

ARTICLES

FREE SPEECH AND DISRUPTIVE CAMPUS PROTESTS

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ABSTRACT

Student activism has been on the rise since the mid-2010s and has spiked more recently with pro-Palestinian demonstrations becoming widespread in late 2023 and 2024. As a result, campus protests and the free speech rights of college students have been a focus of public debate over the past decade, and the past year in particular. Those protests, often disruptive and tumultuous, have faced widespread criticism, including criticism by the House Education Committee in its 2023–24 hearings on campus activism. Members of the House Education Committee relied on one publication in particular in their attacks on student protesters—the “College Free Speech Rankings” published by the Foundation for Individual Rights and Expression. That ranking system explicitly condemns disruptive protest while purporting to measure the “free speech climate” on campuses. The methodology of that system penalizes colleges and universities for disruptive protest, leading to low rankings for schools where students are active and protests are flourishing. This Article argues that criticism of disruptive, nonviolent protests, and in particular a ranking system that further enables such criticism, is wholly

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wrongheaded, and contrary to fundamental free speech principles which hold that raucous, disruptive protest and dissent are a central part of our First Amendment tradition.

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I. INTRODUCTION

Political protests in the United States, although at times idealized in hindsight, are in the moment often tumultuous and disruptive.¹ Over the past century, disputes arising from such protests and acts of dissent have frequently ended up in the courts (usually in the form of criminal prosecutions of individuals), leading to many of the judicial decisions at the heart of First Amendment law in the United States.² Those decisions were largely forged out of civil rights battles, antiwar protests, and various speeches and harangues by extremists and other dissenters.³ As a result of that history, the right to protest is largely viewed both by the courts and in popular culture as inseparable from the right of free speech, and political protest and dissent are ensconced as foundational concepts central to the First Amendment.⁴

Since the 1960s, much of that protest and dissent has occurred on our college campuses.⁵ Although the nature and extent of student protests have waxed and waned over time, by all accounts they have grown more frequent and more intense over the past decade, with 2023 and 2024 seeing a new, increased level as a result of pro-Palestinian protests at universities around the country.⁶ Student

¹ See, e.g., JEANNE THEOHARIS, *A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AND MISUSES OF CIVIL RIGHTS HISTORY* 23–24 (2018) (“The civil rights movement has become museum history, inaccessible for our grubby use today. While the actual civil rights movement was far more disruptive, demanding, contentious, and profound than it’s depicted, the mythologies of it get in the way of seeing the continuities between these struggles, the shoulders current movements stand on, and the ways people can learn from past struggles to approach the problems we face as a nation today.”).

² See, e.g., RONALD K.L. COLLINS & DAVID M. SKOVER, *ON DISSENT: ITS MEANING IN AMERICA* 103–20 (2013).

³ See, e.g., *id.*

⁴ See, e.g., *Counterman v. Colorado*, 600 U.S. 66, 81 (2023) (“[D]issenting political speech [is] at the First Amendment’s core.”); STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 10 (1999) (describing how dissent—“attack[ing] customs, habits, traditions, and authorities”—is a concept that “stand[s] at the center of the First Amendment.”). Although the concept of dissent has been the subject of broad exegesis, see, e.g., COLLINS & SKOVER, *supra* note 2, at 5, as used herein it generally follows Professor Timothy Zick’s straightforward formulation: “Dissent is an expression of non-conformance, a statement of opposition by outsiders directed at those in power.” TIMOTHY ZICK, *MANAGED DISSENT: THE LAW OF PUBLIC PROTEST* 20 (2023). “Protest” as used herein generally refers to public protests, such as demonstrations and marches—“an assembly of individuals gathered in a public place for the purpose of communicating about a matter of public concern to a public audience.” *Id.* at 18. Protest and dissent are often found together; Professors Collins and Skover helpfully suggest that “‘dissent’ may generally be perceived as indicating ‘protest-plus’—that is, a ‘plus’ that suggests societal toleration.” COLLINS & SKOVER, *supra* note 2, at 5–6.

⁵ ZICK, *supra* note 4, at 117.

⁶ With regard to pro-Palestinian campus protests in 2023–2024, see, for example, Isaac Stanley-Becker & Susan Svrluga, ‘*Bunker Mentality*’ at *Columbia Lit Protest Spark That*

protests have often been raucous and disruptive, as protests tend to be, and as a result have frequently been subject to criticism even when peaceful in nature.⁷ The recent pro-Palestinian campus demonstrations are no exception.⁸ The U.S. House of Representatives (House) Committee on Education and the Workforce (House Education Committee) held a series of hearings in 2023 and 2024 addressing those protests.⁹ The role of the First Amendment was nominally front and center throughout those hearings, with university presidents “grill[ed]” on the extent of free speech protection on campuses, whether particular speech is entitled to protection, and how administrators handled disruptive and often tumultuous dissent and protest at their schools.¹⁰ A number of members of the House Education Committee were critical of the disruptive nature of those protests; the committee itself had previously issued a report referring to protesters as “woke mobs” and stating that “the federal government must step in and provide protection for students and faculty.”¹¹

Spread Nationwide, WASH. POST (May 12, 2024, 6:00 AM), <https://www.washingtonpost.com/nation/2024/05/12/columbia-protest-president-shafik-campus-tension> [<https://perma.cc/QNF6-WHDX>] (describing Columbia University administration’s decision to call in the police in response to protests and the “cascade of similar confrontations with law enforcement nationwide” that followed); Paula Chakravartty & Vasuki Nesiah, *Political Dissent is Under Attack on Campus*, N.Y. TIMES, April 8, 2024, at A18 (describing pro-Palestinian protests at New York University subsequent to October 7, 2023, and the university’s response). Regarding campus protests more broadly since the mid-2010s, see, for example, Kristine L. Bowman & Katherine Gelber, *Responding to Hate Speech: Counterspeech and the University*, 28 VA. J. SOC. POL’Y & L. 248, 261–66 (2021) (citing surveys).

