-September 11 response does not yet match these historical overreactions, it nonetheless features some of the same mistakes of principle — in particular, targeting vulnerable groups not for illegal conduct, but for political speech, political activity, or group identity”).

the present period worth analyzing. Pathology also includes an increase in private intolerance for unorthodox and dissenting expression among the public at large, manifested both in private censorship or punishment of dissenting or different speech and in popular arguments urging government to impose such censorship by force of law.³⁰ Pathology reaches basic public attitudes about the proper balance “between the ideals of civil liberty and the perceived necessities of national security.”³¹ The final feature of pathology is an increase in government-sponsored, government-approved, and occasionally government-mandated patriotism, especially involving the flag and its complements, which we have witnessed since 9/11.³²

Terrorism and war created a new pathology after 9/11, combining a new wave of patriotism and patriotic expression with a new popular perspective on the scope of free-speech rights and the freedom to dissent. This Article uses several sport-related expressive controversies to explore three related ideas. First is the concept of symbolic counter-speech, the principle that if symbols can speak (or act as the vehicle or medium for one message), they must bear the responsive or contrary message.³³ Second is the relationship between the popular free-speech tradition and First Amendment jurisprudence — that is, how the popular commitment to free speech conforms to the understanding expressed and enforced by the courts, especially during the present pathological period and in light of the features that define such periods.³⁴ Finally we explore arguments in favor of according special

³⁰ See *infra* notes 198–211 and accompanying text.

³¹ Wood, *supra* note 25, at 459–60; see also BOLLINGER, *supra* note 19, at 139 (“[I]t is critical that the feelings we seek to control, that constitute what we have referred to as the impulse to intolerance, be seen not only as cutting through a broad range of human behavior but also as being universal to all members of the society.”).

³² See *infra* notes 185–97 and accompanying text.

³³ See RANDALL P. BEZANSON, *SPEECH STORIES: HOW FREE CAN SPEECH BE?* 189 (1998) (arguing that the flag is a medium in which the act of flag burning occurs, thus contributing something distinct to the message conveyed by the act of burning that flag); Massey, *supra* note 3, at 373 (“When the arena of speech lies wholly in the realm of the purely symbolic, reply in kind is not only to be expected but deserves preservation, lest the guarantee of freedom of speech stop at the frontier of language and symbol.”); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 57 (1973) (“An act of flag desecration is a counter symbol, which may express hostility, or at least constitute a contradiction of the sanctity of the idea expressed by the flag symbol.”); see *infra* notes 86–158 and accompanying text.

³⁴ See Horwitz, *supra* note 16, at 3 & n.4 (describing poll results showing a majority of the American public after 9/11 favoring censorship of news that the government believes is a threat to national security); Wood, *supra* note 25, at 455 & n.1 (citing poll results showing significant erosion of public support for the First Amendment, with forty-nine percent believing the First Amendment “goes too far”). Such a finding is somewhat deceptive, of course, since that number might begin to drop once a respondent is confronted with specific examples of the expression to be restricted. For a recent study on the public’s willingness to

constitutional protection to the flag and its complements against forms of flag-related counter-speech, which have produced yet another congressional effort at a constitutional amendment to protect the American flag from desecration.³⁵ The recent examples of flag-related symbolic counter-speech suggest that the real concern underlying “flag protection” is not merely the physical integrity of a singular cloth bearing the red-white-and-blue, stars-and-stripes design, but rather a broader effort to enforce a general respect and reverence for the flag, which necessarily assumes the purity, and impunity from attack, of all patriotic symbolism.³⁶ If burning a flag is to be proscribed, the same arguments support proscribing the other forms of “disrespectful” flag-related symbolic counter-speech considered here.

I. SPORT, THE FLAG, AND SYMBOLIC COUNTER-SPEECH

A. Sport, the Flag, and Free Speech

The expressive controversies that are my focus occur at the intersection of three American icons.³⁷ The first of these icons is sport, which maintains an intimate connection to America and American institutions.³⁸ Sport carries political and social

censor expression, see Jennifer L. Lambe, *Dimensions of Censorship: Reconceptualizing Public Willingness to Censor*, 7 COMM. L. & POL'Y 187 (2002); see also *infra* notes 159–286 and accompanying text.

³⁵ See H.R.J. Res. 4, 108th Cong. (2003) (proposing an amendment to the Constitution that would empower Congress to prohibit the physical desecration of the American flag); 149 CONG. REC. H4842 (daily ed. June 3, 2003) (indicating that the proposed amendment prohibiting flag desecration passed the House of Representatives with the necessary two-thirds majority in June 2003); see also ROBERT JUSTIN GOLDSTEIN, FLAG BURNING AND FREE SPEECH: THE CASE OF *TEXAS V. JOHNSON* 228 (2000) (stating that amendments had been proposed regularly beginning in 1995, with several passing the House but failing in the Senate); see also *infra* notes 287–336 and accompanying text.

³⁶ See 149 CONG. REC. H4813 (statement of Rep. Weldon) (“The flag deserves and demands our respect.”); *infra* notes 298–314 and accompanying text.

³⁷ See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience* 41 (Apr. 2003) (unpublished manuscript, on file with author) available at <http://ssrn.com/abstract=405100> (“In any culture there is a group of quasi-authoritative symbols and ideas, and part of understanding the rhetorical terrain of a society entails understanding how public and private actors seek to appropriate those symbols and ideas to their own causes.”).

³⁸ See HARRY EDWARDS, *SOCIOLOGY OF SPORT* 3 (1973) (“[T]here is literally no institution or stratum in modern American society which is not touched in some manner by sport.”); *id.* at 90 (“[S]port is essentially a secular, quasi-religious institution.”); A. BARTLETT GIAMATTI, *TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES* 14 (1989) [hereinafter EDWARDS, *SOCIOLOGY OF SPORT*] (“Sports represent a shared vision of how we

messages. Sport is, and often has been, the vehicle through which to promote, directly or indirectly, notions and ideals of “the good” — of what society should aspire to and can attain, most notably in the areas of race and gender equality and integration.³⁹ Sport also has been the vehicle through which immigrants and

continue, as individual, team, or community, to experience a happiness or absence of care so intense, so rare, and so fleeting”); Harry Edwards, *The End of the “Golden Age” of Black Sports Participation?*, 38 S. TEX. L. REV. 1007, 1007 (1997) [hereinafter Edwards, *Golden Age*] (“[S]port inevitably recapitulates the character, structure, and dynamics of human and institutional relationships within and between societies and the ideological values and sentiments that rationalize and justify those relationships.”); Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 227 (1994) (“Certain games are deeply embedded in American culture and psychology. American football . . . has acquired a quasi-religious significance in the United States as the ritual through which we observe some of our most important national holidays.”).

³⁹ See GIAMATTI, *supra* note 38, at 64 (arguing that Jackie Robinson’s arrival as the first African-American Major League Baseball player in the modern era was an “extraordinary moment in American history,” the point at which baseball “made a tremendous promise — to play the game of America by the rules of the Constitution and the American Dream”); JOHN WILSON, *PLAYING BY THE RULES: SPORT, SOCIETY, AND THE STATE* 54 (1994) (arguing that after World War II, left-wing groups used baseball and its continued segregation as a symbol of the hypocrisy of America’s claim to be the defender of liberty, democracy, and equality); *id.* at 50–51 (“[T]he sport experience could encourage female bonding, women developing primary allegiances to each other. Far from being dominated in and through sport, by taking control of their own physicality in sport, women could actively resist their own subordination.”); James R. Devine, *The Past as Moral Guide to the Present: The Parallel Between Martin Luther King, Jr.’s Elements of a Nonviolent Civil Rights Campaign and Jackie Robinson’s Entry onto the Brooklyn Dodgers*, 3 VILL. SPORTS & ENT. L.J. 489, 551–53 (1996) (describing the effect Jackie Robinson and other great African-American baseball players had on the lives of Baby Boom children and their belief in racial integration); Kimberly A. Yuracko, *One for You and One for Me: Is Title IX’s Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 799 (2003) (arguing that the proportionality interpretation of Title IX of the Education Amendments of 1972 requiring that educational institutions expend funds on men’s and women’s athletics according to gender proportionality “is probably best justified as a perfectionist resocialization measure aimed at providing girls with a set of alternative viable conceptions of themselves either through the role-modeling effects of having visible college varsity female athletes or, more indirectly, through helping to change the social meanings attached to athleticism”); *id.* at 791 (“It may be, in other words, that the strongest and the most honest justification for proportionality is that it encourages girls to develop a sense of their own bodily agency and to develop a conception of themselves as agents in their social and physical world.”).

As to gender, the socio-political value of sport was illustrated best in a commercial for Nike featuring a montage of young and adolescent girls reciting statistics showing the physical, psychological, emotional, and social benefits of female participation in organized athletics — suffering less depression, being more likely to leave a man who beats her, being less likely to get pregnant before she wants to, and learning “what it means to be strong.” Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229, 229 (1996).

minorities have been “Americanized,” assimilated, and given the opportunity to succeed in mainstream American society.⁴⁰ If sport possesses this societal, cultural, political, and sociological meaning, it also can express that meaning. Even if, as one district court judge stated, “the game of baseball is not a form of expression entitled to free speech protection,”⁴¹ sport is a proper vehicle through which a message or meaning may be presented and expressed.

This icon status is especially true for baseball, the “National Pastime,” the game that causes judges, legal scholars, and nonlegal scholars alike to wax poetic about its meaning and about its impact on American culture and society and on the American spirit and psyche.⁴² President Franklin Roosevelt recommended that

The current political debate about Title IX’s requirements of gender equality in education, which has bridged into arguments about gender equality generally, has focused almost entirely on equality in the funding of collegiate athletics. See Yuracko, *supra*, at 800 (“Although a complete social transformation of what it means to be female or what it means to be an athlete has assuredly not taken place, just as assuredly, Title IX has been tremendously successful as a resocialization measure.”).

Interestingly, the true nature of much of sport’s political and sociological achievement was downplayed at the time so as to make the revolution tolerable to mainstream society. See WILSON, *supra*, at 55 (“Despite the obviously political nature of the race problem in baseball, when the color line was broken in 1946 and 1947 it was carefully staged as a nonpolitical event. Jackie Robinson was a model black.”). Social equality was a secondary or incidental benefit of the much different goal of financial gain. See James R. Devine, *The Racial Re-Integration of Major League Baseball: A Business Rather than Moral Decision; Why Motive Matters*, 11 SETON HALL J. SPORT L. 1, 4 (2001) (arguing that the owners and executives who integrated baseball “had strong financial rather than moral motives for reintegrating organized baseball”); Edwards, *Golden Age*, *supra* note 38, at 1011 (“Quite simply, the color ban in professional baseball locker rooms was lifted more as a result of Major League Baseball’s *Achilles walter* than its conscience.”).

⁴⁰ See PETER LEVINE, *ELLIS ISLAND TO EBBETS FIELD: SPORT AND THE AMERICAN JEWISH EXPERIENCE* 3 (1992) (“Sport in general, an activity lauded as open to all based solely on talent, still garners attention as a metaphor of American democratic ideals and a pathway to assimilation.”); *id.* at 7 (“More than a simple agency of assimilation, sport, both as actual experience and as symbol, encouraged the active participation of immigrants and their children in shaping their own identities as Americans and as Jews”); *id.* at 283 (“For both blacks and Jews, sport did offer opportunities for self-esteem, group pride, and American accomplishment.”).

⁴¹ *Interactive Digital Software Ass’n v. St. Louis County*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002), *rev’d*, 329 F.3d 954 (8th Cir. 2003).

⁴² See *Flood v. Kuhn*, 407 U.S. 258, 266 (1972) (“Baseball’s status in the life of the nation is so pervasive . . . that baseball is everybody’s business.”); ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW (Introduction)* (1998) (“The sport resonates with America’s self-image: a contest of skill, acumen, and, occasionally, trickery between individuals who are members of teams. . . . it continues to rebound along with the American spirit.”); GIAMATTI, *supra* note 38, at 95 (describing baseball as “a narrative, an epic of exile and return, a vast, communal poem about separation, loss, and the hope for reunion” and the “Romance Epic of homecoming America sings to itself”); LEVINE, *supra* note 40, at 3

Major League Baseball continue to operate during World War II because he believed it contributed symbolically to the American war effort.⁴³ Even a federal grand jury convened to investigate the “Black Sox Scandal,” the throwing of the 1919 World Series by the Chicago White Sox at the behest of gamblers,⁴⁴ stated that “baseball is more than a national game, it is an American institution, having its place prominently and significantly in the life of the people.”⁴⁵

The second icon is the American flag, *the* symbol of the United States of America, of all that she stands (or is thought to stand) for, that “[m]illions and millions of Americans regard . . . with an almost mystical reverence regardless of what sort of (social, political, or philosophical) beliefs they may have.”⁴⁶ It is the

(“Baseball earned the label as America’s National Game supposedly because it personified American values and character and transmitted them to its participants.”); Yablon, *supra* note 38, at 227 (“[O]ne game is more intimately linked to American society and American self-image than any other.”); *see also* FIELD OF DREAMS (Tri-Star 1989) (soliloquy of James Earl Jones as Terence Mann) (“[B]aseball has marked the time. This field, this game, is a part of our past, Ray. It reminds us of all that once was good, and that could be again.”), *available at* <http://www.americanrhetoric.com/MovieSpeeches/moviespeechfieldofdreams.html>; *cf.* *Flood*, 407 U.S. at 260–64 & nn.3–5 (tracing the history of baseball, identifying historic players, and quoting the poetry written about the game); ABRAMS, *supra*, at 66 (“Blackmun’s introductory section [in *Flood*] was so offensive to Justice Byron White that while he joined in the decision, he disassociated himself from Blackmun’s opening paean to the national pastime.”). Not everyone views the Americanism of sports as a good thing. *See* WILSON, *supra* note 39, at 408 n.1 (“What better reflects America’s self-contained, parochial, yet at the same time self-assured, even smug, culture than equating itself with the world, at least as far as sports are concerned?”) (citation omitted).

⁴³ In a dictated letter to Commissioner Kenesaw Mountain Landis, Roosevelt said: I honestly feel that it would be best for the country to keep baseball going. There will be fewer people unemployed and everybody will work longer hours and harder than ever before. And that means that they ought to have a chance for recreation and for taking their minds off their work even more than before. Here is another way of looking at it — if 300 teams use 5,000 or 6,000 players, these players are a definite recreational asset to at least 20,000,000 of their fellow citizens — and that in my judgment is thoroughly worthwhile.

GEOFFREY C. WARD & KEN BURNS, *BASEBALL: AN ILLUSTRATED HISTORY* 276–78 (1994); *see also* CHARLES C. ALEXANDER, *OUR GAME: AN AMERICAN BASEBALL HISTORY* 188 (1991).

⁴⁴ *See* ABRAMS, *supra* note 42, at 154. *See generally* ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (Henry Holt & Co. 1987) (1963).

⁴⁵ WILSON, *supra* note 39, at 331. Wilson argues that the public response to the scandal reflected the depth of belief in the “Americanism” of baseball, notably in the predisposition to believe that the fix was the work not of an American, but of foreign powers or, more problematically, immigrants. *See id.* Major League Baseball also remains the only professional sports league that is exempt from federal antitrust laws. *See Flood*, 407 U.S. at 282–83.

⁴⁶ *Texas v. Johnson*, 491 U.S. 397, 429 (1989) (Rehnquist, C.J., dissenting); *see id.* at 405 (describing the American flag as “the one visible manifestation of two hundred years of

symbol that government intentionally creates and adopts in order to unite the community.⁴⁷ That icon is peculiarly tied to particular events and occasions in American history; thus Chief Justice Rehnquist's dissenting opinion in *Johnson* highlighting times in American history in which the flag played a prominent role, including the adoption of an American flag during the Revolution that allowed American vessels to sail under an authorized national flag, the bombing of Ft. McHenry during the War of 1812 that led Francis Scott Key to pen "The Star-Spangled Banner," the Battle of Gettysburg, and the raising of a flag atop Mount Suribachi by United States Marines after the capture of Iwo Jima during World War II.⁴⁸ In a more recent vein, the symbol of America's immediate survival amid the

nationhood") (quoting *Smith v. Goguen*, 415 U.S. 566 (1974)); *id.* ("Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'"); *id.* at 421 (Kennedy, J., concurring) ("[T]he flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit."). Consider Justice Stevens's dissent:

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.

Id. at 437 (Stevens, J., dissenting). The idea in *Spence v. Washington* that:

For the great majority of us, the flag is a symbol of patriotism, of pride in the history of our country, and of the service, sacrifice, and valor of the millions of Americans who in peace and war have joined together to build and to defend a Nation in which self-government and personal liberty endure.

Spence v. Washington, 418 U.S. 405, 413 (1974); see BEZANSON, *supra* note 33, at 193 ("Patriotism, nationhood, national unity, are the symbolic meanings the flag represents — indeed, they are the messages the flag itself emits as a symbol . . ."); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 10 (1999) (describing the American flag as the nation's most important political, social, and cultural icon); see also 149 CONG. REC. H4832 (daily ed. June 3, 2003) (statement of Rep. Buyer) ("[The flag] represents the physical embodiment of everything that is great and good about our nation — the freedom of our people, the courage of those who have defended it, and the resolve of our people to protect our freedoms from all enemies, foreign and domestic."); see also 146 CONG. REC. 51769 (2000) (statement of Sen. Hatch) ("[W]e are united as Americans. . . . That unity is symbolized by a unique emblem, the American flag.").

⁴⁷ See *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("Government may create national symbols, promote them, and encourage their respectful treatment."); Massey, *supra* note 3, at 369 (arguing that the flag is adopted by the nation's government for the purpose of sending a message to the community about that community's values and meaning).

⁴⁸ See *Johnson*, 491 U.S. at 422–26 (Rehnquist, C.J., dissenting); 149 CONG. REC. H4834 (statement of Rep. Skelton) (rehearsing a laundry list of American military battles and events and the fact that "the flag was with us"); see also Calvin R. Massey, *The Jurisprudence of Poetic License*, 1989 DUKE L.J. 1047, 1047–48 (arguing that Chief Justice Rehnquist's dissenting opinion provides "a dismaying example of the use of history as a rationale for decision," proving only the "obvious fact that the American flag has been a symbol of the nation for its entire existence").

carnage of the World Trade Center on 9/11 was the image of three New York City firefighters hoisting a tattered American flag atop a tilted steel girder.⁴⁹

In addition to the flag itself, there is an iconic value to certain accompanying complementary symbols or symbolic ceremonies that convey acceptance of and respect for the flag, most notably the Pledge of Allegiance and flag salute,⁵⁰ “The Star-Spangled Banner,” by law America’s national anthem;⁵¹ and other patriotic songs (which often are sung in lieu of the anthem), most notably since 9/11 “God Bless America.” Referring to such complements as “symbols” perhaps is misleading, since all involve “pure speech” — the spoken (or sung) word. But almost all communication, even verbal, utilizes symbols.⁵² This is especially so when the combination of words intends to honor or revere something else. The words to the Pledge or anthem usually are uttered or sung in the presence of the flag, adhering to specific requirements as to how one is to stand and perform the words, thus tying the words even more closely to the thing saluted.⁵³ The words of the

⁴⁹ See 149 CONG. REC. H4828 (daily ed. June 3, 2003) (statement of Rep. Miller) (“[O]n September 11, every American witnessed those brave firefighters raising Old Glory out of the rubble of the World Trade Center. That was a symbol of America’s resolve that our freedom will reign even in the face of unprecedented terror.”); *id.* at H4836 (statement of Rep. Langevin) (describing the flag “raised out of the rubble of the World Trade towers”); *id.* at H4832 (statement of Rep. Barrett) (“It was a photo of 3 firefighters raising the flag amidst the rubble of the World Trade Center that showed not only our nation, but the world we would not fall.”).

⁵⁰ See 4 U.S.C. § 4 (2000) (establishing the words of the Pledge of Allegiance and the rules of conduct during its recitation); *Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (“Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee.”); Steven G. Gey, “*Under God*,” *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1873–75 (2003) (describing origins of the Pledge); see also Lackland H. Bloom, Jr., *Barnette and Johnson: A Tale of Two Opinions*, 75 IOWA L. REV. 417, 417 (1990) (discussing the 1988 presidential campaign, in which Republican candidate George H.W. Bush gained public support by criticizing Democratic candidate Michael Dukakis for vetoing a compulsory public school Pledge-recitation law when governor of Massachusetts); Michael Kent Curtis, *Reading the First Amendment by the Light of the Burning Flag*, in 1 THE CONSTITUTION AND THE FLAG: THE FLAG SALUTE CASES xlv–xlv (Michael Kent Curtis ed., 1993) (discussing the 1988 campaign).

⁵¹ See 36 U.S.C. § 301 (2000) (establishing “The Star-Spangled Banner” as the national anthem and establishing rules for conduct during its playing); *Johnson*, 491 U.S. at 423 (Rehnquist, C.J., dissenting) (quoting the first verse of the anthem and describing the song’s origins in the pen of Francis Scott Key while observing the bombardment of Ft. McHenry during the War of 1812).

⁵² See Nimmer, *supra* note 33, at 33 (“Indeed, in one sense all speech is symbolic. . . . [A]ll communications necessarily involve the use of symbols.”).

⁵³ See 4 U.S.C. § 4 (providing that the Pledge “should be rendered by standing at attention facing the flag with the right hand over the heart”); 36 U.S.C. § 301(b)(1)(A) (prescribing the same conduct as to the singing of the national anthem when the flag is

Pledge have meaning only with reference to the object of that pledge — the flag, the republic for which it stands, and the underlying political, social, ideological, and cultural ideas it represents. An anthem is, by definition, a song or hymn of praise or loyalty for or to something else.⁵⁴ The anthem means something more than its words and music; it acts as a musical or lyrical tribute to, or affirmation of, something else — the United States, the flag, and their underlying ideals. An anthem also has a participatory component; it is sung as part of a larger ceremony or event in which participation is expected, encouraged, and, perhaps, compelled. That participatory element contains its own symbolism. By participating, individuals adhere to and adopt the ideas symbolized in the song itself;⁵⁵ by not participating, they send a different, contrary message.⁵⁶

The third icon is the First Amendment and the principle of the freedom of speech.⁵⁷ Freedom of speech has come to entail what it means to be a person.⁵⁸ It

displayed); *see also* FLA. STAT. ANN. § 1003.44(1) (West 2003) (“When the national anthem is played, students and all civilians shall stand at attention, men removing the headdress, except when such headdress is worn for religious purposes. The pledge of allegiance to the flag . . . shall be rendered by students standing with the right hand over the heart.”).

⁵⁴ *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 76 (4th ed. 2000) (“[a] hymn of praise or loyalty”); WEBSTER’S THIRD NEW INT’L UNABRIDGED DICTIONARY 92 (1998) (“a song or hymn of praise”); MERRIAM-WEBSTER’S DICTIONARY 49 (10th ed. 1993) (“a song or hymn of praise or gladness”).