⁷ See discussion *infra* Part IV.

⁸ See, e.g., Stanley-Becker & Svrluga, *supra* note 6; Chakravartty & Nesiah, *supra* note 6.

⁹ See David A. Bell, *Elise Stefanik, Dean of Faculty*, CHRON. HIGHER EDUC. (Apr. 22, 2024), <https://www.chronicle.com/article/elise-stefanik-dean-of-faculty> [<https://perma.cc/3DFR-YYBW>] (reporting on House Education Committee hearings in December 2023 and April 2024). In addition to those hearings, student activists have been pilloried by potential employers, by the press, and by alumni for their stands on issues and for their participation in those protests. See, e.g., Branko Marcetic, *A Tidal Wave of State and Private Repression Is Targeting Pro-Palestinian Voices*, JACOBIN (Nov. 3, 2023), <https://jacobin.com/2023/11/anti-palestine-mccarthyism-censorship> [<https://perma.cc/T73N-EXAJ>] (describing employer and alumni criticisms and reactions to student protesters in the Fall of 2023).

¹⁰ See Bell, *supra* note 9. Those hearings were also focused in large part on antisemitism on campus. *Id.*

¹¹ See *Holding Campus Leaders Accountable and Confronting Antisemitism: Hearing Before the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) [hereinafter *House Hearing Transcript*] (indicating various committee members’ criticism of the universities’ responses to student protests); *@EdWorkforce Unveils Alarming Report on Free Speech in Postsecondary Education*, H.R. COMM. ON EDUC. & THE WORKFORCE (Sept. 21, 2023), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409591> [<https://perma.cc/F2WM-VUCY>]; H.R. COMM. ON EDUC. & THE WORKFORCE, 118TH CONG., REP. ON FREEDOM OF SPEECH AND ITS PROTECTION ON COLLEGE CAMPUSES 13 (Sept. 21, 2023), https://edworkforce.house.gov/uploadedfiles/free_speech_committee_report_final.pdf [<https://perma.cc/9JXQ-9LD7>] [hereinafter EDUC. COMM. REP. ON FREE SPEECH]. The Republican staff

In support of their attack on recent campus protests, House Education Committee members trumpeted their reliance on one particular publication—the Foundation for Individual Rights and Expression’s (FIRE) *College Free Speech Rankings* (FIRE Rankings), which claim to show “which colleges promote and protect the free exchange of ideas.”¹² House Education Committee members specifically and repeatedly cited the FIRE Rankings in those hearings, claiming that the rankings showed that universities where raucous and disruptive demonstrations occurred had a poor free speech climate.¹³

As discussed below, this view that disruptive protests are contrary to free speech principles is wholly wrongheaded. The FIRE Rankings are a primary example of this faulty view.¹⁴ Those rankings are fundamentally flawed insofar as they fail to account for the centrality of protest and dissent to principles of free speech and the First Amendment.¹⁵ Specifically, the rankings present a misleading picture of free speech on campus by placing nonviolent disruptive

of the House Committee issued a subsequent report in October 2024. See H.R. COMM. ON EDUC. & THE WORKFORCE, 118TH CONG., REPUBLICAN STAFF REP. ON ANTISEMITISM ON COLLEGE CAMPUSES EXPOSED (Oct. 31, 2024), https://edworkforce.house.gov/uploadedfiles/10.30.24_committee_on_education_and_the_workforce_republican_staff_report_-_antisemitism_on_college_campuses_exposed.pdf [<https://perma.cc/WE4R-735D>].

¹² See *House Hearing Transcript*, *supra* note 11, at 4 (statement of Rep. Virginia Foxx, Chairwoman, H.R. Comm. on Educ. & the Workforce); FOUND. FOR INDIVIDUAL RTS. & EXPRESSION & COLLEGE PULSE, 2024 COLLEGE FREE SPEECH RANKINGS 5 (2023), https://www.thefire.org/sites/default/files/2023/09/CFSR%202024_final_updated.pdf [<https://perma.cc/5SYW-GCJP>] [hereinafter FIRE RANKINGS]. FIRE is a nonprofit organization that focuses on free speech issues. FIRE RANKINGS, *supra*, at 1. The FIRE Rankings rank colleges based on a survey of students; an assignment of “bonus points” or “penalty points” for the institution’s actions with regard to free speech controversies on campus; and a deduction or addition to the score based on FIRE’s assessment of the school’s written policies. See *id.* at 42–45. FIRE has been undertaking its college free speech rankings since 2020 and surveyed 55,102 undergraduates from 254 colleges and universities for the 2024 rankings. *Id.* at 5. FIRE issued its 2025 rankings in September 2024. FOUND. FOR INDIVIDUAL RTS. & EXPRESSION & COLLEGE PULSE, 2025 COLLEGE FREE SPEECH RANKINGS (2025), <https://www.thefire.org/sites/default/files/2024/09/2025%20College%20Free%20Speech%20Rankings%20Report%20FINAL.pdf> [<https://perma.cc/J6CN-2EH3>] [hereinafter 2025 FIRE RANKINGS]. Those rankings are substantially similar to the 2024 rankings in terms of methodology and approach. Compare *id.* at 36–41, with FIRE RANKINGS, *supra*, at 41–45.