⁵⁵ *See Barnette*, 319 U.S. at 633 (stating that by participating in the flag salute the individual “communicate[s] by word and sign his acceptance of the political ideas it thus bespeaks”); Nahmod, *supra* note 13, at 542 (“True intellectual and emotional attachment to patriotic symbols, and allegiance to a political community, arise out of free choice, not coercion.”).

⁵⁶ *See infra* notes 119–25 and accompanying text.

⁵⁷ *See* BOLLINGER, *supra* note 19, at 7 (“[T]he free speech idea nonetheless remains one of our foremost *cultural* symbols. It is suffused with symbolic significance.”); Massey, *supra* note 3, at 376 (“Fidelity to free speech becomes the miner’s canary of our aspirations to tolerance. Thus it assumes a symbolic importance of its own, quite transcendent of the value of speech it preserves.”) (footnote omitted); Schauer, *supra* note 37 (manuscript at 41–42) (arguing that the First Amendment serves a symbolic function in American society); Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT* *supra* note 8, 175, 197 (describing American culture in which the idea of free speech is especially powerful); Strauss, *supra* note 26, at 33 (“The First Amendment to the U.S. Constitution is the most celebrated text in all of American law.”).

⁵⁸ *See*, BOLLINGER, *supra* note 19, at 174 (“[F]ree speech is a social context in which basic intellectual values are developed and articulated, where assumptions about undesirable intellectual traits are offered and remedies proffered.”); CURTIS, *supra* note 20, at 251 (arguing that many individuals in the nineteenth century saw free speech as a basic human right, apart from the First Amendment or state constitutions); THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6 (1970) (“The proper end of man is the realization of his character and potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence, suppression of belief, opinion, or other expression is an affront

is what it means to be a member of a functioning democracy,⁵⁹ since democracy, by

to the dignity of man, a negation of man's essential nature."); MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 11 (1984) (arguing that the true value served by free speech is "individual self-realization," enabling an individual to develop her powers and abilities, to realize her full potential and to control "her own destiny through [the] making [of] life-affecting decisions"); Steven D. Smith, *Believing Persons, Personal Beliefs: The Neglected Center of the First Amendment*, 2003 U. ILL. L. REV. 1233, 1282 (2002) (arguing that believing is central to what makes us persons and the political community must recognize and respect the manifestations of belief); *id.* at 1295 ("[A] conception of the person as believer helps to explain why believing and its manifestations in expression and religion deserve special respect."); *see also* *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("It is the function of speech to free men from the bondage of irrational fears."); Blasi, *Good Character*, *supra* note 8, at 83 (arguing that the "character conducive to the maintenance" of a healthy mentality regarding change is the "principal benefit of a robust freedom of speech").

⁵⁹ *See* CURTIS, *supra* note 20, at 21 ("Without free speech for those who are in the minority today (but who, with free speech, might become a majority tomorrow), popular government is an illusion.").

Once one accepts the premise of the Declaration of Independence — that governments "derive their just powers from the consent of the governed" — it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.

EMERSON, *supra* note 58, at 7; *see also* REDISH, *supra* note 58, at 22 (arguing that "individuals need an open flow of information and opinion to aid them in making their electoral and governmental decisions," as well as all other decisions); Curtis, *supra* note 24, at 343 (stating that "broad freedom of speech is inherent in democracy," and arguing that "to the extent that the people's agents" can deprive them of information, "the nation becomes less democratic"); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 205 ("Political freedom ends when government can use its powers and its courts to silence its critics."); Massey, *supra* note 3, at 376 ("Free speech is . . . a placeholder for societal hopes that go far beyond speech itself — indeed, which go to the vision of meaning we have for our society."); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263 ("In my view, 'the people need free speech' because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others."); Strauss, *supra* note 26, at 36 (arguing that the first principle of free speech is that "government may not punish people for criticizing it or its officials"); *see also* Meyer v. Grant, 486 U.S. 414, 421 (1988) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (stating that there is "practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing the "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").

definition, cannot function without free speech.⁶⁰ And it is what it means to be an American.⁶¹ Freedom of speech frequently trumps other societal and constitutional values,⁶² to the dismay of some commentators.⁶³ There is a pervading sense that if

⁶⁰ See Curtis, *supra* note 24, at 343 (“Democracy is the radical idea that ordinary people must be trusted to present, hear, and evaluate very divergent approaches and to make the right choices.”); see also BeVier, *supra* note 23, at 1090 (describing the Warren Court’s understanding that “speech, especially speech about government officials and public affairs, is a positive good in a democratic society rather than a tiresome or trivial nuisance that nevertheless must occasionally be tolerated”).

⁶¹ See BOLLINGER, *supra* note 19, at 7 (arguing that free speech “remains one of our foremost *cultural* symbols . . . suffused with symbolic significance”); CURTIS, *supra* note 20, at 3–4 (arguing that, at the time of the American Revolution there already was established a popular free speech tradition, that “grew up outside the courts” and “had significant popular appeal”); *id.* at 250–51 (describing the historical view that free speech was considered a right or privilege of American citizens); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 87 (1990) (“[A]s a cultural symbol . . . the first amendment has enlivened . . . the rebellious instincts within us all.”); Curtis, *supra* note 8, at 424 (“[I]deas of free speech have larger cultural significance. . . .”); see also BOLLINGER, *supra* note 19, at 7 (“It is by the goodness of God . . . that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them.”) (quoting Mark Twain) (internal quotations omitted).

⁶² See Schauer, *supra* note 37 (manuscript at 5) (“Once the First Amendment shows up, much of the game is over”); see also *Virginia v. Black*, 123 S. Ct. 1536, 1551 (2003) (plurality opinion) (“It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings.”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (striking down an ordinance prohibiting race-based hate speech as not serving the government’s compelling interest in ensuring “the basic human rights of members of groups that have historically been subjected to discrimination”); *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam) (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”); *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 328–29 & n.1 (7th Cir. 1985) (accepting the premise of an anti-pornography ordinance that pornography affects thoughts and that “[m]en who see women depicted as subordinate” are more likely to treat them as such, but concluding that “this simply demonstrates the power of pornography as speech”), *aff’d* 475 U.S. 1001 (1986); REDISH, *supra* note 58, at 55 (“[O]ur political and social traditions dictate that the first amendment right must give way only in the presence of a truly compelling governmental interest.”).

⁶³ See, e.g., CATHARINE A. MACKINNON, *ONLY WORDS* 106–08 (1993) (arguing against protection for certain racist and sexist speech in the interest of pursuing the constitutional mandates of equality that prohibits the imposition of social inferiority “through any means, including expressive ones”); Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1186 (2001) (“Is a community constitutionally forbidden to discourage the wearing of the Confederate flag as an intentional affront to African-American citizens, or of Swastikas worn to encourage anti-Semitism?”); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 Nw. U. L. REV. 343, 348 (1991) (arguing that

one can invoke the freedom of speech to support her position in a legal, social, or political controversy, she gains the upper hand.⁶⁴ Frederick Schauer describes this phenomenon as First Amendment “magnetism” or “opportunism,” the drawing of disparate, seemingly unrelated-to-expression issues into the First Amendment’s rhetorical orbit by people and organizations with a wide array of political goals, usually when other arguments are not rhetorically or doctrinally available.⁶⁵

First Amendment doctrine is complicated, perhaps by necessity, given the range of speech issues arising in a complex society.⁶⁶ Moreover, the modern meaning of the First Amendment is not truly a product of the ten words of the First Amendment’s free speech clause.⁶⁷ Rather, the ideal of free speech has a basic

nothing in constitutional or moral theory requires the adoption of a free-speech exception to equality rather than an equality exception to free speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2357 (1989):

Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.

See also Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1392 (1994) (“The ‘one person-one vote’ rule exemplifies the commitment to political equality. Limits on campaign expenditures are continuous with that rule.”).

⁶⁴ See Schauer, *supra* note 37 (manuscript at 42) (“The individual or group gaining the support of the First Amendment often believes, and often correctly, that it has secured the upper hand in public debate. The First Amendment not only attracts attention, but also appears to strike fear in the hearts of many who do not want to be seen as being against it.”); Schauer, *supra* note 57, at 193 (suggesting that recourse to First Amendment arguments is especially likely to attract powerful but otherwise ideologically distant allies to a cause).

⁶⁵ See Schauer, *supra* note 37 (manuscript at 47) (“Time and again, legal arguments that appear initially to have little to do with free speech turn up in First Amendment clothing far more than free speech arguments turn up in, say, equal protection clothing.”); Schauer, *supra* note 57, at 192:

[T]he fact that the First Amendment is the authority of choice when no authority is on point, and when all available authorities are equally not on point, says a great deal about the way in which the First Amendment functions in American society, even as its non-American equivalents tend, interestingly, not to be used in the same way in other societies.

⁶⁶ See SHIFFRIN, *supra* note 61, at 169 (“[I]f the first amendment is to serve the human needs of a complicated society, first amendment doctrine will inevitably be too complicated for anyone but specialists to understand.”); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT*, *supra* note 8, at 153 (“The simple and absolute words of the First Amendment float atop a tumultuous doctrinal sea.”).

⁶⁷ See Strauss, *supra* note 26, at 36 (“Formally, the textual basis for that law, in the Constitution, is of course the First Amendment. But the central principles that protect free expression in the United States were not established by the addition of the First Amendment to the Constitution in 1791.”); Curtis, *supra* note 24, at 357 (agreeing that First Amendment law is a twentieth-century invention, but that free speech has a long career outside, rather than inside, the courts); Post, *supra* note 66, at 153; see also CURTIS, *supra* note 20, at 251 (describing nineteenth-century view of free speech as a basic human right, apart from any constitutional declaration).

meaning,⁶⁸ reflected in four inter-related principles.

The first principle is the need to protect the rights and interests of dissenters, those holding and wishing to speak, write, present, and receive thoughts, ideas, opinions, and beliefs that run counter to the mainstream, counter to the orthodoxy of the political majority reflected in the extant government and society as a whole — those speakers who attack prevailing notions.⁶⁹ Second, and related, is the underlying importance of tolerance — personal, public, and governmental — for those opposing, conflicting, or contrary ideas, and the importance of attaining self-control in the face of objectionable or contrary expression (as well as other social encounters).⁷⁰ Free speech instills in people and society self-control with respect to other people and ideas, which was the underlying premise behind Justice Brandeis's suggestion that "[i]t is the function of speech to free men from the bondage of irrational fears."⁷¹ It reflects an exercise of the individual effort to overcome intolerance for others and other ideas.⁷² Free speech serves as a counterweight to

⁶⁸ See SHIFFRIN, *supra* note 61, at 169 ("[C]itizens understand what the FIRST AMENDMENT means.").

⁶⁹ See COLE & DEMPSEY, *supra* note 1, at 92 ("[C]onstitutional standards sharply curtail the ability of the government to punish its political opponents."); CURTIS, *supra* note 20, at 19 ("Without some broad protection of the right to dissent, democracy and intellectual enquiry cannot work. Free speech protects the right to dissent, and dissent is crucial if the sovereign people are to have a chance to be part of the decision-making process. . . .") (footnote omitted); SHIFFRIN, *supra* note 46, at 10 ("If we must have a 'central meaning' of the First Amendment, we should recognize that the dissenters — those who attack existing customs, habits, traditions, and authorities — stand at the center of the First Amendment and not at its periphery."); SHIFFRIN, *supra* note 61, at 5 (arguing that a major purpose of free speech is to protect "those who would break out of classical forms: the dissenters, the unorthodox, the outcasts"); *id.* (arguing that the First Amendment sponsors "the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all"); Lidsky, *supra* note 21, 1010 (arguing that the broad protection afforded to radical political dissidents is a source of unique pride in the United States); Nahmod, *supra* note 13, at 543 (arguing for the import of protecting the "self-declared political outsider and 'symbol-breaker.'") (footnote omitted).

⁷⁰ See BOLLINGER, *supra* note 19, at 10 ("[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters."); *id.* at 138 ("[T]he impulse behind intolerance toward belief and speech is really but a particular manifestation of a larger phenomenon and social problem."); Massey, *supra* note 3, at 375 ("Tolerating abhorrent speech permits us to identify our biases, and perhaps enables us to purge ourselves of hidden intolerance.").

⁷¹ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

⁷² See BOLLINGER, *supra* note 19, at 141 (arguing that free speech allows us "to become the master of the fears and doubts that drive us to slay the specter of bad thoughts"); Massey, *supra* note 3, at 375 (arguing that the "intolerant impulse" is counterproductive in the long-term, enabling society "to tell itself (smugly and falsely) that *it* has no problem; the problem lies within those horrid offenders whom we have righteously muzzled"); *see also* Curtis,

“the natural tendency of all citizens, those in the majority as well as those in the minority, to lose confidence in reason and pursue their goals through force.”⁷³

Third, free speech demands that the greatest amount of information, thoughts, ideas, and opinions be disseminated from the greatest number of sources, without artificial restrictions on the amount or flow of information imposed from above or outside the individual.⁷⁴ Speech is valuable because it informs people and persuades them to believe or do those things.⁷⁵ Public discussion and dissemination of ideas that may affect or influence beliefs can function only if participants in that discussion are ensured of the greatest and freest amount and range of information and ideas.⁷⁶

Fourth, and related, is Justice Brandeis’s insistence that the remedy to be applied to noxious or objectionable ideas is “more speech, not enforced silence.”⁷⁷ This does not mean, of course, that noxious or objectionable doctrine or ideas always will be defeated by more speech; rather, Vincent Blasi suggests “noxious doctrine is most likely to flourish when its opponents lack the personal qualities of wisdom, creativity, and confidence. And those qualities . . . are best developed by discussion and education, not by lazy and impatient reliance on the coercive authority of the

supra note 8, at 454 (“Ideas of free speech affect not only the behavior of those they directly govern, but of all those influenced by the values they create.”).

⁷³ Blasi, *supra* note 8, at 78.

⁷⁴ See REDISH, *supra* note 58, at 47 (“Since the concept of self-realization by its very nature does not permit external forces to determine what is a wise decision for the individual to make, it is no more appropriate for external forces to censor what information or opinion the individual may receive in reaching those decisions.”); Curtis, *supra* note 24, at 343 (“[A] people deprived of a continuing right to evaluate alternatives is a people deprived of their right to chart their course.”).

⁷⁵ See REDISH, *supra* note 58, at 50; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338 (1991).

⁷⁶ See Strauss, *supra* note 75, at 337 (“There would be little left of the first amendment, as we understand it, if the government could suppress speech whenever it plausibly believed that the speech might, at some point and in some way, persuade people to do things of which the government disapproved.”); see also *Whitney v. California*, 274 U.S. 362, 375–76 (1927) (Brandeis, J., concurring) (arguing that the framers believed in “the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form”).

⁷⁷ *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); see also Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988) (calling the opinion “arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment”); Curtis, *supra* note 8, at 433 (stating that Brandeis’s views have become central to free speech law); Strauss, *supra* note 75, at 348 (“Brandeis’s optimistic view — that ‘good [counsels]’ and ‘more speech’ are the ‘remedy’ for ‘evil counsels’ because they can ‘avert the evil’ — has exerted a powerful hold on first amendment rhetoric.”).

state.”⁷⁸ Nor is censorship justified on the ground that speakers on one side can manipulate public opinion; rather, it is “incumbent upon the defenders of good ideas to learn how to influence public opinion even more skillfully” in response to bad ideas.⁷⁹

These four principles together lead to concrete rules. Government cannot restrict, ban, punish, or burden some ideas or points of view from the realm of debate while allowing others to flourish.⁸⁰ Government cannot restrict, ban, punish, or burden speech based on the expected audience response or reaction to that speech,⁸¹ at least unless the reaction entails listeners obeying the speaker’s

⁷⁸ Blasi, *supra* note 8, at 76; see Lidsky, *supra* note 21, at 1023–24 (“The suppression of radical speech almost always is an exercise of ‘irrational fears,’ and more precisely the irrational fear of ‘political change.’ Rather than ‘silence coerced by law,’ radical speech must be answered with ‘reason as applied through public discussion.’”); Massey, *supra* note 3, at 375 (“[T]olerance of ugly speech, whether racist epithet or burning flag, may be the avenue to recognition of our collective shadow, the first step in its eventual voluntary extirpation by transformation.”).

⁷⁹ Blasi, *supra* note 8, at 76; see also Strauss, *supra* note 75, at 362 (“Manipulation is one of the many harmful consequences that, under the persuasion principle, the government may not take into account.”); *id.* at 363–64 (arguing that manipulative speech on one side of an issue may counteract manipulative speech on the other and that government itself can provide “more speech” to overcome the manipulative character of private speech on one side).

⁸⁰ See Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 889 (1993) (arguing that the interplay of harshly contrasting viewpoints is the very thing that makes political dialogue worthwhile, and criticizing any theory that would eliminate any viewpoints from the dialogue); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267, 282 (1991) (“[A]t least in its theoretically pure state, the principle disallowing viewpoint regulation stands as the cornerstone of our democratic theory.”); Geoffrey R. Stone, Comment, *Anti-Pornography Legislation as Viewpoint-Discrimination*, 9 HARV. J.L. & PUB. POL’Y 461, 464 (1986) (“[G]overnment may not restrict speech because it disapproves of a particular message.”); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”); *City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

⁸¹ See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”) (citations omitted); *Cohen v. California*, 403 U.S. 15, 22 (1971) (“[W]e do not think the fact that some unwilling ‘listeners’ in a public building may have been briefly exposed to [objectionable speech] can serve to justify” its suppression); Strauss, *supra* note 75, at 334 (“[G]overnment may not restrict speech because it fears, however justifiably, that the speech will persuade those who hear it to do something of which the government disapproves.”); *id.* at 342 (arguing for “hostility to measures that restrict speech

commands and engaging in imminent lawless action.⁸² The “fixed star in our constitutional constellation” is that government may not coerce or compel utterance of or adherence to orthodoxy in politics, nationalism, religion, or other matters of opinion,⁸³ although government is free itself to present its conception, likely shared by the majority, of the good.⁸⁴ And there is the “bedrock principle” that “government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁸⁵

B. Counter-Speech and Symbolic Counter-Speech

These principles lead to the Brandeisian concept of counter-speech.⁸⁶ For every thought, opinion, idea, or point of view put forward by any speaker, other thoughts, opinions, ideas, or points of view — identical, similar, slightly divergent, or directly contradictory — must be permitted. Indeed, counter-speech is the imperative response to any thought, opinion, idea, or point of view. Counter-speech may come not only from government in response to antigovernment speech (the paradigm that

on the ground of offensiveness). *But see Hill v. Colorado*, 530 U.S. 703, 716–17 (2000) (emphasizing “[t]he unwilling listener’s interest in avoiding unwanted communication” as a valid governmental interest to support restriction on certain face-to-face communications outside reproductive health clinics); Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1369 n.170 (2002) (arguing that the statute upheld in *Hill* allows individuals to shut down speech of which they disapprove).

⁸² See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that a state only can prohibit speech “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

⁸³ *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 76 (1992) (calling Justice Jackson’s *Barnette* language “among the most eloquent pronouncements ever on First Amendment freedoms”); Bloom, *supra* note 50, at 422 (“These are unquestionably among the most powerful and most often quoted paragraphs ever written by a United States Supreme Court Justice.”); *id.* at 423 (calling *Barnette* “as close to law-as-literature as we can expect from the Supreme Court”); Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 254–55 (2000) (stating that Justice Jackson’s “soaring declaration” has received “universal adulation”).

⁸⁴ See EMERSON, *supra* note 58, at 698 (“Participation by the government in the system of freedom of expression is an essential feature of any democratic society.”); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 184–85 (2002); Yuracko, *supra* note 39, at 789–90 (“[G]overnments should promote certain widely shared conceptions of the good . . .”).

⁸⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁸⁶ See Curtis, *supra* note 8, at 433 (“Justice Brandeis thought of the First Amendment as empowering people ‘to think as you will and to speak as you think’, and . . . the only appropriate remedy for much evil speech is counter-speech and reason.”).

Justice Brandeis had in mind in *Whitney*⁸⁷), but from all private speakers in response to all other speech, whether from government or other private speakers. This is the free trade or interchange of ideas and the jumble of multiple perspectives that free speech demands.⁸⁸

Importantly, counter-speech and the presentation of all points of view must not be understood in a bipolar way — that one message or view in favor of a particular subject matter (the American flag connotes freedom, equal opportunity, religious tolerance, and good will⁸⁹) can be met only by a directly opposite view (the American flag connotes tyranny and oppression⁹⁰). Point-of-view includes

⁸⁷ See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (“But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.”); see also Strauss, *supra* note 75, at 347 (“There is no need to suppress persuasive speech because the government can simply counteract the effects of such speech with its own answering speech.”).

⁸⁸ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas”); see also Blasi, *supra* note 8, at 84 (“The most important environmental consequence of protecting free speech is the intellectual and moral pluralism, and thus disorder in a sense, thereby engendered.”); Curtis, *supra* note 8, at 454 (arguing that the values of free speech include the belief that truth is more likely to emerge from multiple perspectives and that a commitment to civility is necessary for that interchange of perspectives); Gey, *supra* note 80, at 889.

The unfettered opportunity for counter-speech also explains why public-figure defamation plaintiffs bear a heightened burden in overcoming the First Amendment. “Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); see also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan, J., dissenting) (“[T]he public person has a greater likelihood of securing access to channels of communication sufficient to rebut falsehoods concerning him than do private individuals in this country who do not toil in the public spotlight.”) In other words, they possess the power and opportunity to engage in effective counter-speech in response to the original objectionable or defamatory statements and that self-help, rather than recovery of damages, with its attendant chilling effect on expression, is the appropriate remedy. See *Gertz*, 418 U.S. at 344.

⁸⁹ See *Johnson*, 491 U.S. at 437 (Stevens, J., dissenting); BEZANSON, *supra* note 33, at 193 (“Patriotism, nationhood, national unity, are the symbolic meanings the flag represents — indeed, they are the messages the flag itself emits as a symbol”); see also 149 CONG. REC. H4832 (daily ed. June 3, 2003) (statement of Rep. Buyer) (“It represents the physical embodiment of everything that is great and good about our nation — the freedom of our people, the courage of those who have defended it, and the resolve of our people to protect our freedoms from all enemies, foreign and domestic.”).

⁹⁰ This is the view of the flag’s meaning held by former NBA player Mahmoud Abdul-Rauf, who created a firestorm in 1996 when he refused to participate in the national anthem

everything surrounding and contributing to the message — the speaker,⁹¹ the medium of communication,⁹² the manner of communication,⁹³ the choice of appealing to reason, emotion, or both,⁹⁴ and the time, place, and circumstance in

ceremony prior to games. See Kelly B. Koenig, Note, *Mahmoud Abdul-Rauf's Suspension for Refusing to Stand for the National Anthem: A "Free Throw" for the NBA and Denver Nuggets, or a "Slam Dunk" Violation of Abdul-Rauf's Title VII Rights?*, 76 WASH. U. L.Q. 377, 378 (1998); see also *infra* notes 119–25, 307–24 and accompanying text.