¹³ See *House Hearing Transcript*, *supra* note 11, at 4 (statement of Rep. Virginia Foxx, Chairwoman, H.R. Comm. on Educ. & the Workforce); *id.* at 38 (statement of Rep. Tim Walberg); *id.* at 100 (statement of Rep. Kevin Kiley). Those rankings have also become a point of reference for the media since their inception in 2020 and are often invoked to criticize disruptive campus protests. See, e.g., George F. Will, *Wokeness in All Its Self-Flattering Moral Vanity Comes for a Statue at Princeton*, WASH. POST (Jan. 6, 2023, 8:14 PM), <https://www.washingtonpost.com/opinions/2023/01/06/wokeness-attack-on-princeton-statue/> [<https://perma.cc/6Q8K-876R>] (citing FIRE Rankings).

¹⁴ See discussion *infra* Part V.

¹⁵ See discussion *infra* Part V.

protest on the negative side of the ledger in their assessment, whereby schools that have raucous demonstrations where speaking events are disrupted by counterspeech or otherwise, or where students simply opine that they do not object to such vigorous protest, receive a lower ranking.¹⁶ The rankings nowhere mention that such disruptive protests, and calls to sanction others or to disinvite speakers, are in most instances acts of dissent also entitled to First Amendment protection.¹⁷

The FIRE Rankings' narrow conception of free speech not only fails to do justice to the concepts of protest and dissent at the heart of the First Amendment but, as Professor Mary Anne Franks aptly states, "in Orwellian fashion, target[s] a long-recognized, well-established form of protected free speech—student protest—and recast[s] it as censorship."¹⁸ As discussed below, the rankings accomplish this in part by failing to clearly distinguish protests by private actors—*i.e.*, students—from government censorship.¹⁹ A different but closely

¹⁶ See *User's Guide to FIRE's Campus Disinvitation Database*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/research-learn/users-guide-fires-campus-disinvitation-database> [<https://perma.cc/39QA-BPL8>] [hereinafter *FIRE User's Guide*]. Thus, not surprisingly, there is extensive overlap between those schools with active pro-Palestinian protests in 2024 and those colleges and universities that scored worst on the FIRE Rankings, including Columbia University; George Washington University; Harvard University; Middlebury College; New York University; Princeton University; Stanford University; the University of California, Los Angeles; and the University of Vermont. See Sonel Cutler, Alecia Taylor & Amelia Benavides-Colón, *Here's Where Student Protesters Have Demanded Divestment From Israel*, CHRON. HIGHER EDUC. (June 13, 2024), <https://www.chronicle.com/article/heres-where-student-protesters-are-demanding-divestment-from-israel> [<https://perma.cc/7L9A-SA4A>] (listing "where encampments, multiday protests, and sit-ins appeared on campuses in April, May and June"); FIRE RANKINGS, *supra* note 12, at 46–56. The FIRE Rankings are based on 2023 data, but active protests in 2024 are undoubtedly an indicator of an activist campus in earlier years and more generally. FIRE RANKINGS, *supra* note 12, at 1; see Cutler et al., *supra*.

¹⁷ See FIRE RANKINGS, *supra* note 12. As discussed below, peaceful disruptive protest, including counterspeech at a university speaker event that disrupts a speaker, and pre-emptive protest resulting in the revocation of a speaker invitation, is entitled to protection under the First Amendment. See Charles F. Walker, *Campus Speakers and Counterspeech: A First Amendment Rationale for Continued Student Protests*, 31 VA. J. SOC. POL'Y & L. 84, 88–89, 98–108 (2024); Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551, 563–72 (2019); discussion *infra* Part V.

¹⁸ See Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 233 (2019) (addressing the actions of FIRE and other groups).

¹⁹ See discussion *infra* Part V. Actions by private actors impinging on others' speech—social sanctions—are distinct from government actions that impinge on speech, which are generally subject to First Amendment regulation. See, e.g., Thomas Healy, *Social Sanctions on Speech*, 2 J. FREE SPEECH L. 21, 22–23 (2022). Social sanctions imposed by private actors, colloquially referred to as "cancel culture," do not involve state action and are not covered by the First Amendment. *Id.* As used herein, the term "social sanctions" refers to actions "by individuals and private entities that impose a cost on speakers and therefore might be thought to suppress the expression of certain ideas or the use of particular language" and may range from criticism and condemnation to heckling, shouting down, deplatforming and boycotts. *Id.* at 22.

related issue with the FIRE Rankings is seen in their conflation of principles of free speech with principles of civility.²⁰ The FIRE Rankings articulate a view of the world in which the concept of free speech does not allow for an active, vocal campus where political protests are common, and where there may be tempestuous, disruptive, and at times angry debate. Civil, polite discussion is an ideal to strive for, and an activity to be praised. But that civility is not what the First Amendment calls for, and it is arguably not what broader principles of free speech require.²¹

The question of how we assess free speech and expressive conduct by students at a time when protest is flourishing has potentially significant implications going forward. This Article focuses on the FIRE Rankings because they appear to be part of a wider trend (driven largely from outside academia) seeking to cabin free speech on campus, in part by criticizing those colleges and universities where the exercise of free expression, in the form of protest and dissent, is thriving.²² Indications of such a trend are seen in not only in the House Education Committee hearings regarding pro-Palestinian campus protests, but also in state legislative efforts over the past few years to curb protest.²³ The FIRE Rankings, while touting free speech principles, fuel this intolerance for student activism with their express disdain for disruptive protest.²⁴ This narrow-mindedness runs contrary to a long tradition of First Amendment thought that holds a broader view of protest and dissent as a central precept.²⁵ Professor Vincent Blasi captures the essence

²⁰ See Healy, *supra* note 19, at 60–62.

²¹ Indeed, the concept of the “marketplace of ideas” is premised on the view that private actors will use social sanctions in responding to speech—that speakers of false ideas, or hateful ideas, will be met with counterspeech pushing back against that speech. Healy, *supra* note 19, at 27–29; see, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”).

²² See, e.g., Magarian, *supra* note 17, at 563–64; Cutler et al., *supra* note 16.

²³ See Jessica Blake, *Campus Protest Hearings Continue at the State Level*, INSIDE HIGHER ED (July 16, 2024), <https://www.insidehighered.com/news/government/state-policy/2024/07/16/campus-protest-hearings-continue-state-level> [https://perma.cc/WE6Q-X797]. As one House member commented after the May 2024 hearing of the House Education Committee regarding pro-Palestinian campus protests, those hearings “are thinly veiled attacks on higher education in itself, and one of the most fundamental democratic rights—free speech.” Forbes Breaking News, *‘An Attack on Higher Education’: Ilhan Omar Defends Anti-Israel College Campus Protesters*, YOUTUBE, at 00:30 (May 26, 2024), https://www.youtube.com/watch?v=MZmn-Gdi1_Q [https://perma.cc/RZA3-JV2U]. State efforts to curb protest have been ongoing for years. See discussion *infra* Section III.D.; Blake, *supra*.

²⁴ See Magarian, *supra* note 17, at 563–64; *FIRE User’s Guide*, *supra* note 16; FIRE RANKINGS, *supra* note 12, at 3.

²⁵ FIRE itself has voiced support for student protests, see, e.g., *Here’s What Students Need to Know About Protesting on Campus Right Now*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION

of that tradition in his tribute to the First Amendment scholar Professor Harry Kalven, Jr.:

Kalven did not argue that dissenters ought to be tolerated, he argued that they ought to be heard. He fought tirelessly in the law journals against those who would require that acts of expression satisfy minimum standards of rationality and civility in order to qualify for First Amendment protection. He believed that the freedom of speech belongs to the inarticulate and the angry as well as to the loyal and respectful opposition He did not think that “crackpots” and “subversives” and “extremists” deserve First Amendment protection because they are harmless. He thought they deserve protection because they have something to say that ought to be heard in a democratic society.²⁶

As argued below, any conception of the First Amendment that eschews these foundational principles, that requires speech to meet “minimum standards of rationality and civility” in order to merit protection, or that denies activism in the form of confrontation and dispute, cannot form a sound and reliable basis for the measure of free speech.²⁷

The focus of this Article is nonviolent protest and dissent, and specifically speech and expressive conduct that fall under the aegis of free speech protections. Although violent protest may in some circumstances be characterized as dissent, it has no claim to the shield of the First Amendment.²⁸ As to the broader applicability of

(April 25, 2024), <https://www.thefire.org/news/heres-what-students-need-know-about-protesting-campus-right-now> [<https://perma.cc/F3AG-DKDN>] (noting that “[s]tudent protest is a proud democratic tradition on our college campuses.”), and Professor Ronald Collins, whose book *On Dissent* is cited herein, see COLLINS & SKOVER, *supra* note 2, is a Fellow with FIRE, see *Ronald K. L. Collins*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, <https://www.thefire.org/about-us/our-team/ronald-k-l-collins> [<https://perma.cc/73HS-CJQZ>]. The organization has, however, elsewhere indicated disapproval of protests involving disruption. See, e.g., Sean Stevens, *Yes, Harvard Is Last in Free Speech. The Rankings Don't Lie*, CHRON. HIGHER EDUC. (Feb. 27, 2024), <https://www.chronicle.com/blogs/letters/yes-harvard-is-last-in-free-speech-the-rankings-dont-lie> [<https://perma.cc/44NM-TJ6X>] (characterizing speaker protests as “mob-style deplatforming demands”). Regardless of statements by the organization and its representatives, the FIRE Rankings themselves clearly penalize disruptive activism and issue lower rankings to those schools where protest is thriving. See, e.g., *FIRE User's Guide*, *supra* note 16.

²⁶ Vincent A Blasi, *Harry Kalven, Jr.*, 61 J. LEGAL EDUC. 301, 306–07 (2011).

²⁷ See *id.* at 306.