⁹¹ See Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 GEO. WASH. L. REV. 235, 257 (1998) ("The message's overall nature may change when the messenger changes. . . . The same statement from different speakers may constitute a different message."); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 56–57 ("[E]spousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board.").

⁹² See BEZANSON, *supra* note 33, at 189 (arguing that "medium is as important as (perhaps more important than) message, [so] we must think about medium, itself, as communication"); Kitrosser, *supra* note 81, at 1390 (quoting MARSHALL MCLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 85 (1964), arguing that displaying a piece of cloth with the words "American flag" across it would convey the same meaning as the Stars-and-Stripes, but the effect would be quite different); Nahmod, *supra* note 13, at 546 ("[S]ymbols have political, social, and economic implications for Americans as individuals and as members of a political community. . . . [F]lag burning is a good example of the successful generation and manipulation of such symbols in an attempt to influence beliefs and behavior.").

⁹³ See Kitrosser, *supra* note 81, at 1390–91 ("[T]he manner in which ideas are presented, as well as the manner in which experiences are represented, often are more crucial than the ideas or representations themselves. . . . [T]here is also great significance in the manner of presentation chosen."); Ronald J. Krotoszynski, Jr., *Cohen v. California: "Inconsequential" Cases and Larger Principles*, 74 TEX. L. REV. 1251, 1254 n.25 (1996) ("Whether we extol or excoriate this kind of social protest, the First Amendment . . . gives protesters broad latitude to select the means of communicating their point of view.").

⁹⁴ [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Cohen v. California, 403 U.S. 15, 26 (1971); see Krotoszynski, *supra* note 93, at 1254; see also Kitrosser, *supra* note 81, at 1350 (arguing that *Cohen* laid the groundwork for the notion that the manner in which one chooses to express one's self can have as much communicative significance as one's underlying message); Nimmer, *supra* note 33, at 34 ("The emotive content of expression can be fully as important as the intellectual, or cognitive, content in the competition of ideas for acceptance in the marketplace."); *id.* at 35 ("[M]ost communications encompass both cognitive and emotive content.").

which the message is presented.⁹⁵ One weakness in Alexander Meiklejohn's free speech theory was his insistence that free speech means "not that everyone shall speak, but that everything worth saying shall be said,"⁹⁶ ignoring the fact that a different speaker using a different communicative medium and manner in a different time and place is, in fact, presenting a different point of view — something else worth saying and needing to be said.

An original message, thought, or idea may be expressed through the use of a symbol.⁹⁷ Counter-speech may be immediately and directly responsive to the original expression it is intended to counter. Thus, counter-speech to a symbol also may be symbolic, especially using the same symbol as the vehicle or medium for the counter-speech. This is a subclass of counter-speech I label "symbolic counter-speech." Symbolic counter-speech is a necessary and natural outgrowth of the intersection between the right to communicate through expressive symbols and the Brandeisian imperative of counter-speech. As Calvin Massey explains it:

[S]ince pure symbols carry messages — and *only* carry messages — governments may not stop the conversation once one opinion has been uttered by exhibition of the symbol. When the arena of speech lies wholly in the realm of the purely symbolic, reply in kind is not only to be expected but deserves preservation, lest the guarantee of freedom of speech stop at the frontier of language and symbol.⁹⁸

A counter-speaker necessarily must be free to respond to the symbol on its own terms;⁹⁹ counter-speech to the expressive ceremony of the national anthem or Pledge must be free to come through that very ceremony and counter-speech to the expressive symbol of the flag must come through a flag.

Symbolic counter-speech is not original expression. It is the counter or response to the original symbolic message transmitted by means of the symbol itself. If the

⁹⁵ See *Brown v. Cal. Dep't of Trans.*, 321 F.3d 1217, 1224 (9th Cir. 2003).

⁹⁶ ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 26 (1960).

⁹⁷ See *United States v. Eichman*, 496 U.S. 310, 318 (1990) ("Government may create national symbols, promote them, and encourage their respectful treatment."); *Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind."); SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 130 (1998) ("We do indeed live by symbols, whether they are tangible pieces of colored cloth or marble depictions of those the culture wishes to honor, or the more intangible messages generated by days of commemoration and celebration."); Nahmod, *supra* note 13, at 545 ("Americans live in a society permeated by symbols generated and manipulated by government. . ."); *id.* at 546 ("[S]ymbols have political, social and economic implications for Americans as individuals and as members of a political community.").

⁹⁸ Massey, *supra* note 3, at 373 (footnote omitted).

⁹⁹ See Nimmer, *supra* note 33, at 57 ("An act of flag desecration is a counter symbol, which may express hostility, or at least constitute a contradiction of the sanctity of the idea expressed by the flag symbol.").

original symbol (the flag or anthem) did not exist, or if it did not carry some message, there would be no need or desire to counter-speak to that message through the symbol. Justice Scalia recognized this point during oral argument in *Johnson*, suggesting that a flag-burner's "actions would have been useless unless the flag was a very good symbol for what he intended to show contempt for."¹⁰⁰ The flag and the honoring ceremony, and their meanings as generally accepted by government and a majority of the people, is the original message; the attack on the flag or ceremony is the counter-message.

The symbol not only carries the original message, but acts as the medium through which the counter-speaker makes her point.¹⁰¹ And this manner of communication is effective precisely because symbols, such as the flag or its complements, are not neutral.¹⁰² Rather, symbols, themselves having meaning, contribute something distinct to the meaning conveyed by the counter-speech that confronts the symbol's original meaning.¹⁰³ Any attempt to protect the symbol, to protect its ability to present its symbolic message without interference from conflicting messages,¹⁰⁴ breaks down because the very decision to protect the symbol assigns that preferred message to it.¹⁰⁵ The original presentation of the symbol is speech with a meaning or message preferred by those who create, display, or present the symbol. One necessary manner of countering that speech is through the symbol itself, creating a message with a particular, unique meaning.¹⁰⁶

¹⁰⁰ See GOLDSTEIN, *supra* note 35, at 93 (quoting oral argument in *Texas v. Johnson*); see also Nahmod, *supra* note 13, at 543 (arguing that burning a flag communicated the message that "the flag's conventionally accepted message of patriotism and unity does not necessarily reflect unanimity or satisfaction in the political community.").

¹⁰¹ See BEZANSON, *supra* note 33, at 195.

¹⁰² See *id.* at 193.

¹⁰³ See *id.* at 189, 197.

¹⁰⁴ See *id.* at 197.

¹⁰⁵ See Ely, *supra* note 10, at 1507 ("Orthodoxy of thought can be fostered not simply by placing unusual restrictions on 'deviant' expression but also by granting unusual protection to expression that is officially acceptable."); Nimmer, *supra* note 33, at 57 ("To preserve respect for a symbol *qua* symbol is to preserve respect for the meaning expressed by the symbol. It is, then, fundamentally an interest in preserving respect for a particular idea."); see also *Johnson*, 491 U.S. at 416–17 (stating that if the State could prohibit flag burning whenever it is likely to endanger the flag's symbolic role, "[w]e would be permitting a State to 'prescribe what shall be orthodox' by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.").

¹⁰⁶ See Bloom, *supra* note 50, at 426 (arguing that there is no other equally effective manner of presenting an anti-symbol message than by attacking the representation of the symbol); Kitrosser, *supra* note 81, at 1391 ("[T]he visual nature of the presentation chosen by Johnson, particularly in light of common visceral associations with the physical entity of the flag, was not interchangeable with verbal communication."); Nimmer, *supra* note 33, at 56 ("[T]hat flag burning is an emotion-laden form of stating 'I hate the government' should not render it any less eligible for first amendment protection.").

C. Sport, Symbolic Speech, and Symbolic Counter-Speech

The three icons we have identified — sport (baseball in particular), the flag, and free speech — intersect in any discussion of symbolic counter-speech. Patriotic symbolism is an integral part of sport. Most obviously, playing “The Star-Spangled Banner” has been a sports ritual since the first time it was played, spontaneously, during the 1918 World Series, as American troops fought in France.¹⁰⁷ Fans and participants now stand at attention and sing the anthem (or an equivalent American patriotic song) prior to the start of almost all organized spectator sporting events in every sport at every level.¹⁰⁸ Indeed, sporting events mark the only occasions in which adult Americans regularly gather and collectively participate in these symbolic and ceremonial tributes to flag and nation.¹⁰⁹ The ceremony has become part of the sporting event itself; teams and fans even develop unique traditions with regard to that ceremony.¹¹⁰

¹⁰⁷ See WARD & BURNS, *supra* note 43, at 132. The story goes that during the seventh-inning stretch, the band began playing the anthem, at which point fans began to sing and players removed their caps and stood at attention; everyone cheered when the display was done. It was repeated every game in the Series and continued the following year. *See id.*

¹⁰⁸ Game organizers also play the anthem of any other nation represented by a team participating in the contest, most frequently teams from Canada playing in professional baseball, hockey, and basketball games. The Canadian anthem has been part of the recent controversies. *See infra* note 130 and accompanying text.

¹⁰⁹ Except, of course, for special patriotic events, such as a Memorial Day parade or a Fourth of July celebration, or one of the many memorial services held on the anniversary of 9/11. The only other regular such ceremonies occur in public schools. *See, e.g.,* CAL. EDUC. CODE § 52720 (West 2003) (“In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. In every public secondary school there shall be conducted daily appropriate patriotic exercises.”); *see also* FLA. STAT. ANN. § 1003.44(1) (West 2003) (“The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state.”); PA. STAT. ANN. tit. 24, § 7-771(c)(1) (West 2003) (providing for the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day); *see also* Bloom, *supra* note 50, at 420 (“[I]t is likely that many children who did not share the Jehovah’s Witnesses’ objection continued to pledge allegiance to the flag, implicitly influenced at least in part by peer group pressure and unaware that the ritual was not mandatory.”).

It also may occur on the Capitol steps after a particularly unpopular judicial decision. *See* Carl Hulse, *Lawmakers Vow to Fight Judges’ Ruling on the Pledge*, N.Y. TIMES, June 30, 2002, at A20 (describing how, following the Ninth Circuit decision prohibiting use of “Under God” in the Pledge of Allegiance in public schools, House Speaker Dennis Hastert led dozens of House members to the Capitol steps to recite the Pledge (with the words “Under God”) and sing “God Bless America”).

¹¹⁰ In Baltimore, the birthplace of “The Star-Spangled Banner,” fans of the Orioles (the team often referred to by the shortened “the O’s”), in singing “O, say, does that star-spangled banner yet wave,” join together in placing a special, loud emphasis on the “O.”

This link between spectator sports and the flag has sharpened during the pathology that began on 9/11. Baseball stopped for six days after the attacks;¹¹¹ it resumed in several stadiums amid a sea of patriotic symbolism commanded by Major League Baseball. For example, players wore American flags on uniforms and caps and teams handed out flags for fans to wave during the anthem and “God Bless America” (which Major League Baseball ordered teams to include in the seventh-inning stretch).¹¹² Baseball returned to New York, the locus of the terrorist attacks, even more dramatically, in an emotional game at Shea Stadium that carried symbolic meaning about America’s survival, resilience, and recovery through the expressive forum of the American game. The game also carried patriotic symbolism — red, white, and blue ribbons painted on the grass, the American flag design and *God Bless America* painted on the dugouts, singer Diana Ross, accompanied by two choirs, singing “God Bless America,” and singer Marc Anthony singing the national anthem.¹¹³ Three games of the 2001 World Series were played at Yankee Stadium in the Bronx six weeks later, with the tattered American flag recovered from the wreckage of the World Trade Center flying above the park.¹¹⁴ And baseball continued to require this symbolism in subsequent seasons in order to “honor America” during wars in Afghanistan and Iraq, including playing “God Bless America” during the seventh-inning stretch and displaying a special Stars and Stripes Major League Baseball logo on the field during certain holiday games.¹¹⁵

This in no way suggests there is anything inappropriate about baseball’s use of patriotic symbolism. Major League Baseball and its teams, and all other professional and collegiate sports leagues and teams, are endowed with free-speech rights to engage in whatever expression, symbolic or otherwise, that they, their constituent organizations, and the fans who support them agree is appropriate.¹¹⁶ And if sport is indeed a vital social, cultural, and political institution and if it is the one place at which expressive patriotic rituals regularly occur, it is appropriate to help foster those ideals in a time at which patriotism and love of nation are (at least perceived to be) uniquely important. No one questions government’s ability, even

¹¹¹ See Joseph Duarte, *America Responds: A Star-Spangled Renewal; Astros Start Back Against Bonds*, THE HOUSTON CHRON., Sept. 18, 2001, at 1.

¹¹² See Joseph Duarte, *Fans Should Be Ok With Security*, THE HOUSTON CHRON., Sept. 21, 2001, at 6.

¹¹³ See Tyler Kepner, *Mets Magic Heralds Homecoming*, N.Y. TIMES, September 22, 2001, at D1.

¹¹⁴ See Steve Buckley, *World Series: No Argument, This One Was a Clutch*, THE BOSTON HERALD, Oct. 31, 2001, at 100.

¹¹⁵ See Press Release, Major League Baseball, Major League Baseball Announces Patriotic Initiatives for 2002 Season (Mar. 28, 2002) (on file with author).

¹¹⁶ See Ely, *supra* note 10, at 1505 n.96 (arguing that an individual, and necessarily also a private organization, “can obviously employ his flag in the exercise of his first amendment freedoms: indeed he does so every time he flies it.”).

its duty, to foster national unity by persuasion and example and to use the flag and other symbols to “knit the loyalty of their followings.”¹¹⁷ And no one questions the ability of private organizations, especially culturally vital organizations, to assist government in these efforts. The focus of controversy is the degree and manner to which government may silence the contrary message, especially by prohibiting the expression of the contrary message through the chosen symbol.¹¹⁸

We can identify three distinct forms of symbolic counter-speech, although they are not exclusive categories. A particular example of symbolic counter-speech may fit more than one description. We can illustrate all three with examples of symbolic counter-speech drawn from sport.

The first form is nonparticipation in a symbolic activity, notably a ceremony or ritual designed to affirm and honor the symbol.¹¹⁹ Nonparticipation can be understood in two ways. On one hand, the refusal to participate is protected by the First Amendment guarantee against being compelled to speak, write, or present any message or idea that an individual does not wish to present.¹²⁰ On the other hand,

¹¹⁷ See *Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (“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.”); *id.* at 640 (“National unity as an end which officials may foster by persuasion and example is not in question.”); *Nahmod*, *supra* note 13, at 542 (arguing that government promotion of a patriotic symbol will help influence individuals to share that sentiment, which is the primary purpose of this kind of government speech); see also *Smith*, *supra* note 58, at 1313 (“[C]ommunity must solicit the allegiance of citizens by appealing not just to their material interests but also to their beliefs.”); *Wasserman*, *supra* note 84, at 184 (“Government necessarily possesses broad discretion to select and put forward its own message as a way of presenting, explaining, and defending its policies to the People.”); see *infra* notes 179–91, 315–21 and accompanying text.

¹¹⁸ See *Texas v. Johnson*, 491 U.S. 397, 418 (1989) (“To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest.”); *Barnette*, 319 U.S. at 640 (“The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.”); *CURTIS*, *supra* note 20, at 133 (arguing that even if one accepts, as most antebellum Americans did, the lawfulness of slavery, “harsh criticisms of slavery that were directed to peaceful action by whites should have been protected”); *Ely*, *supra* note 10, at 1507 (“Orthodoxy of thought can be fostered not simply by placing unusual restrictions on ‘deviant’ expression but also by granting unusual protection to expression that is officially acceptable.”).

¹¹⁹ See *Barnette*, 319 U.S. at 642 (holding that state authorities violated the First Amendment by compelling Jehovah’s Witnesses in public schools to salute the flag and recite the Pledge); see also *Curtis*, *supra* note 50, at xxxii–xxxiv; *Wasserman*, *supra* note 84, at 169–71.

¹²⁰ See *Barnette*, 319 U.S. at 634 (“To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”); *Wasserman*, *supra* note 84, at 171 (“*Barnette* laid the ground for free speech protection from government demands that one ‘express . . . acceptance of or agreement with any particular belief.’”).

the act of nonparticipation — of opting-out of participation — in government- or majority-sponsored symbolic speech itself communicates a message and functions as an affirmative expressive act through silence that makes a point about one's views or feelings about the message of the original symbolic ceremony.¹²¹ Nonparticipation as an affirmative expressive act can run the range from simple absence from the ceremony to more obvious or obtrusive nonparticipation.

During the 2003 college basketball season, as the United States was ramping towards military action against Iraq, Toni Smith, a member of the women's team at Manhattanville College, a small liberal arts college in New York, began turning her back to the flag during the national anthem to protest American war plans, as well as what she believed were inequities in the society symbolized by the flag.¹²² Smith had a partner in her protest for one game when Deidra Chatman, a member of the University of Virginia women's team, similarly turned away from the flag during the anthem prior to a nationally televised game.¹²³

Smith and Chatman's actions were similar to those of NBA player Mahmoud Abdul-Rauf in 1996, who (initially with the team's permission) remained in the locker room when the anthem was played prior to games; he stated that he could not participate in the ceremony honestly and sincerely, given his beliefs that the American flag was a symbol of tyranny and oppression of African Americans.¹²⁴ Rauf was suspended by the NBA for one game, after which he agreed to stand on the court during the anthem, but praying silently rather than standing at attention.¹²⁵ In all three examples, the anthem and the ceremonial playing of the anthem presented a message, and Smith, Chatman, and Rauf used their nonparticipation in that ceremony to present a counter-message of disagreement through the medium of the ceremony itself.

The second type of symbolic counter-speech attacks the symbol itself — by destroying (as by burning) a present physical representation of the symbol,¹²⁶ by

¹²¹ See Wasserman, *supra* note 84, at 171 n.36 (noting the understanding "that refusal to salute the flag was an affirmative symbolic expressive act, presented through silence").

¹²² See Pennington, *supra* note 14.

¹²³ See William C. Rhoden, *This Athlete Backs Down After Protest*, N.Y. TIMES, Mar. 4, 2003, at D1. Chatman's actions did not cause the same national stir as Smith's, because Chatman apologized for her actions and agreed not to do it again after meeting with the school's director of athletics the following day. *Id.*

¹²⁴ See Koenig, *supra* note 90, at 383–84 & n.25.

¹²⁵ See *id.*

¹²⁶ See *United States v. Eichman*, 496 U.S. 310, 312 (1990) (involving several individuals who set fire to American flags to protest various aspects of American policy, including the passage of a federal law prohibiting flag desecration); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (involving defendant who burned an American flag during a demonstration at the sight of the Republican National Convention); GOLDSTEIN, *supra* note 35, at 46–49, 172–73 (detailing facts underlying flag burnings that lead to *Eichman* and *Johnson*); see also *id.* at 172 (stating that the federal flag protection law in 1989 "triggered a wave of flag burnings

using the symbol in other than the prescribed or generally accepted manner, or by altering that representation to create a new, different, and perhaps contrary symbol.¹²⁷ One of the most infamous sports-centered examples of this form occurred at Dodger Stadium in Los Angeles in 1976, when two fans ran onto the field carrying an American flag and tried to set it on fire. Los Angeles Dodgers outfielder Rick Monday ran over and pulled the flag away before the fans could start the fire, drawing a standing ovation from the crowd.¹²⁸

One also could attack a symbol through an inconsistent manner of participation with that symbol. Congress prescribes proper behavior with respect to American symbols and participation in honoring ceremonies;¹²⁹ a counter-speaker may make a statement by failing to follow those participatory guidelines. Consider several incidents that occurred in sports stadiums in the United States and Canada in 2003 before and during American military action in Iraq, a war criticized and opposed by the Canadian government and much of the Canadian public. Canadian baseball and hockey fans booed the American national anthem and American fans did the same to the Canadian national anthem.¹³⁰ In each case, the booing fans attacked the other nation's symbolic anthem, counter-speaking against the other's position on military action in Iraq, as well as responding to prior incidents in which the other nation's fans jeered one's own anthem.

designed both to defy and to test it, in some cases within moments after it became effective").

¹²⁷ See *Spence v. Washington*, 418 U.S. 405, 406 (1974) (involving a college student who displayed the American flag upside down, with a peace symbol made of removable black tape on both sides, to protest the killings at Kent State); see also William W. Van Alstyne, *Freedom of Speech and the Flag Anti-Desecration Amendment: Antinomies of Constitutional Choice*, in 2 THE CONSTITUTION AND THE FLAG: THE FLAG BURNING CASES 572, 577 (Michael Kent Curtis ed. 1993) [hereinafter FLAG BURNING CASES] (questioning whether placing a new symbol on top of a flag would be an act of physical desecration of the flag).

¹²⁸ *Constitutional Amendment Authorizing Congress to Enact Protections for the Flag of the United States: Hearing on S.J. Res. 40 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *Amendment Hearing*] (testimony of Tommy Lasorda).

¹²⁹ See, e.g., 4 U.S.C. § 4 (2000) (providing that the Pledge "should be rendered by standing at attention facing the flag with the right hand over the heart"); 36 U.S.C. § 301(b)(1)(A) (2000) (same as to the singing of the anthem when the flag is displayed); see also FLA. STAT. § 1003.44(1) (West 2003) ("When the national anthem is played, students and all civilians shall stand at attention, men removing the headdress, except when such headdress is worn for religious purposes. The pledge of allegiance to the flag . . . shall be rendered by students standing with the right hand over the heart.").

¹³⁰ See *Chilly Debut*, *supra* note 15 (describing baseball fans at Wrigley Field in Chicago booing "Oh, Canada"); Caldwell, *supra* note 15 (describing a professional hockey team apologizing for fans in Montreal booing "The Star-Spangled Banner" in protest of the U.S.-led war against Iraq).

Like the Pledge of Allegiance or national anthem, boos, jeers, and hisses are verbal, but they also are symbolic, having no meaning apart from the symbol (the flag and anthem) being jeered, its meaning and what it represents.¹³¹ “Boo” is a word, but it is a meaningless word apart from its target. This recalls Chief Justice Rehnquist’s insistence that flag burning, to the extent it might be expressive, is “the equivalent of an inarticulate grunt or roar.”¹³² Arguably, a hiss or a jeer is not much more articulate. Neither is a barbaric yawp.¹³³ But grunts, jeers, and yawps, inarticulate though they may be standing alone, are quite articulate when directed at a particular symbol or object. They attain a clear, understandable meaning when directed against something expressive, something putting forward its own meaning. Everyone understands what it means for fans to boo “The Star-Spangled Banner.”