²⁸ See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence. ‘Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline many not constitutionally masquerade under the guise of “advocacy.”’” (quoting *Samuels v. Mackell*, 401 U.S. 66, 75 (1971) (Douglas, J., concurring))).

the First Amendment to campus protests, although the First Amendment's strictures are limited to public universities, many private colleges and universities have committed to follow free speech principles with regard to their regulation of student conduct and events, and the First Amendment's metrics therefore provide an important touchstone for such regulation overall.²⁹

This Article begins by providing a brief overview of the FIRE Rankings. It then discusses in Part III how the concepts of protest and dissent, including disruptive, tumultuous, and offensive speech and expressive conduct, have served as a central element in the development of First Amendment case law and jurisprudence over the past century.³⁰ Part IV argues that while such protest and dissent are often raucous, disruptive, and messy, they do not thereby lose their First Amendment protection in the college setting or otherwise.³¹ Part V addresses the importance of inclusion of the concepts of disruptive protest and dissent in any assessment of free speech, and the related issue of properly distinguishing between First Amendment law and social sanctions.³² The Article concludes that any fair measure of free speech requires a broader view of free speech principles and a more precise articulation of those principles and their relation to First Amendment law than is currently found in the narrow and imprecise view offered by the FIRE Rankings, with their intolerance for student activism, protests, and counterspeech.³³

²⁹ See, e.g., David Cole, *Who's Canceling Whom?*, N.Y. REV. BOOKS (Feb. 8, 2024), <https://www.nybooks.com/articles/2024/02/08/whos-canceling-whom-canceling-of-the-american-mind/> [<https://perma.cc/N4FQ-5Q8U>] (“[M]any if not most private universities have adopted free expression policies that largely mirror the rules that would apply to a public university directly bound by the First Amendment.”). In addition, some states have constitutional provisions, statutes, or regulations protecting freedom of speech that may impact private institutions. See, e.g., CAL. EDUC. CODE § 94367 (West 2024) (prohibiting private colleges from making or enforcing rules subjecting students to discipline on the basis of speech that would be protected by the First Amendment or California Constitution if regulated as a public university). See generally Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2301–02 (2021) (examining “local, state, and federal laws that work to protect the same interests that the Free Speech and Press Clauses of the First Amendment protect”).

³⁰ See discussion *infra* Part III.

³¹ See discussion *infra* Part IV.

³² See discussion *infra* Part V.

³³ See discussion *infra* Part VI.

II. "MEASURING" FREE SPEECH ON CAMPUS

A. *The FIRE Rankings*

The FIRE Rankings purport to measure free speech on campus.³⁴ Those rankings are based on numeric scores assigned to each college and university rated.³⁵ Thus, of 248 schools, Michigan Technological University ranked first with an "overall score" of 78.01 and Harvard University ranked last with a score of 0.00.³⁶ That numeric score has three components: a survey of student perceptions of the "speech climate" on each campus; an assessment of the institution's free speech policies; and the assignment of "bonus points" for actions FIRE deems "indicative of a positive climate for free speech," combined with the deduction of "penalty points" for actions deemed to be "indicative of a poor campus climate for free speech."³⁷ The FIRE Rankings refer variously to colleges' "campus climate," "speech climate," and "culture of free expression," although the rankings do not otherwise define those terms.³⁸

The student survey is a central part of the FIRE Rankings.³⁹ The survey asks students questions about their comfort expressing their views on controversial topics; their tolerance for allowing liberal or conservative speakers on campus; their views on how acceptable it is to engage in disruptive protest of a speaker, including shouting down speakers or trying to prevent them from speaking on campus; how clear the administration's position on free speech is; and social and political issues that are difficult to discuss on campus.⁴⁰ The rankings state that "[t]he key factors differentiating high-performing schools (the top five) from poorly performing ones (the bottom five) are scores on the [student survey] components of 'Tolerance Difference' and 'Disruptive Conduct.'"⁴¹ According to the rankings, students at the bottom five schools were "more biased toward allowing controversial liberal speakers on campus over conservative ones" and more

³⁴ See FIRE RANKINGS, *supra* note 12, at 5.

³⁵ *Id.* at 6.

³⁶ *Id.* at 6, 46, 56. As noted above, numerous schools where protest is especially active received low rankings. See *supra* text within note 16. The 2025 FIRE Rankings put the University of Virginia in first place, and have Harvard University, Columbia University, and New York University at the bottom sharing an "abysmal" status. 2025 FIRE RANKINGS, *supra* note 12, at 2.

³⁷ FIRE RANKINGS, *supra* note 12, at 42–44.

³⁸ *Id.* at 5, 44.

³⁹ See *id.* at 21.

⁴⁰ *Id.* at 42.

⁴¹ *Id.* at 2.

accepting of disruptive protest to “stop a campus speech.”⁴² The student survey portion of the rankings focuses in particular on this latter point, with a series of questions regarding how acceptable it is to engage in disruptive conduct to protest a campus speech.⁴³ The rankings express “disappoint[ment]” that overall a number of students find disruptive tactics “acceptable to some degree.”⁴⁴ For example, the survey found that 63% of students stated that “[s]houting down a speaker to prevent them from speaking on campus” was an acceptable form of protest.⁴⁵ Students can answer “always,” “sometimes,” “rarely,” or “never” acceptable in response to each question.⁴⁶ One needs to turn to the back of the survey findings to see that, with regard to the question of “shouting down” speakers, more than half of the students who are characterized by the rankings as finding the disruptive conduct “acceptable” had said that they found the conduct “rarely acceptable.”⁴⁷

The bonus and penalty points also play an important role in the rankings.⁴⁸ Bonus points are awarded to schools for supporting speakers in connection with campus speaking events, for supporting students and student groups in connection with free speech controversies, and for supporting “scholars whose speech rights were threatened during a free expression controversy”;⁴⁹ penalty points are assigned for sanctioning scholars or students in connection with such controversies, and for “[s]uccessfully disinviting an invited speaker from speaking on campus”⁵⁰ Penalty points are thereby given to those schools that held speaking events that were disrupted by student protests, that disinvited speakers, or had a speaker withdraw “because of the controversy caused by their upcoming appearance on campus.”⁵¹ The FIRE Rankings specifically note that the lower ranked schools had a higher number of these

⁴² *Id.*

⁴³ *See id.* at 35.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 77.

⁴⁷ *Id.* Of the 63% of students who stated that shouting down a speaker is acceptable, 32% found such a protest tactic “rarely acceptable” and 26% found the tactic “sometimes acceptable.” *Id.* Only 5% of the students surveyed stated that shouting down a speaker is “always acceptable.” *Id.*

⁴⁸ *See id.* at 44.

⁴⁹ *Id.* at 43.

⁵⁰ *Id.*

⁵¹ *See id.* at 43, 45.

“deplatforming attempts and sanctions.”⁵² Similarly, disruptive conduct, including shouting down speakers, results in penalty points where the event “faced a substantial disruption.”⁵³ The rankings fail to acknowledge that peaceful protests involving speaker disinvitations, disruptive counterspeech, or heckling are also speech or expressive conduct warranting First Amendment protection.⁵⁴

With regard to bonus points—awarded for supporting scholars, students or speakers in connection with free speech controversies—the support in each instance must be “unequivocal.”⁵⁵ That is, with regard to a speaker event for example, even if the event proceeds without disruption, the school is denied “bonus” points if an administrator “condemn[s] the speech, [or] apologize[s] for the [speaker’s] expression.”⁵⁶ Thus, schools where a speaking event proceeds unimpeded but an administrator indicates agreement with protesters by voicing disagreement with the speaker are denied “bonus points” under the FIRE Rankings—a consequence that can result in a lower ranking.⁵⁷ To cite one example, the University of Florida presumably would have been docked bonus points (had the rankings existed at the time) despite allowing the white supremacist Richard Spencer, organizer of the “Unite the Right” neo-Nazi rally in Charlottesville in 2017, to speak on campus in October of that year, because the university president stated that he found “the racist rhetoric of Richard Spencer and white nationalism repugnant” and urged the campus community not to let his “message of hate and racism go unchallenged.”⁵⁸

⁵² *Id.* at 21. The rankings state that “[c]alls to sanction students, student groups, and faculty, and campaigns to get colleges to disinvite speakers from speaking on campus all constitute attempts to deplatform someone, infringing on their right to free expression.” *Id.* at 19.

⁵³ *See id.* at 35, 45.

⁵⁴ *See, e.g.*, Walker, *supra* note 17, at 88–89, 98–104; Magarian, *supra* note 17, at 563–72.

⁵⁵ FIRE RANKINGS, *supra* note 12, at 43.

⁵⁶ *Id.*

⁵⁷ *See id.* at 43–45.

⁵⁸ *See* Bowman & Gelber, *supra* note 6, at 267, 270 (describing the Spencer speaking event and the university response). The Spencer speaking event occurred before the inception of the FIRE Rankings in 2020. *See id.* at 267.

B. Reaction to the FIRE Rankings

The FIRE Rankings have been praised,⁵⁹ while also attracting criticism.⁶⁰ One critic, Professor Ryan Enos, for example, argues that the FIRE Rankings’ methodology is “arbitrary and misleading” and that it “only makes sense if, rather than truly measuring the quality of free speech on campuses, you are interested in generating headlines by criticizing America’s most prominent colleges.”⁶¹ Professor Enos points out that the student survey results—which he characterizes as “the least arbitrary component of the rankings”⁶²—when viewed alone show the lowest ranked schools in the overall rankings standing much higher in the survey rankings.⁶³ It is the deductions and additions to the survey scores—the points added or subtracted by FIRE—that skew the scores and “put a thumb on the scale in a way that penalizes high-profile colleges.”⁶⁴ One way the FIRE Rankings do this is by simply counting incidents at each college, without regard to the size of the institution or the number of speakers and speech events occurring at each.⁶⁵ Large, prominent

⁵⁹ See, e.g., Andrew Handel & Nino Marchese, *Harvard Ranks Dead Last in New College Free Speech Rankings*, AM. LEGIS. EXCH. COUNCIL (Oct. 31, 2023), <https://alec.org/article/harvard-ranks-dead-last-in-new-college-free-speech-rankings/> [<https://perma.cc/E8BR-2FNN>] (“FIRE’s 2024 College Free Speech Rankings report will hopefully serve as a loud wake-up call for certain institutions to prioritize their student’s [sic] constitutionally protected rights of free expression.”).

⁶⁰ See, e.g., Ryan D. Enos, *Harvard Last in Free Speech? Don’t Trust FIRE’s Rankings*, CHRON. HIGHER EDUC. (Feb. 16, 2024), <https://www.chronicle.com/article/harvard-last-in-free-speech-dont-trust-fires-rankings> [<https://perma.cc/S9U7-3AV9>]; Jeffrey Sachs, *Everyone’s Wrong About FIRE: The Organization to Defend Campus Free Speech Has Its Problems, but They’re Not What Critics Think*, CHRON. HIGHER EDUC. (Nov. 30, 2022), <https://www.chronicle.com/article/everyones-wrong-about-fire> [<https://perma.cc/RWK6-DD8Q>].