In the third and final type of symbolic counter-speech, one displays a different, contrary symbol directly at the original symbol, especially with the hope of overriding or drowning out the original symbol.¹³⁴ A good example of this, as with many legal concepts,¹³⁵ can be seen in the movie *Casablanca*. Nazi soldiers stand around the piano at Rick’s Place singing the German national anthem; the club band, at Victor’s request and Rick’s approval, responds by playing *La Marseillaise*, whereupon the patrons at the bar (located in unoccupied French Morocco) join in, drowning out the German song and causing the soldiers to stop singing.¹³⁶ This form of speech also includes the situation in which a counter-speaker displays a contrary symbol in the forum or context in which the original symbol regularly is displayed. Thus, the Ninth Circuit struck down a California Department of Transportation policy allowing American flags to be displayed on highway overpasses (a limited public forum) but prohibiting the display of signs protesting war.¹³⁷

¹³¹ See *supra* notes 52–56 and accompanying text.

¹³² See *Texas v. Johnson*, 491 U.S. 397, 432 (1989) (Rehnquist, C.J., dissenting).

¹³³ See WALT WHITMAN, *Song of Myself*, in *LEAVES OF GRASS* (9th ed. 1977) (1891) (“I sound my barbaric YAWP over the roofs of the world.”).

¹³⁴ See *Stromberg v. California*, 283 U.S. 359, 361, 370 (1931) (overturning conviction under state statute prohibiting display of a red flag as a sign, symbol, or emblem of opposition to organized government).

¹³⁵ Cf. Marcus Cole, “*Delaware is Not a State*”: *Are We Witnessing Jurisdictional Competition in Bankruptcy?*, 55 *VAND. L. REV.* 1845, 1884 (2003) (comparing *Casablanca*, where everyone went to Rick’s, which “wouldn’t be Rick’s without Sam” the piano player, to the system of bankruptcy filing, where an overwhelming number of large corporations file for bankruptcy in the District of Delaware, which would not be Delaware without the two bankruptcy judges who make the district the ideal bankruptcy forum); Mark R. Killenbeck, *The Physics of Federalism*, 51 *U. KAN. L. REV.* 1, 23–24 (2002) (“But I do suspect we should treat the suggestion that such machinations [among the Justices of the Supreme Court] might have occurred in the same manner we react to Captain Renault’s observation in *Casablanca* that he was shocked to hear that individuals might be gambling in Rick’s Place.”).

¹³⁶ See *CASABLANCA* (Warner Bros. 1942). Major Strasser, the German commander, recognizes that Victor’s symbolic triumph poses a threat to German influence in the area.

¹³⁷ See *Brown v. Cal. Dep’t of Transp.*, 321 F.3d 1217, 1224 (9th Cir. 2003).

The most famous sport-related example of this form of symbolic counter-speech occurred at the 1968 Summer Olympics in Mexico City. American sprinters Tommie Smith (the gold-medal winner in the 100-meters) and John Carlos (who won the bronze) stepped to the medal podium wearing black socks and no shoes, Smith wearing a black scarf around his neck, and Carlos a string of Mardi Gras beads.¹³⁸ When "The Star-Spangled Banner" began, both men bowed their heads and raised one black-gloved fist in the Black Power salute.¹³⁹ Smith and Carlos had participated in the honoring ceremony for the flag, but by incorporating a new, contrary symbol into that ceremony, they sought to override or drown out the original (and expected) message of the flag and anthem with their own symbolic counter-message.

Several points explain the contours of symbolic counter-speech, especially as to the second and third forms. The first is Frank Michelman's insight that one cannot attack or destroy *the* flag, but only *a* flag, a particular representation of the symbolic red-white-and-blue, stars-and-stripes design.¹⁴⁰ Similarly, one can turn away from a flag or jeer a recitation of the Pledge or anthem. However, a different piece of cloth hoisted up a flagpole bearing the stars-and-stripes design still would be recognized as the flag regardless of what had happened to the first flag,¹⁴¹ just as the next rendition of the anthem will be understood as such regardless of any protests or jeers that occurred during the earlier ceremony.

Instead, one who counter-speaks to a flag employs the symbol (understanding the symbol as the red-white-and-blue, stars-and-stripes design and its honoring ceremonies) in light of its ordinary meaning, to attack that symbol and what it stands for precisely because it stands for that idea.¹⁴² Similarly, symbolic nonparticipation, such as refusing to stand in the appropriate manner during the

¹³⁸ See WILSON *supra* note 39, at 57; Hartmann, *supra* note 14, at 1; Alfred Dennis Mathewson, *Grooming Crossovers*, 4 J. GENDER RACE & JUST. 225, 236 & n.100 (2001).

¹³⁹ See *supra* note 138. This protest was the one holdover from a failed effort to organize a boycott of the Games by African-American athletes. See WILSON, *supra* note 39, at 56-57; Hartmann, *supra* note 14, at 2. Smith and Carlos were expelled from the Olympic village and permanently suspended from Olympic competition.

¹⁴⁰ See Michelman, *supra* note 10, at 1347 n.36 ("A person simply can't destroy a symbol by destroying one of its simulacra."); see also *United States v. Eichman*, 496 U.S. 310, 316 (1990) ("[T]he mere destruction or disfigurement of a particular physical manifestation of the symbol, without more, does not diminish or otherwise affect the symbol itself in any way.").

¹⁴¹ See Michelman, *supra* note 10, at 1346.

¹⁴² See SHIFFRIN, *supra* note 46, at 10 ("In burning the flag, Johnson rejected, opposed, even blasphemed the nation's most important political, social, and cultural icon."); Nahmod, *supra* note 13, at 543 (arguing that the conduct is one of a "symbol-breaker"); Nimmer, *supra* note 33, at 57 ("An act of flag desecration is a counter symbol, which may express hostility, or at least constitute a contradiction of the sanctity of the idea expressed by the flag symbol.").

national anthem, recognizes the meaning of the anthem, the flag being honored, and the republic for which they stand; the refusal to participate in the ceremony is meaningful because it reflects the nonparticipant's contrary views of those symbols and their meanings.

Second, counter-speech that employs the symbol itself, no matter how violently, is not the same as verbal counter-speech that challenges the symbol's meaning without using the symbol itself. As Lackland Bloom notes with respect to flag burning, "The message is not simply 'I disagree with what the flag represents'; it is also inevitably 'I have no respect for the flag.' As such, there is probably not any other equally effective manner of conveying the message."¹⁴³ Whatever Toni Smith could have said in opposition to America going to war or about the inequities of American society, nothing would have had the impact that her symbolic nonparticipation did. Free speech protects the individual's ability to employ a manner of communicating that will have the maximum impact.¹⁴⁴

Third, much symbolic counter-speech effectively means that the counter-speaker is interrupting the original speaker, either by co-opting the same symbol or drowning it out with her own symbol.¹⁴⁵ This forces us to reconsider John Hart Ely's suggestion that there is no constitutional protection for interrupting a public speaker, even by pure, coherent political speech.¹⁴⁶ This might suggest that a general prohibition on interrupting other speech could prohibit the second and third (especially the second) forms of symbolic counter-speech, since in both forms the symbolic counter-speech interrupts or attempts to interrupt the symbolic original speech.

¹⁴³ Bloom, *supra* note 50, at 426; see Kitrosser, *supra* note 81, at 1390 (quoting MARSHALL McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 85 (1964)) (arguing that displaying a piece of cloth with the words "American flag" across it would convey the same meaning as the Stars-and-Stripes, but the effect would be quite different).

¹⁴⁴ See Krotoszynski, *supra* note 93, at 1254 (distinguishing the question of full and free public debate from the particular content of the message or the nature of the messenger, in order to vindicate the individual right to share political views and to communicate them in unconventional and even patently offensive ways).

¹⁴⁵ See BEZANSON, *supra* note 33, at 197 (arguing that flag-protection statutes sought to protect the flag's ability to carry its message without interference with that message by others).

¹⁴⁶ In the seminal pre-*Johnson* article on the protected nature of flag desecration, Ely wrote:

For the values the state seeks to protect by forbidding interruption, the right of the originally scheduled speaker to have his say and of his audience to listen, are not geared to the message of the interrupter or even to the fact that he has a message. Interruption that expresses disagreement with the speaker threatens those values, to be sure, but no more than they would be threatened by a chant of "Chocolate Mousse" or a chorus of *South Side Shuffle* on the slide trombone.

Ely, *supra* note 10, at 1499-1500.

The answer is that interrupting another speaker is protected expression, but context matters. If the interruption takes the form of the counter-speaker rushing on-stage and grabbing the microphone out of the speaker's hands or kicking her off her soapbox, Ely is correct. The same is true if the interruption occurs in some closed forum of which the speaker has been granted exclusive use.¹⁴⁷ The same if the interruption takes the form of an objector employing the force of law to silence the original speaker, the classic and impermissible "heckler's veto."¹⁴⁸

But it should be a different matter if the interruption comes from a counter-speaker alongside or near an original speaker of equal status, trying to shout the latter down, to present her own message so as to overcome the first message. The right to counter-speak necessarily includes a right to speak over, or otherwise heckle, the original speaker. It only crosses the line to a heckler's veto if the heckler succeeds in halting the first speaker through legally coercive force — that is, some exercise of government power silencing the original speaker.¹⁴⁹ Steve Gey argues

¹⁴⁷ Thus, even assuming that a municipal theatre is a public forum to which a production company may attain access to perform a controversial show such as *Hair* (see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (1975) (Douglas, J., dissenting in part and concurring in the result in part) (arguing that a municipal theatre is a public forum and permitting government to pick and choose which performers may use the theatre creates a regime of censorship)), an audience member who attempts to interrupt the performers who have been granted permission to produce the show can be removed from the theatre.

¹⁴⁸ See Steven G. Gey, *Reopening the Public Forum-From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1586 (1998) ("[T]he principle of unrestricted public speech is unmediated by the fact that the expression will be heard or seen by unwilling listeners or viewers . . ."); Redish & McFadden, *supra* note 27, at 1688 ("If government were allowed to suppress or penalize expression on the grounds that it was found hurtful by private citizens, an intolerable heckler's veto would result, enabling those in power to suppress the expression of any viewpoint their supporters deem offensive."); see also Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 215–16 (1983) (discussing the refusal to accept the heckler's veto or to permit one group of citizens effectively to censor the expression of other because they dislike their ideas); Wasserman, *supra* note 84, at 228 (arguing that anyone who objects to the message presented in public does not have a right to veto the speech by refusing to fund the forum for that speech, but must avert her eyes to avoid the offending message); see also *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) (holding that speech cannot be financially burdened, punished, or banned simply because it might offend a hostile listener); *Cohen v. California*, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections."); *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 680–81 (7th Cir. 2003) ("[A] permit for a parade or other assembly cannot be denied because the applicant's audience will riot. To allow denial on such a ground would be to authorize a 'heckler's veto.'").

¹⁴⁹ See Kitrosser, *supra* note 81, at 1369 n.170 (arguing that a heckler's veto or listener's veto is present when the law accords individuals the power to "shut down speech of which

that the prevailing mythology of free speech is “an agitated but eloquent speaker standing on a soap box at Speakers’ Corner, railing against injustices committed by the government, whose agents are powerless to keep the audience from hearing the speaker’s damning words.”¹⁵⁰ That being true, the prevailing mythology of counter-speech is another, equally agitated, but eloquent speaker standing on a soap box on the opposite corner, countering the first speaker’s words, symbols, and ideas, trying to convince the listening audience that she is right and the first speaker wrong, and perhaps trying to get the first speaker to give up and shut up.

Consider, in the realm of pure speech, *Terminiello v. Chicago*.¹⁵¹ Father Terminiello was giving a speech inside a crowded auditorium to the Christian Veterans of America, railing against (among others) Communists, Eleanor Roosevelt, Zionist Jews, Blacks, Catholics, and “anti-Christians,” including Supreme Court Chief Justice Stone.¹⁵² An angry and turbulent mob of about 1,000 (which Terminiello claimed was comprised of Communists and members of left-wing organizations¹⁵³) gathered outside, throwing rocks, condemning the “fascists” holding forth inside, and making it increasingly difficult for police to maintain order.¹⁵⁴ As a matter of the dialectic between speech and counter-speech, this situation only became problematic when police, seeking to restore order, arrested Father Terminiello for disorderly conduct on the ground that he caused the crowd outside to respond violently to his speech.¹⁵⁵ At that point, the crowd successfully exercised a heckler’s veto — by becoming threatening enough, it compelled the police to employ the force of law to silence the objectionable speaker.

More recently, consider supporters of the Bush Administration and of American military action counter-protesting alongside antiwar demonstrators¹⁵⁶ or the NAACP counter-demonstrating alongside a Klan rally,¹⁵⁷ or Jewish residents counter-demonstrating alongside a Nazi party march in a predominantly Jewish community.¹⁵⁸ In all, the counter-speaker’s explicit goal is to interrupt (or at least compete with) the original (objectionable) speaker, to make it more difficult for the

they disapprove”).

¹⁵⁰ Gey, *supra* note 148, at 1538.

¹⁵¹ 337 U.S. 1 (1949).

¹⁵² *Id.* at 2–3; *see also id.* at 14, 16–22 (Jackson, J., dissenting) (quoting long passages from Terminiello speech).

¹⁵³ *See id.* at 23 (Jackson, J., dissenting).

¹⁵⁴ *See id.* at 3; *see also id.* at 15–16 (Jackson, J., dissenting).

¹⁵⁵ *See id.* at 4 (“[A] function of free speech under our system of government is to invite dispute.”).

¹⁵⁶ *See* Dar Haddix & Andrew Moisar, *Washington Demonstrations For, Against War*, UNITED PRESS INT’L, Oct. 26, 2003.

¹⁵⁷ *See* Church of the Am. Knights of the Ku Klux Klan v. City of Gary, 334 F.3d 676, 680 (7th Cir. 2003) (describing prior Klan rally in Gary, Indiana, that drew between 150 and 200 counter demonstrators, more than five times the number of Klan demonstrators).

¹⁵⁸ *See* BOLLINGER, *supra* note 19, at 24–35.

original message to be heard, to get the counter-message heard (and hopefully adopted) by the same audience, and, perhaps, to so frustrate the original speaker that she ceases speaking altogether (as in *Casablanca*).

The interplay between symbolic speech and symbolic counter-speech proceeds in the same way. Turning one's back to the flag, booing one singing of the national anthem, or making the Black Power salute during one anthem ceremony all are symbolic versions of the same practice; so is burning or destroying one representation of the American flag. Symbolic counter-speech interrupts symbolic original speech with a competing counter-message, in order to make it more difficult for the original symbolic message to be understood, to get the counter-message heard and adopted, and to frustrate those who support the original meaning of the symbol. The symbolic counter-speaker heckles or attempts to drown out the original symbol by employing that very symbol to present a message contrary to the symbol's stated preferred original meaning.

II. FREE SPEECH IN PATHOLOGICAL PERIODS

These examples of flag-related symbolic counter-speech attain added significance because they occur in the midst of the pathological period that has prevailed in the United States since 9/11. Vincent Blasi introduced the idea of pathology, suggesting that its defining feature is a "shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the first amendment."¹⁵⁹ These are "historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."¹⁶⁰ In such periods, he argues, the rights implied by the core propositions of the freedom of speech are denied.¹⁶¹

In fact, systematic governmental suppression is only one of three distinct features that individually and collectively define pathology; I suggest two additional elements. One is an increase in government speech, particularly government-sponsored and encouraged patriotic speech and symbolism; the other is popular intolerance for, and attempted private suppression of, dissenting or unorthodox expression.¹⁶² Importantly, none of the three is necessary, although any of the three may be sufficient to indicate the existence of a pathological period.

¹⁵⁹ Blasi, *supra* note 17, at 467.

¹⁶⁰ *Id.* at 449–50 ("What makes a period pathological is the existence of certain dynamics that radically increase the likelihood that people who hold unorthodox views will be punished for what they say or believe.").

¹⁶¹ *See id.* at 462.

¹⁶² *See id.* at 464–65 ("Important shifts of attitudes regarding dissent can result from internal political developments as well as external pressures and from popular reactions that are less than traumatic.").

With respect to the first feature, what is noteworthy about the present pathology is the extent that government (seemingly at all levels) largely has stayed out of the business of large-scale suppression of expression.¹⁶³ Toni Smith was not silenced — her teammates, coaches, and school administration all supported her in her actions (if not her ideas and beliefs) and she was neither kicked off the team nor ordered to participate in the anthem ceremony.¹⁶⁴ No fans were removed from the ballpark for jeering the national anthem.¹⁶⁵ Tommie Smith and John Carlos were punished,¹⁶⁶ but that was a relatively long time ago in an arguably different free-speech era.

In fact, this is the case with much speech and counter-speech throughout the present pathological period. Antiwar rallies and protests have taken place,¹⁶⁷ albeit not without administrative difficulties. Protesters in New York were denied a permit to march through the streets of New York or move past the United Nations and were confined to a narrow demonstration area some distance from the UN, largely because the federal district court was overly solicitous of the government's asserted interests in public safety.¹⁶⁸ Problems arose as a result of these limitations imposed

¹⁶³ See Horwitz, *supra* note 16, at 4 (“[I]f there is anything extraordinary about the constitutional questions that have arisen in the wake of September 11 and the concomitant legislative responses, it is not that some civil liberties have been threatened, but that one of our central constitutional rights has *not* been threatened.”).

¹⁶⁴ See Pennington, *supra* note 14. Of course, Manhattanville College being a private institution, Smith would not have had a First Amendment claim if the college had not supported her. See SHIFFRIN, *supra* note 61, at 87–88 (stating that the First Amendment provides no protection for students dissenting in private schools).

¹⁶⁵ Besides, the incidents in which “The Star-Spangled Banner” (as opposed to “Oh, Canada”) was booed occurred in Canada. Even proponents of flag protection recognize that nothing can be done to prevent expressions of disrespect for American patriotic symbols abroad.

But this does raise an interesting question of state action and the public forum doctrine. Assuming a particular ballpark is publicly funded and owned, as most are today, could fans have been ordered to stand at attention or removed from the park for booing or otherwise counter-speaking to the anthem? I will explore this question in a future article.

¹⁶⁶ Both were banned from the Olympic Village, sent home, and suspended from international competition. See Hartmann, *supra* note 14, at 2.

¹⁶⁷ See CHRISTOPHER DUNN, ET AL., NEW YORK CIVIL LIBERTIES UNION, ARRESTING PROTESTS: A SPECIAL REPORT OF THE NEW YORK CIVIL LIBERTIES UNION ON NEW YORK CITY'S PROTEST POLICIES AT THE FEBRUARY 15, 2003 ANTI-WAR DEMONSTRATION IN NEW YORK CITY 1 (2003) [hereinafter ARRESTING PROTESTS] (“On February 15, 2003, in cities around the world, millions of people took to the streets for peaceful protest against the impending war with Iraq.”); see also *Handschu v. Special Servs. Div.*, No. 71-CIV.2203 (CSH), 2003 WL 21880456, at *1 (S.D.N.Y. Aug. 7, 2003) (stating that three demonstrations against the impending American invasion of Iraq took place in 2003).

¹⁶⁸ See *United for Peace & Justice v. City of New York*, 243 F. Supp. 2d 19, 25–26, 29–31 (S.D.N.Y. 2003) (upholding New York City's refusal to grant a permit in light of heightened security concerns brought about by large, unorganized marches and in light of the interest in preserving the peace and security of UN Headquarters); *id.* at 24 (“The answer is that this

on the New York protests.¹⁶⁹ New York City police also began a practice of questioning arrested antiwar demonstrators about their political views and affiliations and their prior demonstration activities,¹⁷⁰ a practice sharply criticized by one federal district court judge and one that the city ultimately agreed to halt.¹⁷¹ Moreover, some of the federal prohibitions on providing material support to terrorist organizations have been enforced in such a way as to impose guilt by association, guilt for simple membership in organizations deemed by the Attorney General to be engaged in or supporting terrorism.¹⁷²

march is simply too large for the NYPD to adequately secure the safety of United Nations Headquarters.”); *id.* at 28 (“The City’s concerns with respect to crowd control are exacerbated by the added security concerns since September 11, 2001.”); *id.* at 30–31 (concluding that the plaintiff was given ample opportunity to communicate its message to representatives of the UN via a stationary rally nearby).

¹⁶⁹ See ARRESTING PROTESTS, *supra* note 167, at 7–10 (describing chronology of New York rallies); *id.* at 32–33 (detailing ACLU criticisms of handling of February antiwar demonstrations by New York City Police, including the unnecessary use of force, the use of barricades to create “pens” for protesters, and inefficient processing of demonstrators arrested for minor offenses).

¹⁷⁰ See *Handschu*, 2003 WL 21880456, at *2–3 (enumerating some of the questions asked of protesters, including whether they hate George W. Bush, whether they had been involved in prior sit-down arrests, what groups they are affiliated with, whether they are planning on going to future protests, and their opinions on the war in Iraq).

¹⁷¹ See *id.* at *5 (“These recent events reveal an NYPD in some need of discipline.”); Letter from the New York Civil Liberties Union, to Raymond Kelly, Commissioner, New York City Police Department 1 (Apr. 8, 2003) (calling upon the New York City Police Department to cease practice of collecting and compiling information from arrested demonstrators about their organizational affiliations and prior demonstration histories), available at <http://www.m27coalition.org/4-10-03aclu.pdf>.

¹⁷² See COLE & DEMPSEY, *supra* note 1, at 153 (“The PATRIOT Act makes aliens deportable for wholly innocent associational activity with a ‘terrorist organization,’ irrespective of any nexus between the alien’s associational conduct and any act of violence, much less terrorism.”); also Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408–33 (2003) (arguing that the material support statute does implicate the guilt-by-association critique to the extent it punishes the act of providing one’s self as a member of the organization without some intent to engage in wrongdoing); *id.* (manuscript at 30) (arguing that the material support law interferes with First Amendment activity to the extent that material support includes personnel, including providing one’s self as personnel for an organization); Cole, *supra* note 1, at 10 (“The material support law is a classic instance of guilt by association. It imposes liability regardless of an individual’s own intentions or purposes, based solely on the individual’s connection to others who have committed illegal acts.”); see also COLE & DEMPSEY, *supra* note 1, at 149 (stating that the government detained more than 1,200 persons in connection with the investigation of 9/11, yet only one was charged in connection with the activities); SEPTEMBER 11 DETAINEES, *supra* note 1, at 195 (finding “significant problems in the way the September 11 detainees were treated”).

But formal, systematic suppression has been absent. There has been no Sedition Act or Espionage Act outlawing criticism of the United States, the present administration, or its policies,¹⁷³ and no laws outlawing advocacy of different political or ideological ideas.¹⁷⁴ There has been no HUAC inquiring into people's political affiliations or loyalty to the United States.¹⁷⁵ Lower courts have applied First Amendment doctrine to prohibit blatant governmental attempts to stifle dissent or to shift the rules of debate to favor one side.¹⁷⁶ As David Cole notes, newspapers,

¹⁷³ The essence of the crime of sedition was the claim that advocacy and criticism of public policy and criticisms of the conduct of public officials could be punished as a crime. The crime of sedition contradicts the idea that "we the people" ultimately govern, because it seeks to protect public policies, government officials, and major social institutions from public debate and criticism. As it was applied, the Sedition Act had treated political criticism and opinion as sedition.