⁶¹ Enos, *supra* note 60.

⁶² *Id.* Professor Enos states that he accepts the survey results for purposes of his critique while noting concerns: “[T]here are some aspects of [the survey] that might make one worry about its reliability, most notably the small sample within each college (an average of 217 respondents per institution and as few as 39 at the low end) that is based on an opt-in panel from a commercial polling firm. The small sample sizes and potential bias from an opt-in survey make obtaining representative responses from any single college difficult.” *Id.* In fact, subsequent to Professor Enos’s article, the Pew Research Center reported that opt-in polls of young people can produce misleading results. Andrew Mercer, Courtney Kennedy & Scott Keeter, *Online Opt-In Polls Can Produce Misleading Results, Especially for Young People and Hispanic Adults*, PEW RSCH. CTR. (Mar. 5, 2024), <https://www.pewresearch.org/short-reads/2024/03/05/online-opt-in-polls-can-produce-misleading-results-especially-for-young-people-and-hispanic-adults> [<https://perma.cc/QK7K-RS77>] (“[T]he takeaway is that reporting on complex and sensitive matters . . . requires the use of rigorous survey methods to avoid misleading the public, particularly when studying the attitudes of young people.”).

⁶³ Enos, *supra* note 60.

⁶⁴ *Id.*

⁶⁵ *Id.* The rankings do not account for speaking and other events where there is no controversy, where controversial speakers talk unimpeded, or where student complaints are resolved without publicity. *Id.*

schools and other high-profile campuses that attract controversial speakers and have active student bodies are more likely to have a greater number of incidents.⁶⁶ In addition, FIRE “takes away more points for sanctioning than it adds for supporting.”⁶⁷ Thus, large and high-profile schools are more likely to suffer in the rankings.

Professor Enos is not alone in expressing concerns about methodology. Undergraduates at schools ranked by FIRE have pointed out the lack of nuance in the rankings, noting, for example, apparent misinterpretation of data,⁶⁸ and arguing that “the state of free speech at [a large university] cannot be encapsulated by a single number, and it is a disservice to treat it as such.”⁶⁹

Critics have also pointed to FIRE’s right-wing funding in asking how beholden the organization may be to those individuals and entities and their ideological positions.⁷⁰ Regardless of one’s view of the relevance of an organization’s funding sources, it is an issue that frequently serves as a source for other questions.⁷¹ For example, FIRE supported Turning Point USA (TPUSA), a nonprofit

⁶⁶ *Id.* In response to this criticism, FIRE states that although it relies “primarily on media reports of controversies to publicly verify the outcome of an incident” and that therefore “[i]t is true that this could result in more frequent detection of controversies at high profile colleges,” the outcomes of the controversies need to be recorded, and the issue lies with “the outcomes of those controversies.” Stevens, *supra* note 25. That is, “if high-profile colleges are more likely to provide students and faculty with more exposure to controversial ideas and speakers, then they have a responsibility to model” the behavior called for by the rankings (*e.g.*, no raucous demonstrations that disrupt speakers with counterspeech; fewer students opining that vigorous protest that leads to disruption may be acceptable). *Id.*

⁶⁷ Enos, *supra* note 60. Professor Enos notes that the point system itself appears arbitrary, as it is unclear why a particular number of points should be added or deducted for a particular free speech incident or college policy. *Id.* The examples noted include valuing a “speaker . . . being supported” at one bonus point; a “speaker invitation being revoked” at three penalty points; and a “speaker voluntarily withdrawing” at one penalty point. *Id.* In response, FIRE states that it takes away more points for sanctioning than it adds for supporting a speaker because “negative events” are “more impactful.” Stevens, *supra* note 25.

⁶⁸ Eleanor Clemans-Cope, *Deceitful Statistics Prop Up the Princeton Free Speech Panic*, DAILY PRINCETONIAN (Jan. 18, 2023, 9:15 PM), <https://www.dailyprincetonian.com/article/2023/01/princeton-free-speech-foundation-individual-rights-education-fire-ranking> [https://perma.cc/JD6Z-MCE3].

⁶⁹ The Daily Pennsylvanian Editorial Board, *Addressing the Status of Free Speech at Penn*, DAILY PENNSYLVANIAN (Nov. 28, 2023, 11:17 PM), <http://www.thedp.com/article/2023/11/fire-free-speech-rankings-2024-analysis-history> [https://perma.cc/372T-2Z2Y].

⁷⁰ See MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* 141 (2019).

⁷¹ See Sachs, *supra* note 60. Professor Jeffrey Sachs responds “so what?” to the question of funding. *Id.* It is, however, an entirely legitimate area of inquiry, especially in the realm of policy and politics. See, *e.g.*, *Money, Power and the Influence of Ordinary People in American Politics*, PEW RSCH. CTR. (Sept. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/money-power-and-the-influence-of-ordinary-people-in-american-politics/> [https://perma.cc/42TG-53US] (“[T]he belief that there is too much money in politics is widespread. References to the influence of money and concerns about corruption are some of the most frequently cited critiques of the political system . . .”).

organization widely viewed as a partisan right-wing group,⁷² in its failed effort to receive funding from the University of Chicago.⁷³ Despite the explanation provided by the university for its action in denying funding, the FIRE Rankings promptly downgraded the university's ranking when the funding request was denied.⁷⁴ FIRE's affiliations, for good or for bad, may serve as a basis to question the speed and process associated with that ranking decision.