CURTIS, *supra* note 20, at 115; see Heyman, *supra* note 24, at 548 ("From a modern perspective, the unconstitutionality of the Sedition Act appears beyond dispute: few people would deny that the right to criticize the government and its officials is the hallmark of a democratic society and part of 'the central meaning of the First Amendment.'"); Kalven, *supra* note 59, at 209 ("The central meaning of the [First] Amendment is that seditious libel cannot be made the subject of government sanction."); see also *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.").

¹⁷⁴ See CURTIS, *supra* note 20, at 389–90 (describing World War I-era laws outlawing the causing of insubordination or disloyalty or "uttering, printing, or publishing any disloyal or abusive language intended to cause disrepute as regards the form of government of the United States or the Constitution or the flag. . . ."); *id.* at 390 (describing some cases that resulted in convictions, including "telling a woman who was knitting socks for soldiers, that no soldier would ever see them" and "saying, when he refused . . . [to] kiss the flag, that it was merely cloth, paint, and marks, and might be covered with microbes"); see also *Abrams v. United States*, 250 U.S. 616, 623–24 (1919) (affirming conviction under the Espionage Act for distributing leaflets and other written materials); *Debs v. United States*, 249 U.S. 211, 212 (1919) (affirming conviction under the Espionage Act for speech advocating socialism); *Schenck v. United States*, 249 U.S. 47, 51–52 (1919) (affirming conspiracy conviction under the Espionage Act, in part because time of war required restrictions on speech that might not be proscribable at another time); CURTIS, *supra* note 20, at 390–92; Post, *supra* note 66, at 156–61; Strauss, *supra* note 26, at 47–50.

¹⁷⁵ See BOSMAJIAN, *supra* note 27, at 119 (describing efforts in the 1940s and 1950s by government to demand that citizens reveal their political and religious associations and beliefs); COLE & DEMPSEY, *supra* note 1, at 73 (describing the link between HUAC investigations and FBI investigations of suspected Communists); Redish & McFadden, *supra* note 27, at 1678–82 (describing the HUAC investigation of Communists working in Hollywood and the refusal of several individuals to answer questions about their political affiliations or to disclose the affiliations of others).

¹⁷⁶ See, e.g., *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1223–24 (9th Cir. 2003) (holding that a law prohibiting display of antiwar signs on highway overpasses while

scholars, activists, and human-rights and civil-rights organizations openly criticized the administration's response to 9/11 (as well as the subsequent military campaigns in Afghanistan and Iraq) and did not suffer formal government-imposed sanctions for doing so.¹⁷⁷

It is likely that the expansive judicial interpretation and application of the First Amendment that has prevailed since previous pathologies deters formal suppression and keeps government at bay. Government simply does not even attempt formal censorship or suppression, at least on a broad scale, knowing such laws or actions likely will fall in the face of a protective judicial doctrine.¹⁷⁸ This also makes the few cases in which protective First Amendment rules have not dissuaded government from restricting speech more surprising and more anomalous. Consider William Harvey. Several weeks after 9/11, Harvey, dressed in army fatigues, marched near Ground Zero carrying a placard with a picture of Osama bin Laden superimposed over the burning Twin Towers and handing out leaflets praising bin Laden and the attacks.¹⁷⁹ An angry crowd of approximately sixty people gathered, threatening to kill Harvey if a police officer did not stop him or lock him up. The officer responded by arresting Harvey for disorderly conduct, ostensibly for creating a public disturbance and disrupting pedestrian traffic by drawing an angry crowd

allowing American flags to be displayed constitutes impermissible viewpoint discrimination); *Circle School v. Phillips*, 270 F. Supp. 2d 616, 625–26 (E.D. Pa. 2003) (holding unconstitutional a state law that required parental notification if a student wished to opt out of reciting the pledge or singing the national anthem in school, because the state had provided a disincentive for students to opt out, thereby coercing them into reciting the state-sponsored message).

¹⁷⁷ Cole, *supra* note 1, at 6.

¹⁷⁸ See Curtis, *supra* note 24, at 354 (“[O]ne could argue that the Court has simply and finally rejected its past repressive decisions. . . . [T]hese past repressive decisions can reasonably be seen as relics of a bygone age. . . .”); Horwitz, *supra* note 16, at 49 (“[T]he development and broad acceptance of a protective approach to speech, one which raised high barriers against the cognitive shortcomings that attend the popular passions of a moment of crisis, rendered heightened speech regulation unacceptable at just the moment that no other constitutional incursion seemed implausible.”); see also COLE & DEMPSEY, *supra* note 1, at 151 (arguing that past responses to times of great fear are seen as mistakes); BeVier, *supra* note 23, at 1090–91 (arguing that the Warren Court expanded the reach of the First Amendment and the current Court has preserved most of this expansion and broadened coverage in some areas); Blasi, *supra* note 17, at 456 (“The most serious lapses in toleration of dissent . . . have acquired an aura of ignominy that says much about the importance of free speech in the pantheon of national ideals.”); Cole, *supra* note 1, at 7 (“[T]he punishment of dissent during World War I and of political association during the Cold War is seen as a grave error.”). But see Nagel, *supra* note 28, at 334 (“The judiciary’s record in freedom of expression cases does not evince any special competence or sensitivity for promoting the freedom of speech. . . .”).

¹⁷⁹ See Tom Perotta, *Pro Bin-Laden Speech Leads to Disorderly Conduct Charge*, N.Y.L.J., Feb. 1, 2002, at <http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZ1DZ8K6XC>.

around him.¹⁸⁰ The arrest at the crowd's behest converted private objections to Harvey's speech into a heckler's veto.¹⁸¹ Surprisingly, the District Attorney decided to prosecute; even more surprisingly, the trial judge denied a motion to dismiss the charges on First Amendment grounds, stating, "[it] is the reaction which speech engenders, not the content of the speech, that is the heart of disorderly conduct" and that Harvey should have expected a violent reaction, given the timing of his speech.¹⁸² Of course, that runs contrary to the principle that audience reaction is content and the possibility of a hostile response does not deprive speech of its protected character.¹⁸³ The state eventually dropped the charges, undoubtedly realizing that any conviction would not withstand First Amendment scrutiny on review.¹⁸⁴

Again, however, the absence of widespread government restrictions on speech does not mean that we are not dealing with a pathological period with regard to free speech. The presence of the two other defining elements of pathology suggests that we are.

With respect to the increase in government-sponsored patriotic symbolism and expression, consider Sheldon Nahmod's point that:

Government, of course, plays a significant role in promoting patriotic symbols. By indicating that the majority of the political community believes that certain patriotic symbols are indeed deserving of respect, such governmental promotion has the full intellectual and emotional force of that community behind it. Obviously, this cannot help but influence individuals to share that sentiment; indeed, that is a primary purpose of this kind of government speech.¹⁸⁵

Sanford Levinson similarly argues that government uses symbols to "promote privileged narratives of the national experience."¹⁸⁶ The desire to promote that

¹⁸⁰ *Id.*

¹⁸¹ See *supra* notes 148–58 and accompanying text.

¹⁸² See Perotta, *supra* note 179.

¹⁸³ See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Cohen v. California*, 403 U.S. 15, 21 (1971) (stating that government's ability to shut off discourse to protect others from hearing it is limited in order to avoid empowering a majority to silence dissidents); Kitrosser, *supra* note 81, at 1369 (arguing that Supreme Court doctrine suggests that regulations targeting offensive manner of expression function in the same speech-restrictive manner as content-based regulations).

¹⁸⁴ See Press Release, New York Civil Liberties Union, NYCLU Hails Dismissal of Criminal Prosecution for Controversial Public Demonstration About World Trade Center Attack (Apr. 25, 2002) (*available at* www.nyclu.org/wtc_harvey_042502.html).

¹⁸⁵ Nahmod, *supra* note 13, at 542.

¹⁸⁶ LEVINSON, *supra* note 97, at 10 (arguing that those with political power within a given society organize public space to convey and teach the public a desired lesson).

privileged narrative sharpens during pathology, as government and the prevailing majority seek to retain power by promoting their preferred message through their preferred symbol. Thus was the Confederate flag revived as a symbol of the South, southern culture, states' rights, and state sovereignty during the Civil Rights Movement¹⁸⁷ and the words "under God" added to the Pledge of Allegiance in 1954 in specific response to "Godless" Communism during the Cold War.¹⁸⁸

Government-supported patriotism has been the central expressive component of the present pathology. Several states after 9/11 mandated that public school days include patriotic activities and ceremonies.¹⁸⁹ And, in one of the stranger examples,

¹⁸⁷ See *id.* at 91.

¹⁸⁸ See *Gey, supra* note 50, at 1875 ("As the Cold War era progressed, patriotism and religiosity often merged to form a common front against the perceived threat of atheistic Communism."); *id.* at 1875–81 (tracing legislative history of change, including congressional concerns that the American way of life was under attack by an atheistic and materialistic social and political system).

¹⁸⁹ See, e.g., FLA. STAT. ANN. § 1003.44(1) (West 2003) ("Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag. . . . The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state."); see also 105 ILL. COMP. STAT. ANN. 5/27-3 (West 2003) ("American patriotism and the principles of representative government, as enunciated in the American Declaration of Independence, the Constitution of the United States of America and the Constitution of the State of Illinois, and the proper use and display of the American flag, shall be taught in all public schools and other educational institutions supported or maintained in whole or in part by public funds. The Pledge of Allegiance shall be recited each school day by pupils in elementary and secondary educational institutions supported or maintained in whole or in part by public funds."); MO. ANN. STAT. § 171.021(2) (West Supp. 2003) ("Every school in this state which is supported in whole or in part by public moneys shall ensure that the Pledge of Allegiance to the flag of the United States of America is recited in at least one scheduled class of every pupil enrolled in that school no less often than once per week."); PA. STAT. ANN. tit. 24, § 7-771(c)(1) (West Supp. 2003) ("All supervising officers and teachers in charge of public, private or parochial schools shall cause the Flag of the United States of America to be displayed in every classroom during the hours of each school day and shall provide for the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day.").

States have been careful to draft the statutes to ensure that students are informed of their right to opt-out of participation. See FLA. STAT. ANN. § 1003.44(1) ("Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge."); PA. STAT. ANN. tit. 24, § 7-771(c)(1) (West Supp. 2003) ("Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief."). *But see* *Circle School v. Phillips*, 270 F. Supp. 2d 616, 625–26 (E.D. Pa. 2003) (striking down portion of Pennsylvania statute requiring parental notification of students who opt out). See also *Bloom, supra* note 50, at 420 ("[I]t is likely that many children who did not share the Jehovah's Witnesses' objection continued to pledge allegiance to the flag, implicitly influenced at least by peer group pressure and unaware that the ritual was not mandatory.").

members of Congress, in symbolic criticism of France and French opposition to the U.S.-led invasion of Iraq, sought to rename items such as French toast, French fries, and French cuffs by substituting the word "freedom."¹⁹⁰ Government patriotic speech becomes fully effective only to the extent the public wholeheartedly adopts the patriotic message. The flag and other patriotic symbolism caught on and American flags proliferated after 9/11;¹⁹¹ the increase in amount and intensity of patriotic imagery and ceremony at sporting events and the establishment of mandatory patriotic activities by important social institutions such as Major League Baseball, is one aspect of this.¹⁹² Freedom fries never quite resonated with the public.

Government speech is the best, most legitimate, and most constitutionally valid response to times of great stress, as government rallies the populace and gains support for its policies by participating in the public dialogue; patriotic symbolism such as the flag and its complements is one powerful rhetorical tool in that dialogue.¹⁹³ It becomes problematic during pathological periods when it becomes mandatory for individuals to adopt or repeat the government-endorsed message or to honor the government-endorsed patriotic symbol.¹⁹⁴ Government speech also

¹⁹⁰ See Press Release, Rep. Walter B. Jones, House Office Buildings to Serve "Freedom Fries" (Mar. 11, 2003) (Chairman of the Committee on House Administration ordered removal of names French fries and French toast from restaurant menus in House office buildings) available at <http://jones.house.gov/html/031103.html> (last visited Nov. 24, 2003); White House Press Briefing, Ari Fleischer, 2003 WL 1605953, *14 (Mar. 28, 2003) (indicating similar changes made on Air Force One).

¹⁹¹ See *Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1220 (9th Cir. 2003) ("Across America, her great national emblem, the United States flag, and its colors, became ubiquitous, appearing everywhere — from cars to homes, buildings to clothes."); Graber, *supra* note 5, at 810 ("Americans are subject to constant 'United We Stand' messages whenever they watch television, listen to the radio, read a newspaper, or even drive down the highway."); see also *Brown*, 321 F.3d at 1220 (stating that the patriotic fervor, and the display of flags increased after President Bush declared "war" on terrorism); *supra* notes 46–56 and accompanying text.

¹⁹² See *supra* notes 107–18 and accompanying text.

¹⁹³ See LEVINSON, *supra* note 97, at 91 (describing the history of Alabama flying the Confederate flag over the Capitol, noting it was placed there in 1961, on the anniversary of the beginning of the Civil War, and again in 1963, when Attorney General Robert Kennedy traveled to Montgomery to negotiate the admission of African-American students to the University of Alabama); Curtis, *supra* note 50, at xlv (arguing that politicians regularly use the flag as background for communications); Massey, *supra* note 3, at 369 (describing the American flag as "a symbol adopted by the nation's government for the purpose of sending some message to the community").

¹⁹⁴ See *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1942) (holding that government may not "force citizens to confess by word or act" their faith in a government-prescribed orthodoxy); Curtis, *supra* note 50, at xiv ("*Barnette* had declared that the First Amendment prohibited government enforced orthodoxy."); Nahmod, *supra* note 13, at 542 ("True intellectual and emotional attachment to patriotic symbols, and allegiance to a political

becomes problematic when it devolves into demagoguery from individual government officials, especially suggestions that criticism of the government or its policies in time of crisis or fear is wrongful, illegal, unpatriotic, or tantamount to treason.¹⁹⁵ The not-subtle threat of formal suppression or censorship inherent in such statements has the (likely intended) effect of muffling dissenting voices, meaning that only government's message (or the messages of those who concur with the government) will be heard in the public debate.¹⁹⁶ It converts, however

community, arise out of free choice, not coercion."); Wasserman, *supra* note 84, at 188 ("[R]egardless of government's unquestioned interest in speaking and spreading its message, it may not conscript unwilling private citizens to assist in the dissemination of that message or convert individuals into a billboard or mouthpiece for that message.").

¹⁹⁵ See Blasi, *supra* note 17, at 457 ("[T]he suppression of dissent ordinarily is undertaken in the guise of political affirmation, of insisting that everyone stand up and be counted in favor of the supposed true values of the political community."). The most infamous incident of the present pathology was Attorney General John Ashcroft's testimony before the Senate Judiciary Committee in December 2001. See *Anti-Terrorism Policy Review: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (testimony of Attorney General John Ashcroft):

[T]o those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

Another incident involved White House Press Secretary Ari Fleischer, who commented shortly after 9/11 that "all Americans . . . need to watch what they say, watch what they do. This is not a time for remarks like that; there never is." White House Press Briefing, Ari Fleischer (Sept. 26, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/200109265.html>. Responding to press questions challenging his earlier statements, Fleischer reiterated that "everybody has to think through the repercussions, the implications of what they say . . . [P]eople have to think carefully about the things that they do and they say." White House Press Briefing, Ari Fleischer (Sept. 28, 2001) available at <http://www.whitehouse.gov/news/releases/2001/09/20010928-8.html>; see also Martin R. Scordato & Paula A. Monopoli, *Free Speech Rationales After September 11th: The First Amendment in Post-World Trade Center America* 13 STAN. L. & POL'Y REV. 185, 187 (2002).

¹⁹⁶ See Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. (forthcoming Spring 2004) (manuscript at 45, on file with author) (arguing that there is "something significant about the subtle dangers involved when government action challenges constitutional values in informal, non-legalistic ways . . ."); Scordato & Monopoli, *supra* note 195, at 201 (suggesting that such government statements impinge on speech in an informal, but powerful way); Wasserman, *supra* note 84, at 187 ("Government power to teach, inform, and persuade necessarily equals the converse power to indoctrinate, distort judgments, and perpetuate the current political regime.").

informally, the second, somewhat more acceptable feature of pathological periods into the first, unacceptable feature of formal suppression.¹⁹⁷

The present period also is marked by popular intolerance for dissenting and unorthodox expression, the third element of pathology. The public must second any government-imposed restrictions in order for those restrictions to take hold.¹⁹⁸ Where the general public objects, the government almost certainly will back off its suppression. This was the case with the Alien and Sedition Act of 1798 — the Act expired after only two years and all those convicted under the Act were pardoned.¹⁹⁹ Similarly, during the Civil War most dissent was left undisturbed and most individuals who were arrested for expressive activities quickly were released.²⁰⁰ A public committed to free speech checks and limits government encroachment on speech.²⁰¹ On the other hand, the absence of such a public commitment to free

¹⁹⁷ See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 17–18 (2000) (arguing that dissent must be left open and that the government conception of the good should be only one of many advanced); Wasserman, *supra* note 84, at 184 (“The First Amendment demands . . . that the objector maintain her right to dissent from objectionable policies by speaking against the policies and the elected officials who pass and enforce them.”).

¹⁹⁸ See Devins, *supra* note 25, at 1142 (“During the Red Scare of the early 1950s, all parts of government and the American people joined forces in limiting speech.”); see also Blasi, *supra* note 17, at 457 (arguing that the challenge to constitutional liberties “can take on the character of a mass movement” and “can engage the imagination of the man on the street”); *id.* at 456 (arguing that pathological periods test the political community’s commitment to the norms of free speech and tolerance for dissent).

¹⁹⁹ See CURTIS, *supra* note 20, at 93–94 (describing arrest of Jedidiah Peck, a member of the New York legislature, and the public opposition to the arrest that led Federalists to back off from prosecuting him); Curtis, *supra* note 24, at 358–59 (describing debates over the Sedition Act and the fact that, after the Act expired and Jefferson pardoned those convicted under the act, a broad consensus as to free speech protection emerged); Heyman, *supra* note 24, at 553 (arguing that the political controversy over the Sedition Act played an important role in the election of Thomas Jefferson, who pardoned those convicted under the Act); Nagel, *supra* note 28, at 315 (arguing that the election of Jefferson, assisted by public reaction against the Sedition Act prosecutions, “abruptly quelled the suppressions of that period”).

²⁰⁰ See Nagel, *supra* note 28, at 315 (“The use of a wide array of censoring devices during the Civil War failed to constrict the publication of dissenting, even traitorous, views and information, including detailed reporting about military plans.”); see also CURTIS, *supra* note 20, at 348 (describing argument that emerged during the Civil War that “democracy entailed the right of the people who would be affected by government policy to attempt to persuade other citizens to change it. Because the right was a continuing one, government policy had to be open to criticism and revision.”).

²⁰¹ See CURTIS, *supra* note 20, at 352 (“The high public regard for freedom of speech and concern for the relation of free speech to popular government kept the repression from becoming more extensive. Americans’ support for and use of free speech checked and limited the administration’s encroachment on free speech and free press.”); see also Nagel, *supra* note 28, at 316 (“[N]one of our most serious periods of repression was influenced

speech principle permits, and at times encourages, government encroachments to take hold.²⁰²

A related problem arises where the community at large, rather than challenging government restrictions on speech, engages in its own private intolerance for, and suppression of, dissenting speech.²⁰³ The people at large may be overcome by the urge to censor or silence in times of stress, apart from, and seemingly in spite of, judicial interpretation of the First Amendment.²⁰⁴ Patriotism frequently manifests itself in private suppression of dissenting speech; de Tocqueville labeled this an "irritable patriotism," in which individuals define their patriotic duty to include defending nation and society against all criticisms, viewing any criticism of the nation to be a personal attack that must be challenged.²⁰⁵ Such patriotism also attains a popular mandatory quality; failure to participate in patriotic activities is akin to direct criticism. Government speech that takes the form of "watch what you say" demagoguery is problematic, even absent the imposition of formal legal restrictions on expression, precisely because the public will understand government officials to mean that critical expression, including nonadoption of patriotic ideals, should not be tolerated and the public may act to achieve that suppression.²⁰⁶ This feature of pathology has been most prevalent during the current period.

significantly by judicial enforcement of the first amendment, yet each ended well short of destroying the system of free expression.").

²⁰² Cf. Scordato & Monopoli, *supra* note 195, at 201 (suggesting that private speech restrictions may be "a bellwether of governmental action").

²⁰³ See CURTIS, *supra* note 20, at 116 ("At times of real and imagined crisis, elites and members of the general public continued to treat some subjects as too important to be trusted to the democratic process. The idea that matters of public concern should be kept off the agenda that 'we the people' would consider is a recurring theme in battles over restrictions on speech."); Blasi, *supra* note 17, at 462 (arguing that constitutional norms such as free speech "derive their authority initially from public acceptance and depend for their continued effectiveness on the attitudes of the political community" and that "central norms are threatened when public attitudes shift in significant ways").

²⁰⁴ See Blasi, *supra* note 17, at 453 ("[U]nless the appeal to constitutionalism evokes genuine sentiments of long-term commitment or aspiration . . . citizens cannot be expected to forego their preferences of the moment in deference to the claims of the constitutional regime."); *id.* at 457 ("The strength of the political community's commitment to those norms is tested, and it may matter a great deal how well the central norms were nurtured in the periods of calm that preceded the pathology.").

²⁰⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 237 (J.P. Mayer ed., George Lawrence trans., 1969).

²⁰⁶ See Chesney, *supra* note 196 (manuscript at 45) (arguing that informal government challenges to free-speech values possess the capacity to "get the proverbial camel's nose in the tent"); Scordato & Monopoli, *supra* note 195, at 201 ("When White House Press Secretary Ari Fleischer states that 'people have to watch what they say and watch what they do' . . . there is an argument that the government has begun to impinge on speech in an informal, but powerful way."); *id.* at 202 (arguing that private restrictions on private speech may be responding to a subtle form of government influence).

III. FREE SPEECH AND THE FIRST AMENDMENT

Underlying public, nongovernment opposition to incidents of flag-related symbolic counter-speech at sporting events is a sense that the symbolic counter-speakers acted improperly and should have been silenced. The tenor of public response suggests a view that those speakers engaged not in core free-expressive activities, but rather in an “absurd and immature” stunt,²⁰⁷ misusing and abusing their rights by disrespecting America, the flag, the government, veterans, and soldiers defending the nation overseas and at home. And government or other authority should possess and should exercise the power to limit and silence such counter-speakers. In other words, Toni Smith should have been required to join her teammates in the anthem ceremony (just as Mahmoud Abdul-Rauf was) or she should have been kicked off the team (just as Tommie Smith and John Carlos were expelled from the Olympic games) and the booing fans should have been removed from the park.²⁰⁸

This popular call for punishment of expression, even absent formal government imposition of that punishment, suggests the presence of the third defining feature of pathology, a popular departure from the larger free-speech commitment to preserving the individual’s ability to make a political statement.²⁰⁹ The reaction reflects a censorial environment in some portions of the populace, the people speaking not through their elected representatives in the form of formal legal restrictions on dissent, but through their own actions and comments that hint at informal restrictions on dissent.²¹⁰ If such reactions do not suggest a First Amendment problem because government never acted to silence or punish anyone,²¹¹ they do suggest a free speech problem. And that is something different.

²⁰⁷ *Cohen v. California*, 403 U.S. 15, 27–28 (1971) (Blackmun, J., dissenting).

²⁰⁸ See *supra* notes 119–39 and accompanying text.

²⁰⁹ See Krotoszynski, *supra* note 93, at 1255.

²¹⁰ Curtis, *supra* note 24, at 365 (“Much constitutional discussion and action outside of the courts was repressive and reactionary.”).

²¹¹ See Scordato & Monopoli, *supra* note 195, at 200 (“The First Amendment protections of speech are meant to apply to situations where the government has limited a citizen’s right to speak. It is not concerned, as a conceptual matter, with situations where private actors take or threaten action that might chill or limit speech.”); see also SHIFFRIN, *supra* note 61, at 87 (“The common understanding of lawyers and judges is that the first amendment applies only to *governmental* abridgements of speech.”); Graber, *supra* note 5, at 782 (“Courts usually consider the constitutional limits on state power only when state officials take some constitutionally controversial action, such as passing a law many persons claim violates the First Amendment.”).

The First Amendment is the Constitution's textual commitment to free speech,²¹² applicable only as to restrictions by the federal government (and the states, through the Fourteenth Amendment),²¹³ enforced primarily by the courts,²¹⁴ its scope and meaning developed via common-law processes of trial-and-error and doctrinal evolution.²¹⁵ The First Amendment actually fears participation by the people, trusting courts to respect and protect dissenters, to be tolerant of opposing views, and to protect vulnerable minorities from the will of political majorities.²¹⁶ The First Amendment places the power to protect speech in the hands of judges rather than members of the political community.²¹⁷ Akhil Amar attributes this preference for judges to the Fourteenth Amendment's alteration of the First Amendment paradigm — from protection of popular speech critical of an unpopular government

²¹² See Strauss, *supra* note 26, at 36 ("Formally, the textual basis for that law, in the Constitution, is of course the First Amendment. But the central principles that protect free expression in the United States were not established by the addition of the First Amendment to the Constitution in 1791.").

²¹³ See SHIFFRIN, *supra* note 61, at 87–88.

²¹⁴ See Nagel, *supra* note 28, at 304 ("The Court has remained vigilant in seeking to shape a system of open public discussion even when it has rejected free speech claims."); *id.* at 337 ("It is true, however, that the Court has struck down many restrictive laws and practices in the last sixty years; it is this record to which proponents of the modern judicial role point as justification for their high regard for judges as protectors of free speech."); Strauss, *supra* note 26, at 44 (arguing that the most visible development of First Amendment principles occurred in the courts).

²¹⁵ See Strauss, *supra* note 26, at 44–45 (arguing that the American system of freedom of expression emerged in a way typical of the common law, in that it was evolutionary, developing through trial-and-error over fifty years; relied and built upon prior judicial decisions; and reflected concern with matters of policy and political morality).

²¹⁶ See CURTIS, *supra* note 20, at 21 ("The idea of popular protection for free speech might sound strange to modern ears. Today, quite properly, many think of courts as protecting free speech against popular majorities."); Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 783 (1986) ("To say that we ought to pay more attention to . . . majorities does not inevitably mean that there ought to be more restrictions on speech, although I do not deny that, in today's world, such would be the short-term outcome of such a course of action."). *But see* Nagel, *supra* note 28, at 317 ("There is no reason to think that the judiciary's efforts to do justice in individual cases will necessarily foster the vigor or quality of public discussion generally.").

²¹⁷ See Schauer, *supra* note 216, at 765 ("The common wisdom is that if juries were given more decisional power in these areas, either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow."); *see also* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 (1984) (holding that appellate judges must exercise independent judgment and determine whether the record establishes that some speech is unprotected by the First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) (requiring independent appellate factual review "so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression").

(which we expect the rest of the public will protect vigorously) to protection of unpopular speech critical of popular government or of popular political and social norms and ideals, which is better protected by federal judges than by localist publics.²¹⁸ The symbolic counter-speech with which we are concerned, attacking as it does the flag as a popular symbol of the nation and its ideals and raising the ire of the popular majority, falls in this new paradigm.

Free speech, on the other hand, is the popular tradition and understanding of the basic right of all persons to express themselves and to participate in public discussion and debate in an open, pluralist, democratic society.²¹⁹ Free speech is those four principles that are central to a meaningful right of expression.²²⁰ Free speech is concerned not only with what government cannot do,²²¹ but with what individuals can do in the realm of expression. Free speech also is what the public is willing to accept and tolerate in the expressive conduct of others, before moving either to privately silence those minority voices with which the majority disagrees²²²

²¹⁸ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 242 (1998); Akhil Reed Amar, Comment, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 153 (1992).

²¹⁹ See SHIFFRIN, *supra* note 61, at 73 ("Censorship becomes unthinkable only insofar as the collective conscience of a culture has placed it beyond the bounds."); Curtis, *supra* note 24, at 360–61:

Free speech protected the poet, the philosopher, and the scientist. All people had an interest in its preservation. The majority had no right to silence the minority. All had the right to discuss political, moral, and social questions and to espouse any theory they chose.

See also CURTIS, *supra* note 20, at 250–51 (describing antebellum arguments that free speech applied even as to suppression by state governments of abolitionist speech, even though the First Amendment did not apply to the states); *id.* at 352 (arguing that American support for and use of free speech checked abuses by the federal government during the Civil War); *cf.* SHIFFRIN, *supra* note 61, at 74 (describing the "rich American cultural understanding of freedom of speech").

²²⁰ *See supra* notes 66–85 and accompanying text.

²²¹ *See* Curtis, *supra* note 50, at lviii ("By rejecting censorship based on content where speech does not fall into previously established categories it finds justify suppression, the Court protects core First Amendment values and tells legislatures clearly what they may not do.").

²²² Private silencing may take several forms, from the violent (*see* CURTIS, *supra* note 20, at 222–27 (describing series of violent mob attacks on abolitionist printer Elijah Lovejoy in Alton, Illinois, the last of which resulted in his death); *id.* at 144–46 (describing attacks on the paper of James Birney in Cincinnati)), to the hortatory (*see id.* at 146–48 (describing public meetings in Cincinnati where resolutions called for the discontinuance of abolitionist publications within the city because, whatever the evils of slavery, the abolitionist press fomented violence)), to private expressive retaliation such as shunning. *See* Redish & McFadden, *supra* note 27, at 1688 (arguing that a different free-speech inquiry is raised when private individuals find particular views to be abhorrent or offensive and wish to react to those who express or associate with those views); *see supra* notes 196–206 and accompanying text.

or to get the government to do it for them.²²³ As Michael Kent Curtis argues, “the free speech tradition ultimately belongs to the American people and derives strength from their commitment to it,” making crucial a deeper public understanding of the meaning of free speech, apart from constitutional interpretation.²²⁴

Free speech and the First Amendment may, but need not, run together. The majoritarian commitment to free speech is neither perfect nor unwavering.²²⁵ The important difference is that private responses to other private speech, including private restrictions or censorship of other private speakers, are themselves an exercise of the private free speech right.²²⁶ Whatever the right or power of government to act as speaker in the public debate, it cannot express its views by censoring, shunning, or otherwise sanctioning a speaker.²²⁷ But the individual right to select and present one’s own views and beliefs does not “insulate [the individual] from the negative reactions of other private [individuals] who deem those [beliefs] to be offensive.”²²⁸ The command that government not restrict speech in order to protect listener sensibilities²²⁹ does not mean that those private listeners may not protect their own sensibilities by avoiding, including by informal silencing (where one has the power to do so), objectionable speech. The private listener’s objections to offensive speech only become an impermissible heckler’s veto when the listener

²²³ See *supra* notes 145–58 and accompanying text.

²²⁴ CURTIS, *supra* note 20, at 21; see Graber, *supra* note 5, at 810.

²²⁵ See CURTIS, *supra* note 20, at 144–51, 219–27 (describing antebellum mob violence against abolitionist printers in Ohio and Illinois); Redish & McFadden, *supra* note 27, at 1682 (stating that Hollywood directors, writers, and actors who refused to answer questions about their political affiliations did not appear to the public as patriotic defenders of the First Amendment, but as “smug revolutionaries, seeking protection from the nation they were trying to subvert”).

²²⁶ See Redish & McFadden, *supra* note 27, at 1688 (arguing that a distinct First Amendment concern arises in considering how a private individual may react to a view which she finds abhorrent or offensive); Scordato & Monopoli, *supra* note 195, at 200 (“If private citizens are reacting to private speech, a view of free speech grounded in a marketplace of ideas rationale would be completely consistent with this type of citizen reaction.”).

²²⁷ See Redish & McFadden, *supra* note 27, at 1705.

²²⁸ See *id.* at 1713; *id.* at 1700–01 (“[I]ndividuals have a First Amendment right not to associate with other individuals when doing so would effectively undermine their ability to associate for the purpose of achieving pre-determined political ends.”); see also Michelman, *supra* note 10, at 1343 (“Drawing lines, splitting differences, striking bargains, venting spleens — all are the people’s prerogatives.”); Scordato & Monopoli, *supra* note 195, at 200 (arguing that, absent governmental action limiting speech, the negative reactions of private citizens to private speech reflects the marketplace of ideas working as it should).

²²⁹ See *Cohen v. California*, 403 U.S. 15, 21 (1971) (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it . . . would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”); Michelman, *supra* note 10, at 1349.

causes government to exercise sovereign power to restrict that speech to protect her sensibilities.²³⁰

Consider, for example, the Hollywood blacklist of the late 1940s and 1950s, when ten writers, directors, and actors (collectively known as the Hollywood Ten) effectively were barred from working by the major movie studios because of their membership in and activities with the American Communist Party.²³¹ Martin Redish suggests the blacklist was protected free-speech activity of the private movie studios who refused to work with the Hollywood Ten, seconded by the private movie-going public and private citizens groups who engaged in their own, related expressive activity by refusing to watch their films.²³² The private-speech conduct by the studios and moviegoers was counter-speech to the offensive original speech at issue — the Hollywood Ten's Communist ideologies and beliefs. Redish suggests that:

[T]he cognitive disdain that private moviegoers had for the Communist ideology of the blacklisted actors, directors, and screenwriters gives rise to a constitutionally protected interest in exercising the choice not to associate with the efforts of the blacklisted individuals, in much the same way that pro-choice individuals possess a constitutional right to boycott the products produced by a pro-life activist.²³³

On the other hand, commitment to the free speech tradition and the principles at the core of that tradition means that even private individuals should counter-speak in a way that does not smack of censorship, as the blacklist effectively did. This is not to suggest that one acts in derogation of free-speech principles when she seeks to avert her eyes,²³⁴ or when she seeks to disassociate from an offending messenger²³⁵ or offending message.²³⁶ But perhaps even private responses to

²³⁰ See *supra* notes 145–58 and accompanying text.

²³¹ See BOSMAJIAN, *supra* note 27, at 121–23, 125–32; Redish & McFadden, *supra* note 27, at 1682–83.

²³² See Redish & McFadden, *supra* note 27, at 1683. *But see id.* at 1714 (suggesting the problems created by the fact that HUAC worked cooperatively with the movie studios and supported or encouraged the creation of the blacklist); see also BOSMAJIAN, *supra* note 27, at 123 (describing the list of subversive organizations and publications that HUAC prepared and distributed and on which the studios relied).

²³³ Redish & McFadden, *supra* note 27, at 1713.

²³⁴ See *Cohen*, 403 U.S. at 21.

²³⁵ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (holding that First Amendment associational rights of private organization were violated by forced inclusion of a homosexual member, where homosexual conduct was inconsistent with the values the organization sought to instill); Redish & McFadden, *supra* note 27, at 1720 (“[T]he Supreme Court in *Dale* recognized the right of a private association to exclude those whose admission could undermine furtherance of the association’s pre-determined political or ideological

objectionable speech should take the form of true counter-speech that simultaneously reflects recognition of the value and need for tolerance of dissenting or unorthodox viewpoints, as opposed to a demand for formal and official silencing of that objectionable speech.²³⁷ Even if private suppression such as the blacklist or other private rebukes are themselves expressive acts entitled to First Amendment protection, we nevertheless might question whether responses having such a censorial tone are inconsistent with the free-speech tradition.²³⁸

Relating this distinction back to the flag and its complementary symbols, Justice Brennan made a valid point in *Johnson* when he argued:

[P]recisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns²³⁹

In other words, since the attack on the flag is symbolic counter-speech (the flag's message itself being the original symbolic speech), the response should be (to continue the terminology) counter-symbolic-counter-speech — some symbolic reiteration of support, reverence, honor, affirmation, and respect for the flag or of approbation of the counter-speaker and her counter-speech, continuing to use the flag itself as the expressive medium. From the standpoint of a commitment to

several newspaper columnists and the cancellation of a syndicated television show in response to assorted criticisms of President Bush in the days and weeks after 9/11).

²³⁶ See *Hurley v. Irish-Am. Gay, Lesbian Bisexual Grp. of Boston* 515 U.S. 557, 570 (1995) (stating that a private speaker's selection of contingents to form an overall message is entitled to protection from being made to include any objectionable contingents); Wasserman, *supra* note 84, at 173 ("The parade organizers had decided to exclude a message they did not like from their parade message, and that was sufficient to invoke their rights as private speakers to shape expression, by speaking on one subject and remaining silent on another."); see also Scordato & Monopoli, *supra* note 195, at 186 (describing sharp private rebukes of authors and commentators who "voic[ed] unpopular opinions" after 9/11).

²³⁷ See Massey, *supra* note 3, at 375 ("From a societal perspective, toleration of ugly speech, whether racist epithet or burning flag, may be the avenue to recognition of our collective shadow, the first step in its eventual voluntary extirpation by transformation.").

²³⁸ See Redish & McFadden, *supra* note 27, at 1716 ("The only matter for discussion, then, concerns the wisdom and morality of the acts of private citizens who induced, prepared, or enforced the blacklist.").

²³⁹ *Texas v. Johnson*, 491 U.S. 397, 419–20 (1989); see also Mark V. Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39, 43 (1990) (arguing that Justice Brennan did just that in his opinion — waved his own flag).

principles of free speech, the proper response does not include changing the law to deprive counter-speech of protection (or urging such a change in the law).²⁴⁰

At the height of the excitement over Toni Smith's protests in February 2003, fans attended Manhattanville College away games specifically to counter-speak to Smith's protest.²⁴¹ They waved American flags (often handed out by the opposing school's student government) during the anthem and when Smith was introduced prior to the game, booed Smith when she was introduced and whenever she touched the ball, and sang "God Bless America" following the game.²⁴² These fans did as the free speech tradition suggests — reemployed their patriotic symbols (the flag, the song) to make clear their objections to Smith and her symbolic counter-speech, thereby reaffirming their commitment to and belief in the flag and its meaning. And they did it without depriving Smith of the opportunity to play basketball or to continue making her own symbolic counter-statement.

Importantly, counter-speech does not automatically become part of the message of the original speech. While the decision to fly the flag, play the national anthem, or otherwise incorporate patriotic symbolism at the ballpark represents the team's expressive choice, the participation or nonparticipation of individual fans or players does not become part of the team's expression. Toni Smith's nonparticipation in the anthem did not become part of, or interfere with, the patriotic message that Manhattanville College, the basketball team, the fans, and her teammates (all of whom made clear their disagreement with Smith's views) sought to present by continuing to stand at attention and sing "The Star-Spangled Banner."²⁴³ In other words, the school, the team, and the fans could speak symbolically by themselves while also tolerating Smith's symbolic counter-speech, without jeopardizing the integrity of their own original message. If the original speaker's goal is to preserve the original symbolic message, a private prohibition on counter-speech to that symbol will not necessarily serve that goal.

The judicial conception of the First Amendment and the popular conception of free speech may share a symbiotic relationship. It has been suggested that the Supreme Court does not come to a speech-protective position until after popular preferences already have reached that position.²⁴⁴ The courts did not "discover" the

²⁴⁰ This is not to suggest that a private individual's call on government to change the law or amend the Constitution to prohibit flag-related counter-speech is not itself a First Amendment-protected argument; it is. This is to suggest that in making the argument, one does not adhere to principles of free speech. See Redish & McFadden, *supra* note 27, at 1716; see *supra* notes 207–38 and accompanying text.

²⁴¹ See Pennington, *supra* note 14.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See Nagel, *supra* note 28, at 316 ("[N]one of our most serious periods of repression was influenced significantly by judicial enforcement of the first amendment, yet each ended well short of destroying the system of free expression."); *id.* at 337 (arguing that the modern

First Amendment until, at the earliest, 1919,²⁴⁵ and arguably not until 1931,²⁴⁶ and truly broad protections are a product of the past fifty years.²⁴⁷ On the other hand, there has been a long public understanding of free speech and its core ideals, asserted and protected outside the courts.²⁴⁸ As Michael Kent Curtis describes in detail, early efforts to defend free speech (notably against the Alien and Sedition Act of 1798, restrictions on abolitionist and antislavery speech, and restrictions on dissent during the Civil War) were fought on popular ground, by the people outside

general public mood of tolerance for free speech likely was caused by educational and cultural shifts that in turn produced the judicial effort for the protection of free speech). Michael Kent Curtis noted:

At first, the courts largely forgot or ignored the robust free speech tradition that was mobilized against suppression of antislavery speech and that helped to mold the Fourteenth Amendment. But more recent court decisions, particularly since the 1930s, have reincarnated crucial aspects of the free speech tradition and enshrined it in constitutional law.

CURTIS, *supra* note 20, at 384–85; *see also* Nagel, *supra* note 28, at 337–38 (“[N]o Supreme Court decision either legitimized or encouraged early criticism of the war in Vietnam, yet the eventual success of that criticism in discrediting the war might not only have legitimized political dissent generally, but also emboldened the courts to attempt to protect such dissent.”) (footnote omitted).

²⁴⁵ *See* Lee C. Bollinger, *Dialogue Introduction* to ETERNALLY VIGILANT, *supra* note 8, at 1 (describing three cases from 1919 as the first time the Supreme Court interpreted the meaning and reach of the principle of free speech); Nagel, *supra* note 28, at 302 (“It is generally recognized that neither the federal nor the state courts were significant protectors of free speech prior to 1919”); Post, *supra* note 66, at 153 (“In a remarkable series of opinions in 1919, Justice Oliver Wendell Holmes virtually invented both First Amendment theory and First Amendment doctrine.”); Strauss, *supra* note 26, at 47 (stating that the First Amendment canon in the Supreme Court began not with a ringing Holmes or Brandeis dissent, but with a Holmes opinion upholding suppression of speech).

²⁴⁶ *See* Strauss, *supra* note 26, at 50 (“The Supreme Court did not actually uphold a free-speech claim until 1931. . . .”); *see also* Stromberg v. California, 283 U.S. 359 (1931) (reversing a conviction under state statute prohibiting display of red flag as a symbol of opposition to organized government).

²⁴⁷ *See* CURTIS, *supra* note 20, at 20 (“[N]ot until the 1930s, 1940s, and 1960s did a broadly protective reading of First Amendment freedoms take shape in the Supreme Court.”); Bollinger, *supra* note 246, at 1 (“[T]he First Amendment — as we know it today — is an invention of the twentieth century.”); Curtis, *supra* note 24, at 358 (agreeing that First Amendment law, if not free speech principle, is a recent product); Strauss, *supra* note 26, at 44 (“The American system of freedom of expression, as we know it, did not begin to emerge as a coherent body of legal principles until well into the twentieth century.”).

²⁴⁸ *See* CURTIS, *supra* note 20, at 21; Curtis, *supra* note 24, at 358 (arguing that core free speech ideas had a long history outside the courts); *see also* Devins, *supra* note 25, at 1140 (“Popular sentiment, not judicial edicts, explain the eventual repudiation of the 1798 Alien and Sedition Act, the 1917 Espionage Act . . . and McCarthy era restrictions on civil liberties.”).

the judicial system.²⁴⁹ By contrast, the Supreme Court only rejected the Sedition Act in 1964, 160 years after public opposition had driven the law from the books and fines and convictions under the law had been undone, when the “court of history” already had declared its unconstitutionality.²⁵⁰

Strict judicial protection of free speech during the past half-century has shifted the balance between popular and judicial defense, with the courts arguably going beyond what the public might otherwise be comfortable with.²⁵¹ Importantly, the First Amendment only requires broad judicial interpretation when the popular political branches are controlled by officials (representing popular constituencies) who are not disposed towards a protective free-speech tradition and who are inclined to repress political dissent; only then will any laws be passed or actions taken that might be challenged and invalidated in the courts.²⁵² In other words, the courts become involved only when the first feature of pathology is present — when government is the one restricting expression, but not where the attempted censorship remains purely private.

Blasi’s pathology theory essentially recognizes the distinction between the people’s free speech and the Court’s First Amendment and seeks to close the gap between the two.²⁵³ He recognizes that there is a “feedback loop” between judicial

²⁴⁹ See CURTIS, *supra* note 20, at 53–55, 105–166, 352–53; see also Graber, *supra* note 5, at 781 (“Jacksonian America was a place where most constitutional controversies were fought outside of courts. The popular free speech tradition that developed during the first sixty years of the nineteenth century was not an exceptional constitutional development, but the dominant mode of constitutional discourse. . .”).

²⁵⁰ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 264, 276 (1964) (“Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”) (footnote omitted); *id.* (stating that fines levied under the Act were paid back and President Thomas Jefferson pardoned all who had been convicted and sentenced); see also Graber, *supra* note 5, at 809 (“We do not know whether Jeffersonian or Jacksonian justices thought the Alien and Sedition Acts constitutional. When Jeffersonian and Jacksonian justices were on the bench, Jeffersonian and Jacksonian officials in the elected branches of the national government refused to re-enact those or analogous measures.”); Heyman, *supra* note 24, at 553; Kalven, *supra* note 59, at 209 (arguing that *New York Times* made the touchstone of the First Amendment the abolition of seditious libel).

²⁵¹ See Horwitz, *supra* note 16, at 3 & n.4; Wood, *supra* note 25, at 455 & n.1. *But see* Robert L. Tsai, *Cognitive Constitutionalism: Speech and Strife*, 67 LAW & CONTEMP. PROBS. (forthcoming 2004) (manuscript at 4, on file with author) (“Cultural acceptance of protective speech norms has fed tolerance of what would otherwise be deemed troubling judicial language if it were found in other areas of law.”).

²⁵² See Graber, *supra* note 5, at 810; see also Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 655 (1993) (stating that the narrative of judicial review “starts with some governmental action that affects an individual”).

²⁵³ See Blasi, *supra* note 17, at 449–50.

interpretation of the First Amendment and public understanding of free speech.²⁵⁴ The problem with Blasi's argument is not his identification of the problem of pathology, but his solution — a "lean, trim" judicially interpreted and applied First Amendment that does not extend so far as to lose popular support for core principles of free speech in the worst of times.²⁵⁵ His solution is to narrow the scope of the First Amendment to make judicial protection of dissenting speech publicly palatable in times of great fear.²⁵⁶

But the way to close the gap is instead for the Court, in taking the interpretive lead in broadly protecting expression, to be publicly persuasive in establishing the contours of protected speech.²⁵⁷ The Court must convince the public that its understanding of the First Amendment is correct and should carry into popular notions of free speech.²⁵⁸ The Court must sell the people on those four principles

²⁵⁴ See Curtis, *supra* note 24, at 348–49; see also Friedman, *supra* note 252, at 668–70 (describing role of courts as facilitators and shapers of public debate on constitutional questions, particularly when the court acts as the catalyst for societal debate on an issue).

²⁵⁵ See Blasi, *supra* note 17, at 477 ("Better equipped for the storms of pathology might be a lean, trim first amendment that covered only activities most people would recognize as serious, time-honored forms of communication."); *id.* ("[W]hat judges say must ring true, at some level of consciousness, with the most influential shapers of public opinion."). For a general response to Blasi's theory, see Martin H. Redish, *The Role of Pathology in First Amendment Theory: A Skeptical Examination*, 38 CASE W. RES. L. REV. 618, 625 (1987–88) ("[I]t is conceivable that reserving the essence of first amendment protection for major political battles could actually cause the first amendment to atrophy.").

²⁵⁶ See Blasi, *supra* note 17, at 462 ("[T]he central norms of the constitutional regime in the United States derive their authority initially from public acceptance and depend for their continued effectiveness on the attitudes of the political community.").

²⁵⁷ Redish, *supra* note 255, at 625 ("[I]t is equally conceivable that a persuasive articulation and defense of fundamental constitutional values by the Justices would have had the exact opposite effect, by defusing the public's mob psychology."); see SHIFFRIN, *supra* note 61, at 73 ("Law can play a role in shaping culture. . ."); Bloom, *supra* note 50, at 427 ("[T]he Court should consider itself under an obligation to speak directly to the people and attempt to explain in nontechnical language why it believes it must reach the result it has."); Curtis, *supra* note 50, at lviii ("A crucial function of decisions about the First Amendment is to provide guidance for the public at large. . ."); Friedman, *supra* note 252, at 670 ("Courts can take an unusual or uncredited position and move it to the center. Courts can interrupt societal patterns of thought, presenting wholly new or inadequately considered views, whether the views are welcome or not.").

²⁵⁸ See Bloom, *supra* note 50, at 431 (arguing that the Court's rhetorical failure "sacrifices the opportunity to exert any significant, direct influence on popular understanding of the Constitution"); Friedman, *supra* note 252, at 672 ("Many references to sources supporting constitutional judgments are an appeal to the values of the people."); Krotoszynski, *supra* note 93, at 1255 (arguing that "factual and doctrinal clarity contributes not only to the opinion's persuasive force, but also helps to educate the citizenry about the importance of open debate in a democratic society"); Nagel, *supra* note 28, at 324 ("The idea that judicial opinions are useful educational devices stems, in part, from admiration for the inspiring

of free speech and on their application not only in the abstract, but in these concrete circumstances.²⁵⁹ Unfortunately, the Court often does not do this well.²⁶⁰ Especially recently, the Court drafts decisions to convince, persuade, and guide its own world — itself, lawyers, and lower courts — rather than the public.²⁶¹ This failure affects popular acceptance of the principles announced by the Court, that is, whether a principle that the Court says is part of the First Amendment also becomes part of the popular conception of the free-speech tradition.²⁶²

The difficulty in this regard is starkest with reference to the type of flag-related symbolic counter-speech discussed here. In striking down the compulsory flag salute in *Barnette*,²⁶³ the Court relied on broad, powerful rhetoric, written in a “straightforward, easily comprehensible, and frequently moving style.”²⁶⁴ The

rhetoric found in many decisions.”).

²⁵⁹ [I]t would be naive to think there is, or is soon likely to be, a total mutual trust prevailing among the citizens themselves. The phenomenon of the tyranny of the majority . . . remains a factor and is often reflected in a general wariness one occasionally senses between groups within the nation.

BOLLINGER, *supra* note 19, at 241; SHIFFRIN, *supra* note 61, at 168 (“Even when people prize dissent in the abstract there can be no assurance that they will respect it in the concrete.”); Nagel, *supra* note 28, at 326 (“There is substantial evidence demonstrating that although the public approves of civil liberties in the abstract, it generally disapproves of them in concrete situations.”); *see also supra* notes 68–96 and accompanying text.

²⁶⁰ *See* BeVier, *supra* note 23, at 1091 (arguing that current Supreme Court opinions are anything but lively, nor are they rhetorically memorable, tending to be “wooden, stale, formulaic, tiresome to read — and windy”); Post, *supra* note 66, at 153 (“[W]hat is amiss with First Amendment doctrine is not so much the absence of common ground about how communication within our society ought constitutionally to be ordered, as our inability to formulate clear explanations and coherent rules capable of elucidating and charting the contours of this ground.”).

²⁶¹ *See* Bloom, *supra* note 50, at 430 (“Arguably, the Court does not speak to the public persuasively, if at all, to a large degree because it has gotten out of the habit of engaging in ordinary discourse.”); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 178 (1985) (“The Court, in short, has adopted the formulaic style in part because its primary audience is not the general public. It is addressing itself, its clerks, and the lower courts.”).

²⁶² *See* Bloom, *supra* note 50, at 431 (arguing that the Court should explain certain, more controversial decisions to the public simply out of respect); Curtis, *supra* note 24, at 367 (“When broadly accepted, Court decisions, like some constitutional amendments, may signal that a decision has been reached.”); Curtis, *supra* note 50, at lviii (“[T]he new First Amendment is driven by extraordinary attention to highly complex and formalistic rules, rules whose very complexity seems to divert the Court, the public, and advocates from the purposes such rules are designed to achieve.”).

²⁶³ *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

²⁶⁴ Bloom, *supra* note 50, at 420; *see* Tsai, *supra* note 251 (manuscript at 12) (arguing that “uplifting, nationalistic language has been a periodic feature of free expression decisions. . . .”); *see also Barnette*, 319 U.S. at 634 (“To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual’s right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.”);

opinion was broadly accepted by the public as right, not necessarily because it struck the public as intuitively correct, but because it was written "in language apparently aimed at explaining, as well as persuading the public at large and not simply constitutional lawyers, that the Court had reached the right decision."²⁶⁵ In contrast stand the Court's opinions upholding flag burning as protected speech²⁶⁶ (two decisions notable for their immediate unpopularity)²⁶⁷ and the repeated congressional and popular efforts to overturn them, suggesting that the public has not accepted the Court's conclusion or reasoning.²⁶⁸

id. at 637 ("To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.").

[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.

Id. at 641; *see also id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.").

²⁶⁵ Bloom, *supra* note 50, at 423; Curtis, *supra* note 50, at lviii ("The great contribution of Justice Jackson's decision . . . was that in clear, forceful and non-technical language it explained the deeper meaning of free speech in the flag-salute controversy."); *see also* Krotoszynski, *supra* note 93, at 1255-56 (proferring *Cohen v. California*, the "fuck-the-draft" case, as another case in which the Court used easily understood language to emphasize to the public the political values embodied in the First Amendment).

²⁶⁶ *See* United States v. Eichman, 496 U.S. 310 (1990) (striking down a federal statute prohibiting flag burning); Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning is constitutionally protected speech and striking down a state prohibition); *see* Kitrosser, *supra* note 81, at 1353 (stating that *Eichman* basically relied on the ground laid by *Johnson* one year earlier).

²⁶⁷ *See* GOLDSTEIN, *supra* note 35, at 111-13 (describing public and political outcry in the immediate aftermath of *Johnson*, including polls showing overwhelming popular majorities opposed to the decision and in favor of a constitutional amendment); Friedman, *supra* note 252, at 605-06 & n. 142 (noting that polls showed that almost two-thirds of society appeared to support a constitutional amendment to undo those decisions).

²⁶⁸ *See* FLAG BURNING CASES, *supra* note 127, at 291-455 (providing legislative materials on the Flag Protection Act of 1989, a direct federal response to *Johnson*); GOLDSTEIN, *supra* note 35, at 228 (describing repeated congressional efforts since 1995 to pass a constitutional amendment empowering Congress to outlaw flag desecration, some of which passed the House and failed in the Senate); Curtis, *supra* note 50, at xlvi (describing immediate responses to *Johnson*, including the Flag Protection Act and a constitutional amendment); Michelman, *supra* note 10, at 1354 (discussing whether less harm is done by a judicially accepted statute prohibiting flag burning or by a constitutional amendment prohibiting flag burning); Van Alstyne, *supra* note 127, at 579 ("[I]n all the debates on the redrafted Federal statute and the proposed constitutional amendment, no one ever once gave a good reason

This difference derives, at least in part, from Justice Brennan's denser, more formulaic, less literary approach in *Johnson*.²⁶⁹ His majority opinion focused entirely on First Amendment jurisprudence and precedent, and reads as an effort to fit flag burning into the existing doctrinal framework.²⁷⁰ The Court first focused on why the prohibition on flag burning is not content-neutral and not to be analyzed under the less-strict standard of review for restrictions that are not directed at the communicative impact of the expression.²⁷¹ It then considered whether the government's interests in flag protection are compelling, and whether those interests, on balance, justify restrictions on expressive flag burning, ultimately concluding that they did not.²⁷² *Johnson* is a good example of the Court's current decision-making approach, as described by Robert Nagel, in which the Court puts forward (what it decides are) the appropriate tests, then drafts the opinion in a manner that suggests that the outcome flows ineluctably from that test, with no value judgments added by the Court as to the outcome.²⁷³ Such a style, Nagel argues, disqualifies the reader and reduces the judge to observer of a mechanical function.²⁷⁴

why we should, as a people, desire to strip citizens of such right as they may otherwise have under the First Amendment. . . ."); see also *Amendment Hearing*, *supra* note 128, at 24–30 (statement of Stephen Presser) (arguing that *Johnson* overturned the common belief that the First Amendment did not protect flag desecration, that this view continues to be widely held even after *Johnson*, and that a constitutional amendment best reflects popular opinion). Of course, the fact that no amendment has succeeded in passing both houses of Congress perhaps suggests that, while there may be majority support for an amendment, the necessary supermajority support is missing. See Friedman, *supra* note 252, at 606.

²⁶⁹ Cf. Curtis, *supra* note 50, at lviii (arguing that one can measure the unfortunate distance traveled by the First Amendment by comparing the simplicity of *Barnette* with the complexity of later symbolic-speech cases).

²⁷⁰ See Bloom, *supra* note 50, at 427 ("From a purely doctrinal standpoint, Justice Brennan did a creditable job of explaining why the conviction could not be sustained."); Nahmod, *supra* note 13, at 547 ("*Johnson* is an easy case if well-established first amendment principles are applied to it").

²⁷¹ See *Texas v. Johnson*, 491 U.S. 397, 406–10 (1989); see also Kent Greenawalt, *O'er the Land of the Free: Flag Burning As Speech*, 37 UCLA L. REV. 925, 930 (1990) (arguing that the important step in *Johnson* was determining the constitutional level of scrutiny); *id.* at 935 (arguing that the Court's conclusion that the state interest is directed at communication is sound).

²⁷² See *Johnson*, 491 U.S. at 416–17 (concluding that the government was attempting to control the use of a designated symbol for certain purposes and to restrict the use of that symbol for other purposes); *id.* at 417–18 (rejecting a separate juridical category for the flag).

²⁷³ See Nagel, *supra* note 261, at 204 (arguing that "doctrine determines the outcome (as the judges watch)," with the judges' task focused on deciding how the entire set of problems should be handled, acting more as regulator than adjudicator); see also BeVier, *supra* note 23, at 1091 (arguing that the Court's doctrinal tests "lend to the opinions a mechanistic, bureaucratic tone . . . designed to give the impression that they genuinely guide and constrain the Court's judgment").

²⁷⁴ See Nagel, *supra* note 261, at 197; see also Curtis, *supra* note 50, at lviii.

Largely absent from *Johnson* is *Barnette*-style publicly directed rhetoric. There are traces of such efforts toward the end of Justice Brennan's opinion, including suggestions that the "flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today;"²⁷⁵ that the decision is a "reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as *Johnson's* is a sign and source of our strength;"²⁷⁶ that "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters,"²⁷⁷ but to "persuade them that they are wrong;"²⁷⁸ and that "[w]e do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents."²⁷⁹ All true and all meaningful.²⁸⁰ But, as Lackland Bloom suggests, it rings flat, coming across as preachy, patronizing, and heavy-handed, suggesting that those who favor the punishment of flag burning are acting in a way inconsistent with American values.²⁸¹ Justice Brennan may have been trying to explain and justify his decision to the general public so that First Amendment protection became free speech principle — he just did not do a very good job.²⁸²

²⁷⁵ *Johnson*, 491 U.S. at 419.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 420.

²⁸⁰ See Tushnet, *supra* note 239, at 43; see also Krotoszynski, *supra* note 93, at 1254 n.26 (arguing that Justice Brennan does "an excellent job of vindicating important First Amendment values without endorsing the particular behavior at issue"); Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165, 168 (1989) ("While prudence, self-restraint, and an appropriate sense of judicial modesty may have precluded such language, the Court's decision has raised, not lowered, the significance of Old Glory.").

²⁸¹ See Bloom, *supra* note 50, at 428; see also *Johnson*, 491 U.S. at 434 (Rehnquist, C.J., dissenting) (belittling that portion of the majority opinion as "a regrettably patronizing civics lecture"); Tushnet, *supra* note 239, at 43 (calling this an "odd statement" in light of the Chief Justice's own dissent).

²⁸² See Bloom, *supra* note 50, at 428; see also GOLDSTEIN, *supra* note 35, at 113–14 (citing Supreme Court sources indicating that the justices were too blasé about the issue, that consensus on the Court had been reached easily on the issue, and that the justices were not prepared for the type of flag-waving that followed). Justice Brennan's failure in this regard is surprising given that he had demonstrated in earlier First Amendment decisions an ability to utilize a high-minded rhetorical style. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *id.* at 273 ("Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations."); see also BeVier, *supra* note 23, at 1080 (describing Justice Brennan's opinion in *New York Times* as "masterful and doctrinally innovative").

Of course, even the most literary, grandly rhetorical, nontechnical decision may not persuade the public to the Court's conclusion; perhaps nothing will disabuse a vocal portion of the population of the belief that any perceived "disrespect" for the flag and its complements, no matter the form, is so beyond the pale as to be forever subject to restriction.²⁸³ The point, really, is that the Court should at least make the effort to convince the public that its view is correct in order to advance free speech in the public mind, as well as the First Amendment in the doctrinal sense.²⁸⁴ Or at least draft the opinions, as Lillian BeVier argues the Warren Court did, so as to generate a public "impression of a Court vigorously engaged, grappling with fundamental questions and confidently drawing new doctrinal boundaries."²⁸⁵

Ironically, publicly directed rhetoric often comes not from the Court majority, but from the dissent. Nagel argues that Chief Justice Rehnquist's dissent in *Johnson*, with its references to Emerson, Whittier, Key, and America's greatest military triumphs, was addressed not to lawyers, but to the public, an effort to foment political opposition to the Court's decision precisely to ensure that the majority's First Amendment principles did not gain broad acceptance as free speech principles.²⁸⁶

²⁸³ See Bloom, *supra* note 50, at 431 (arguing that many still disagree with Justice Jackson's opinion in *Barnette* and that even the most evocative opinion in *Johnson* would not have changed many minds); see also Curtis, *supra* note 50, at xiv ("Barnette had declared that the First Amendment prohibited government enforced orthodoxy. *Johnson* put that principle to a severe test, in the form of an insult to the flag that was deeply offensive to many Americans.") (footnote omitted).

²⁸⁴ See Bloom, *supra* note 50, at 427 ("*Johnson* is the type of case in which the Court should consider itself under an obligation to speak directly to the people and attempt to explain in nontechnical language why it believes it must reach the result that it has."); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1061 (2000) (arguing that the judiciary may sway public opinion and "plays a role in the formation of public ideas not only about individual decisions, but about broader questions of equality and democracy"); Nagel, *supra* note 28, at 324 ("The ringing words in some of the dissents of Justice Holmes or Black, for example, have become part of our political culture."); Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 690 (1990) ("Every persuasive opinion necessarily helps to shape the political climate.")

²⁸⁵ BeVier, *supra* note 23, at 1091.

²⁸⁶ See Nagel, *supra* note 284, at 689 ("Think what you will of Rehnquist's dissent, I do not believe it was addressed primarily to lawyers."); see also Krotoszynski, *supra* note 93, at 1255 n.32 (describing Rehnquist's opinion as "a pathetic attempt to justify a purely emotional response to the facts of the case"); Massey, *supra* note 48, at 1047-48 (arguing that Rehnquist's opinion provides "a dismaying example of the use of history as a rationale for decision," proving only the "obvious fact that the American flag has been a symbol of the nation for its entire existence"); cf. M.C. Mirow, *Kennewick Man, Identity, and the Failure of Forensic History*, in HISTORY IN COURT: HISTORICAL EXPERTISE AND METHODS IN FORENSIC CONTEXT 241, 242 (Alain Wijffels ed., 2001) ("[F]orensic history is an adaptation of 'academic' history suited to the resolution of legal disputes and may include historical interpretations by non-historians.").

IV. SYMBOLIC COUNTER-SPEECH AND THE FLAG

One of the three features of a pathological period is an increase in symbolic expression, as those seeking to maintain control in times of great fear — be it government or popular majority — resort to the symbolic short-cut to unity and commitment in the face of the feared challenge to that status quo.²⁸⁷ Thus the proliferation of American flags since 9/11, particularly at sporting events.²⁸⁸ The increase in symbolic speech correlates to the decrease in both government and private tolerance for dissent and unorthodoxy, the other defining elements of pathology.²⁸⁹ At the same time, the increase in government-sponsored and publicly supported patriotic symbolic speech necessitates at least the opportunity for an increase in symbolic counter-speech. The source of the controversy as to flag-related symbolic counter-speech is the tension between simultaneous increases in opportunities for dissenting counter-speech and the tendency toward suppressing all dissenting counter-speech.

Because much symbolic counter-speech involves the flag and its complementary symbols, the concept allows us to examine popular and government arguments and efforts towards “flag preservation.” By definition, flag preservation restricts or limits flag-related symbolic counter-speech, the use of the flag as the vehicle or medium for counter-speech to the flag’s preferred message.²⁹⁰ The most prominent flag-preservation efforts are the repeated attempts to amend the Constitution to overturn *Johnson* and *Eichman* and to give Congress the power to outlaw flag desecration; the most recent effort passed the House of Representatives in June 2003.²⁹¹ It is tempting to think of the present proposed amendment as a product of

²⁸⁷ LEVINSON, *supra* note 97, at 130 (“We do indeed live by symbols, whether they are tangible pieces of colored cloth or marble depictions of those the culture wishes to honor, or the more intangible messages generated by days of commemoration and celebration.”); Nahmod, *supra* note 13, at 542 (“By indicating that the majority of the political community believes that certain patriotic symbols are indeed deserving of respect, such governmental promotion has the full intellectual and emotional force of that community behind it.”); see *supra* notes 185–97 and accompanying text.

²⁸⁸ See *supra* notes 107–18 and accompanying text.

²⁸⁹ See Blasi, *supra* note 17, at 462 (“The central norms are threatened when public attitudes shift in significant ways. . . . [T]he core commitments of the first amendment, the attitudes that matter most are those regarding the practical wisdom and moral propriety of tolerating unorthodox, disrespectful, potentially disruptive ideas.”); see *supra* notes 162–206 and accompanying text.

²⁹⁰ See *supra* notes 97–106, 140–58 and accompanying text.

²⁹¹ See H.R.J. Res. 4, 108th Cong. (2003) (proposing constitutional amendment providing “The Congress shall have power to prohibit the physical desecration of the flag of the United States”); 149 CONG. REC. H4843 (daily ed. June 3, 2003) (passing the House with the necessary two-thirds supermajority).

the current pathology; certainly arguments in the House in favor of the amendment played on 9/11, terrorism, current overseas military activities, and the extant pathology.²⁹² But in fact such amendment efforts have been a regular occurrence since 1995.²⁹³

A proper understanding of the concept of symbolic counter-speech, particularly as it has played out at sporting events during the present pathology in the United States (and Canada), reveals several important insights into the flag-preservation movement. The concept illustrates the logical and theoretical inconsistency between flag preservation and principles and traditions of free speech.

Most importantly, a constitutional prohibition on use of the flag as the medium for counter-speech is not, as flag-protection proponents assert, merely a minor restriction on one “particularly incendiary” manner of conveying a message.²⁹⁴ This argument is employed primarily to gain the support of those people who profess a commitment to the free-speech tradition by convincing them that a prohibition on flag desecration (and presumably other types of flag-related symbolic counter-speech) does not work a broad exception or incursion into the freedom of speech.²⁹⁵

But the very reason for speaking symbolically — particularly through the flag and its complements — is to simplify the communicative process, to more easily get

²⁹² See, e.g., 149 CONG. REC. at H4813 (statement of Rep. Weldon) (“Even as American soldiers prepared for war in Iraq, there were reports of protesters defacing flags, even flags being displayed in a memorial to the victims of September 11, 2001. These acts are disgraceful. They are repugnant, and they should not happen in this great Nation.”). Representative Vitter similarly stated:

Across our land Americans proudly flew their flags from their homes, cars and workplaces as a demonstration of their love for the United States, our values, and their support for the war against terrorism. These actions clearly illustrate that the American people see the flag as a symbol of hope, strength, and freedom. It is the one national symbol that we can all unify behind. In the flag is at one time our history, our aspirations, and our identity. Therefore, we should act today as reaffirmation of what our country stands for.

Id. at H4831; see also *id.* at H4832 (statement of Rep. Barrett) (“I wonder how the soldiers in Afghanistan or Iraq, who fight every day to protect our nation from ever seeing the horrors of another September 11, feel when they see or hear about American citizens burning the American flag — the very flag they fight under.”).

²⁹³ See GOLDSTEIN, *supra* note 35, at 228 (describing annual attempts at such an amendment since 1995, several of which passed the House and failed in the Senate); cf. Greenawalt, *supra* note 271, at 927 (arguing that the issue of flag burning is relatively trivial, but “[o]nly a country whose fundamental institutions are solid and accepted has the luxury to worry about such a minor matter”).

²⁹⁴ See *Amendment Hearing*, *supra* note 128, at 24–26 (statement of Stephen Presser); see also 149 CONG. REC. H4820 (daily ed. June 3, 2003) (statement of Rep. Cunningham) (“Protest in any way you want, just do not burn the American flag.”).

²⁹⁵ See Schauer, *supra* note 37 (manuscript at 42) (“The First Amendment . . . appears to strike fear in the hearts of many who do not want to be seen as being against it.”).

one's message across and accepted by listeners.²⁹⁶ Symbolism such as a flag "is a short cut from mind to mind," designed to "knit the loyalty" of followers to the nation and its mission and ideals.²⁹⁷ The power of the symbol operates at a visceral, nonrational, emotional level and its repeated use can develop feelings of reverence for that symbol.²⁹⁸ Counter-speakers want to employ symbolism in their counter-message for precisely those reasons.

Moreover, to suggest that opponents of the flag's message still can convey their message through "pure speech"²⁹⁹ ignores the basic purpose and nature of symbolic counter-speech, which is to respond to the original symbol on its own terms. To eliminate flag-related symbolic counter-speech is to deny the same simplified "short cut from mind to mind" to those who would argue for disunity or otherwise oppose the original messages expressed by the flag and its complements.³⁰⁰ It deprives the counter-speaker of the simple, visceral, nonrational, emotive communicative path. It deprives counter-speakers of the ability to express the intensity of their feelings.³⁰¹ Counter-speakers would be unable simply to oppose the flag's message through the flag; they instead must explain and describe the basis for their opposition through reasoned and intellectualized persuasion, unable to employ the particular, unique, and simpler message, to make a direct response to the original symbolic speech that is qualitatively different than a less direct, verbal response.³⁰² And even conceding,

²⁹⁶ See Massey, *supra* note 3, at 369 ("Perhaps symbols, even more than words, contain a distilled clarity that overcomes the ordinary difficulties of communication, and facilitates mutual understanding."); Nahmod, *supra* note 13, at 542 (arguing that this is why government engages in this type of symbolic expression).

²⁹⁷ See *Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

²⁹⁸ Greenawalt, *supra* note 271, at 944.

²⁹⁹ See *Amendment Hearing*, *supra* note 128, at 24 (statement of Stephen Presser); 149 CONG. REC. at H4834 (statement of Rep. Skelton) ("Any point of view that can be expressed by flag burning can be better expressed in a manner that is reasoned, rational and more effective in communicating an idea or attempting to persuade others.").

³⁰⁰ See *Texas v. Johnson*, 491 U.S. 397, 416-17 (1989) (stating that if the state could forbid flag burning, "the flag itself may be used as a symbol — as a substitute for the written or spoken word or a 'short cut from mind to mind' — only in one direction.").

³⁰¹ See Greenawalt, *supra* note 271, at 946 ("[T]he intensity of their opposition was precisely what the protesters were trying to express."); Nahmod, *supra* note 13, at 544 (arguing that communication through emotion is entitled to considerable protection and Johnson himself communicated emotively); Nimmer, *supra* note 33, at 56 ("[T]hat flag burning is an emotion-laden form of stating 'I hate the government' should not render it any the less eligible for first amendment protection."); see also *Cohen v. California*, 403 U.S. 15, 26 (1971) ("We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.").

³⁰² See Nimmer, *supra* note 33, at 55-56 (arguing that expression that stirs emotions can convey the intended message more forcefully than the intellectualized expression of words);

as Michael Curtis does, that symbolic counter-speech directed at the flag and its complements — be it burning a flag, booing the anthem, or the silent nonparticipation of Toni Smith, Mahmoud Abdul-Rauf, Tommie Smith, and John Carlos — is more effective at antagonizing than persuading,³⁰³ core free speech values typically leave to the individual speaker the choice of whether to be fully, or even minimally, effective or persuasive or simply obnoxious.³⁰⁴

Government restriction on any form of flag-related symbolic counter-speech (which a constitutional amendment is intended to enable) affects the substantive balance of public debate and therefore the possible substantive outcome of that debate. It gives one side more leeway and clear advantages in putting forward its message — the ability to muster symbolism and nonrational, nonverbal, emotional persuasion. Free speech is concerned with the process of public debate; thus restrictions that disparately affect the process of debate in a way that influences the substantive outcome of that debate are inherently problematic.³⁰⁵ Put in Justice Scalia's terms, free-speech principles reject any rule that permits "one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."³⁰⁶

If teams, players, and fans can honor American society by singing "The Star-Spangled Banner" but Toni Smith cannot protest that society by turning her back during the song, she, as a counter-speaker, is forced to follow rules of debate that are not imposed on the original speakers. This is true for Smith because her symbolic protest was her best opportunity to reach (and get a response from) a mass audience. She was able to use the one expressive platform uniquely available to her — the anthem ceremony at a college basketball game — to present her message. It would have been infinitely more difficult (if not impossible) for her to have gotten anywhere near the attention by attempting to present her message through the spoken word.

see also Bloom, *supra* note 50, at 426 ("The message is not simply 'I disagree with what the flag represents'; it is also inevitably 'I have no respect for the flag.' As such, there is probably not any other equally effective manner of conveying the message."); Kitrosser, *supra* note 81, at 1391 ("[T]he visual nature of the presentation chosen by Johnson, particularly in light of common visceral associations with the physical entity of the flag, was not interchangeable with verbal communication.").

³⁰³ Curtis, *supra* note 50, at lvii.

³⁰⁴ *See id.* ("[F]or those who think the First Amendment has a solid core, that political speech is part of it, and that politically motivated burning of one's own flag is political speech, suppressing flag burning as political protest is simply not a constitutionally available option."); Krotoszynski, *supra* note 93, at 1254 n.25 ("Whether we extol or excoriate this kind of social protest, the First Amendment . . . gives protesters broad latitude to select the means of communicating their point of view.").

³⁰⁵ *See* Curtis, *supra* note 8, at 450 (arguing that the strength of free speech "comes in part from its nature as an institution that does not specify outcomes").

³⁰⁶ R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

Second, the interests and goals of flag protection are not logically limited to protecting one particular representation of the flag from incineration. Rather, they sound in concerns for guaranteeing, even compelling, respect and reverence for the flag, and, more to the point, for eliminating all outright disrespect for the flag in whatever form.³⁰⁷ At times, this truer, broader goal underlying flag protection comes out in honest public statements about the need to mandate respect.³⁰⁸

But if the goal is commanding respect for the flag, it is unprincipled to limit the legal prohibition only to physical burning or desecration and not to all other expressions of symbolic disrespect. And if the legal solution is an amendment that will change the meaning and application of the Constitution, there is no rational reason to have the amendment stop only with overturning *Johnson* and *Eichman* while leaving other forms of flag-related symbolic counter-speech untouched, including much that shows similar disrespect for patriotic symbols. A broader prohibition, of course, would destroy the illusion that flag protection is anything other than a substantive incursion into free-speech protections.

Consider that Toni Smith (as well as Mahmoud Abdul-Rauf, Tommie Smith, and John Carlos) arguably showed disrespect for the flag and what it (on the understanding of most people) symbolizes when each refused to participate in the legally prescribed manner in the ceremony to honor the flag and America. Consider that baseball fans arguably showed disrespect for the flag and the national anthem when they booed the song. Consider that individuals arguably show disrespect for the flag whenever they display it other than in the formally accepted ways.³⁰⁹ Much has been made of the suggestion that acts of flag desecration undermined the morale of troops fighting in Viet Nam.³¹⁰ But it is not certain that a war veteran or a soldier fighting in Iraq would be any less offended or demoralized by Toni Smith's expressive actions than by a burning flag.³¹¹

³⁰⁷ See Nahmod, *supra* note 13, at 542 (arguing that the dissenters in *Johnson* sought "to force individuals to treat such patriotic symbols as sacred by criminalizing their 'desecration.'"); see also Greenawalt, *supra* note 271, at 946 ("Given the ordinary and major occasions of its use, there is such a thing as too much reverence for the flag as a symbol.").

³⁰⁸ See, e.g., 149 CONG. REC. H4836 (daily ed. June 3, 2003) (statement of Rep. Langevin) ("As an international emblem of the world's greatest democracy, the American flag should be treated with respect and care."); *id.* at H4833 (statement of Rep. Baca) ("We must ensure that our symbol, representing all of the things Americans hold sacred is respected."); *id.* at H4813 (statement of Rep. Weldon) ("The flag deserves and demands our respect."). *But see* Nahmod, *supra* note 13, at 548 (arguing that "sacralizing" the flag is unwise).

³⁰⁹ See *Spence v. Washington*, 418 U.S. 405, 406 (1974) (involving prosecution of student who hung an American flag upside down, with a peace symbol made of black tape placed on both sides of the flag); Van Alstyne, *supra* note 127, at 577; see *supra* note 126-30 and accompanying text.

³¹⁰ See Greenawalt, *supra* note 271, at 945.

³¹¹ *Cf. id.* at 946 ("Presumably what demoralized the troops was knowing a fairly wide opposition to the war was so intensely felt by some citizens that they engaged in the extreme act of burning the flag.").

The most troubling response to Toni Smith's flag-related symbolic counter-speech occurred when a Viet Nam veteran walked out of the stands and onto the court in the middle of one game, American flag in hand, and confronted Smith face-to-face in a threatening manner.³¹² It is difficult to believe that this man would have been more upset had Smith burned a flag as opposed to turning her back to it — and one wonders what he might have done had he been any more upset at Smith and her expressive acts. The incident illustrates the depth of feeling that many hold for the flag and of the anger generated by any perceived disrespect for it.³¹³ But that seems to be true no matter what form flag-related symbolic counter-speech takes — whether the perceived disrespect takes the form of incineration or of a peaceful and silent act such as Smith's. All are inconsistent with the reverence that the flag supposedly demands and that the majority expects all people to hold.³¹⁴ There is no logical basis for prohibiting symbolic physical destruction but not other acts of symbolic protest if the goal is, as surely is the case, to ensure reverence for the flag.

Third, and related, *Johnson* and *Eichman* have been blamed for all manner of social ills, including the country's gradual spiritual and moral decline.³¹⁵ If that is the case, we again must deal with the question of why this moral decline is any more likely to result from burning a flag as opposed to symbolically "disrespecting" it in any other manner. All reflect direct opposition to or contradiction of the central

³¹² See *Vietnam Veteran Storms Court in Protest*, N.Y. TIMES, Feb. 24, 2003, at D8.

³¹³ See *Texas v. Johnson*, 491 U.S. 397, 429 (1989) (Rehnquist, C.J., dissenting) ("Millions and millions of Americans regard [the flag] with an almost mystical reverence . . .").

³¹⁴ See *Nahmod*, *supra* note 13, at 542 ("[I]ndividuals should retain the choice whether to honor patriotic symbols like the flag because, when they do, their commitment is deeper than it would be otherwise.").

³¹⁵ See 149 CONG. REC. H4819 (daily ed. June 3, 2003) (statement of Rep. Chabot) ("As the flag goes, so goes our country. If we allow its defacement, so too do we allow our country's gradual decline."); *Constitutional Amendment Authorizing Congress to Prohibit the Physical Desecration of the Flag of the United States: Hearing on S.J. Res. 14 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 106th Cong. 164–70 (1999) (statement of Stephen Presser) (expressing concern for "widespread decline in the most basic moral principles" as a result of the protected nature of flag burning, including the riots following the Rodney King trial, the explosion in out-of-wedlock births, the increase in violence, and the Oklahoma City bombing, all of which arguably derive, in part, from "a jurisprudence that encourages moral chaos and individual irresponsibility in society"); see also GOLDSTEIN, *supra* note 35, at 231 (describing arguments that a flag-burning amendment would bring the country back from the "fatal point of anarchy" to a "baseline of decency, civility, responsibility and order") (internal quotation marks omitted); *id.* (describing arguments made during the Monica Lewinsky scandal that blamed flag burning for "the 'recent widespread failure of many governmental officials, including even the President . . . to abide by the simplist [sic] moral principles'").

meaning of the flag and its complements and all take the form of what Sheldon Nahmod calls “symbol-breaking” by an outsider.³¹⁶

Perhaps those who decry the moral and spiritual decline wrought by disrespect for the flag would argue that booing fans or protesting athletes, like flag-burners, should be punished for such offensive expressive conduct. Perhaps they also would seek to overturn *Barnette* and make participation in flag ceremonies mandatory.³¹⁷ Indeed, criticizing, directly or otherwise, the requirement that participation in the flag salute (and other patriotic symbolic ceremonies) remain voluntary has been a highly effective political tool.³¹⁸ During the 1988 presidential election, Republican candidate George H.W. Bush scored political points by criticizing Democratic candidate Michael Dukakis for, as governor of Massachusetts, vetoing a bill that would have made the pledge mandatory in public schools.³¹⁹ Of course, Bush never mentioned that such a law would have run afoul of *Barnette* (at least if it did not provide an opt-out) and protection of the free speech rights of minorities against state compulsion; he simply framed the issue as a matter of patriotism.³²⁰ And Bush’s position resonated with the public.³²¹ For similar reasons of patriotism, much of the public likely would argue that Toni Smith’s expressive conduct should have been formally sanctioned or that she should have been kicked off the basketball team or that those who jeer “The Star-Spangled Banner” should be removed from the ballpark.

If so, the movement to protect the integrity of the flag ceases to be a limited, one-shot amendment targeted at one particular (and “particularly incendiary”) type of symbolic counter-speech and two particular Supreme Court decisions protecting that symbolic counter-speech. The flag-protection movement becomes a free-speech stalking horse, suppressing any and all manner of symbolic counter-speech directed at the flag and its complements that smacks of disrespect, be it silent nonparticipation or direct verbal or symbolic responses to the flag.

³¹⁶ See Nahmod, *supra* note 13, at 543; Nimmer, *supra* note 33, at 57 (describing the use of “counter symbols” to express hostility toward or to contradict the patriotic symbol).

³¹⁷ See Bloom, *supra* note 50, at 431 (stating that many, perhaps a majority of, Americans may agree that the First Amendment should not be construed to prohibit the mandatory flag salute); *cf.* Curtis, *supra* note 50, at xiv (“*Barnette* did not compel the result reached in *Johnson*, but if *Barnette* had been decided the other way and had survived as a viable precedent, the outcome in *Johnson* would have been unthinkable.”).

³¹⁸ *But see* Nahmod, *supra* note 13, at 542 (“[G]overnment acts unwisely when it attempts to coerce individual respect for patriotic symbols.”).

³¹⁹ See Bloom, *supra* note 50, at 417; Curtis, *supra* note 50, at xlv.

³²⁰ See Curtis, *supra* note 50, xlv–xlv (“Should public school teachers be required to lead our children in the Pledge of Allegiance?” he asked. “My opponent says no — and I say yes.”).

³²¹ See *id.* at xlv (stating that Dukakis did not respond with a ringing defense of freedom of speech, thus the voters were denied a thoughtful discussion of the issues by the candidates); Bloom, *supra* note 50, at 417.

It is worth noting that the word *desecration*, undefined in the current proposed amendment, generally means “violating the sanctity of” or “treating disrespectfully, irreverently, or outrageously.”³²² Under the latest amendment, a permissible statute outlawing “physical desecration” might prohibit any physical act that violates the sanctity of the flag or treats the flag disrespectfully, irreverently, or outrageously. Such a law would reach Toni Smith’s or Tommie Smith and John Carlos’s silent protests involving shows of disrespect through the physical act of turning away or otherwise not honoring the flag in the legally prescribed fashion.³²³ Symbolic nonparticipation in patriotic ceremonies could be prohibited; in other words, participation with patriotic symbolism could be made mandatory. Suddenly, we are talking about the very compelled or coerced utterance of pro-American belief that *Barnette* condemned as reflecting “an unflattering estimate of the appeal of our institutions to free minds.”³²⁴

Finally, the examples of flag-related symbolic counter-speech show that the meaning of the American flag and its complements as symbols is not “up for grabs,”³²⁵ because the majority will not allow it to be so. Kent Greenawalt suggests the ideal that “no one really controls the flag; it can be used on behalf of dissident causes as well as pro-government ones.”³²⁶ Justice Stevens seized this point in his *Eichman* dissent, suggesting that a person might burn a flag in order to make an accusation against the integrity of those who disagree with him, to charge that the majority actually has forsaken its commitment to freedom and equality (those things for which the flag stands) and that continued respect for the flag is nothing more than hypocrisy.³²⁷

³²² See 149 CONG. REC. H4831 (daily ed. June 3, 2003) (statement of Rep. Schakowsky); see also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 491 (4th ed. 2000) (defining “desecrate” as “to violate the sanctity of; to profane; to put to an unworthy use”); MERRIAM-WEBSTER DICTIONARY 312 (10th ed. 1993) (“to violate the sanctity of; profane; to treat disrespectfully, irreverently, or outrageously”); cf. GOLDSTEIN, *supra* note 35, at 245–47 (describing several post-*Johnson* incidents in which individuals were charged with flag desecration, including students who wanted to paint a mural depicting a burning flag and museum officials who displayed an exhibit of eighty artistic depictions of the flag, including a flag on the floor and one over a toilet); Van Alstyne, *supra* note 127, at 577–78 (discussing the reach of a flag-burning prohibition, including its application to the use of the “stars-and-stripes motif” on clothing or in drawings and pictures).

³²³ See *supra* note 129.

³²⁴ Bd. of Educ. v. *Barnette*, 319 U.S. 624, 641 (1943); see Nahmod, *supra* note 13, at 542 (“[I]ndividuals should retain the choice whether to honor patriotic symbols like the flag because, when they do, their commitment is deeper than it would be otherwise.”).

³²⁵ See Michelman, *supra* note 10, at 1347.

³²⁶ Greenawalt, *supra* note 271, at 945; see also Nahmod, *supra* note 13, at 546 (arguing that the flag is a piece of cloth that may represent the United States and its principles, but that is not identical with them).

³²⁷ See *United States v. Eichman*, 496 U.S. 310, 320 (1990) (Stevens, J., dissenting).

But these events show that patriotic symbols cannot carry multiple meanings, but bear only a single meaning or a combination of similar, related meanings defined by the dominant public in the community.³²⁸ The flag means only freedom, equal opportunity, religious tolerance, national unity, and good will.³²⁹ Any use of the flag or its complements to present a message that deviates from that popularly received meaning is perceived as disrespect and the speaker as being disrespectful, subject to censure and, perhaps, censorship. Efforts to halt any deviating use of the symbols (such as a flag-protection amendment) are designed specifically to prevent interference with that preferred majority message and all have the effect of reinforcing it.³³⁰ Sanford Levinson explains that society is composed of various publics with a relationship to various symbols, each public seeking the validation that comes with their symbols occupying some place of respect in the public realm.³³¹ Eliminating one form of symbolic counter-speech elevates the meaning of the symbol preferred by some publics over the contrary meaning preferred by other publics, depriving some of those publics of the opportunity to employ that symbol.

Toni Smith, Mahmoud Abdul-Rauf, Tommie Smith, and John Carlos attempted precisely what Justice Stevens argued could be expressed through contrary use of the flag. Each sought to communicate the message that “the flag’s conventionally accepted message of patriotism and unity does not necessarily reflect unanimity or satisfaction in the political community.”³³² All four apparently believed that American society was unjust and inequitable, contrary to its stated ideals; the flag represented not what America strived or promised to be, but what America had become. A show of respect for the flag was hypocrisy because the flag no longer

³²⁸ See Greenawalt, *supra* note 271, at 945 (“The symbolism of the flag operates in favor of the government as well as in favor of the national union.”); Nimmer, *supra* note 33, at 57 (arguing that a flag desecration statute is a government command that one idea embodied in the flag symbol is not to be countered by another idea); see also *Texas v. Johnson*, 491 U.S. 397, 417 (1989) (“We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents.”).

³²⁹ See *Johnson*, 491 U.S. at 437 (Stevens, J., dissenting); BEZANSON, *supra* note 33, at 193 (“Patriotism, nationhood, national unity, are the symbolic meanings the flag represents — indeed, they are the messages the flag itself emits as a symbol”); 149 CONG. REC. H4832 (daily ed. June 3, 2003) (statement of Rep. Buyer) (“It represents the physical embodiment of everything that is great and good about our nation — the freedom of our people, the courage of those who have defended it, and the resolve of our people to protect our freedoms from all enemies, foreign and domestic.”); *supra* note 46.

³³⁰ See BEZANSON, *supra* note 33, at 197; Nimmer, *supra* note 33, at 57 (“To preserve respect for a symbol *qua* symbol is to preserve respect for the meaning expressed by the symbol. It is, then, fundamentally an interest in preserving respect for a particular idea.”); see also LEVINSON, *supra* note 97, at 130 (“We must, of course, try to clarify our own responses to these symbols, but it is naive in the extreme to believe that we can achieve any genuine consensus as to their place in the public realm.”).

³³¹ See LEVINSON, *supra* note 97, at 130.

³³² Nahmod, *supra* note 13, at 543.

represented its ideals, so each averted their eyes from the flag and did not participate in the honoring ceremony — Toni Smith and Abdul-Rauf silently, Tommie Smith and John Carlos by confronting the anthem with the competing “Black Power” salute.³³³

For that, each was vilified for disrespecting the flag and the nation,³³⁴ illustrating, if nothing else, that Justice Stevens was wrong. There was no public comprehension or acceptance that Toni Smith could express respect for what she believed the flag was supposed to represent by rejecting what the flag had come to represent, because no one who saw her symbolic counter-message could or would accept what she believed the flag now represented. The flag cannot (because the government and/or the popular majority will not allow it) carry any different meaning; symbolic counter-speech directed at the flag or its complements never will be understood as pro-American or patriotic.

* * *

All this being the case, any restriction on flag-related symbolic counter-speech must be understood as a viewpoint-discriminatory attempt to manipulate the outcome of debate on the issues represented by these connected symbols. The ordinary meaning of the flag is only what the majority dictates, so the only way to express a conflicting message is through a conflicting use of the flag or its complements in some form of symbolic counter-speech. Any restriction on conflicting uses of the flag constitutes a government command that some ideas about flag, song, and nation — those with majority support — are not to be countered by other ideas.³³⁵ And that is the farthest possible departure from the core principles of free expression that demand protection for symbolic counter-speech.³³⁶

³³³ See *supra* notes 122–25, 138–39 and accompanying text.

³³⁴ See Hartmann, *supra* note 14, at 2 (stating that Tommie Smith and John Carlos were said to have “embarrassed the country” by their actions); Pennington, *supra* note 14 (quoting fan who protested Toni Smith’s actions stating that “not respecting the flag is disrespecting your country”).

³³⁵ See Nimmer, *supra* note 33, at 57.

³³⁶ See *supra* notes 68–96 and accompanying text.