One criticism by a student journalist gets at the heart of the issue. Noting that her school is weighed down by its “disruptive conduct” score, that journalist states that the FIRE Rankings are “used as a tool to undermine legitimate progressive dissent or to condemn programs that seek to listen to the voices of oppressed groups.”⁷⁵ Put another way, the FIRE Rankings distort free speech principles by eliminating the concepts of active, disruptive protest and dissent, and thereby allow space for the silencing of those standing up to hate and injustice. The FIRE Rankings thus feed into the growing narrative questioning student activists and their methods of protest, even in cases where the protests are nonviolent.

This broader concept of protest and dissent within free speech principles, which calls for recognizing disruptive activism and its importance to the First Amendment, is discussed in the next section.

III. PROTEST AND DISSENT IN FIRST AMENDMENT JURISPRUDENCE

Protest and dissent are ideas at the core of the First Amendment, and central to any analysis or attempt at measurement of free speech. Of course, dissent and the First Amendment are not synonymous,

⁷² See Nell Gluckman, *Why One College President is Denouncing a Conservative Campus Group*, CHRON. HIGHER EDUC. (Oct. 23, 2023), <https://www.chronicle.com/article/why-one-college-president-is-denouncing-a-conservative-campus-group> [https://perma.cc/KQZ3-KN6D]. TPUSA is a “right-wing group that advocates a Trump-brand of conservatism on college campuses through local chapters.” *Id.* The Chief Operating Officer of Turning Point Action (TPUSA's political advocacy affiliate) has been indicted for posing as a fake elector in the 2020 presidential election. Laurie Roberts, *Fake Elector Indictments Cap a Disastrous Week in Arizona for Turning Point USA*, AZCENTRAL (Apr. 25, 2024, 6:35 AM), <https://www.azcentral.com/story/opinion/op-ed/laurieroberts/2024/04/23/turning-point-usa-smith-asu-fake-elector-embarrassment/73424327007/> [https://perma.cc/XC7U-KJHK].

⁷³ Declan Hurley, *The Inside Story of Why UChicago Fell from First Place to Thirteenth in FIRE's Free Speech Rankings*, CHI. THINKER (Sept. 8, 2023), <https://thechicagothinker.com/the-inside-story-of-why-uchicago-fell-from-first-place-to-thirteenth-in-fires-free-speech-rankings/> [https://perma.cc/45QL-ZQ4Q] (reporting that FIRE advocated for TPUSA in its application before downgrading the school after the application was denied).

⁷⁴ *Id.* The school reportedly stated that the majority of applications are not approved, that TPUSA had a lack of members and events to justify approval, and that the group was similar to an existing group. *Id.*

⁷⁵ Clemans-Cope, *supra* note 68.

and much protected speech, including expression relating to art, literature, and commercial speech, is in many cases completely unrelated to dissent.⁷⁶ Political speech, however, unlike those other forms of expression, is generally viewed as a core component of the First Amendment,⁷⁷ and for this reason (among others) dissent is also foundational. Protest and dissent spur democratic dialogue and the “possibility of constructive change.”⁷⁸ This idea can be seen in the Millian view that “dissent allows a society to test its views and positions, to assure itself of the accuracy of some views and to correct others.”⁷⁹ Dissent also provides a check on the power of the government; the “freedom to criticize government officials” was central to James Madison’s conception of the First Amendment, and that view—that “checking the abuse of official power” is central to the First Amendment—retains its explanatory value today.⁸⁰

As Professor Steven Shiffrin, one of the primary proponents of a dissent-based theory of the First Amendment, points out, the power of dissent as a First Amendment principle is not limited to the

⁷⁶ See COLLINS & SKOVER, *supra* note 2, at 108.

⁷⁷ See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 329 (2010) (“[P]olitical speech . . . is central to the meaning and purpose of the First Amendment.” (citing *Morse v. Frederick*, 551 U.S. 393, 403 (2007))); 303 *Creative LLC v. Elenis*, 600 U.S. 570, 626 (2023) (Sotomayor, J., dissenting) (“[P]olitical expression . . . lies at the heart of the First Amendment.” (first citing *United States v. O’Brien*, 391 U.S. 367, 369–70, 382 (1968); and then citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); see also Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 474 (1996) (“[T]here is reason to think . . . that the political character of expression . . . affects the Court’s decisions, even if in a more subtle fashion than by raising the formal constitutional standard. In recent decades, the Court almost never has upheld a regulation of political speech. Perhaps more tellingly, almost all of the landmarks of First Amendment law—the classic cases that set the tone and provide the focus for analysis of free speech questions—arise out of governmental attempts to restrict speech of an obviously political nature.” (collecting cases)).

⁷⁸ SHIFFRIN, *supra* note 4, at 17, 93.

⁷⁹ Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1759 (2005) (summarizing John Stuart Mill’s view of dissent). Dean Gerken notes that Mill wrote of the “peculiar evil of silencing the expression” of dissenting opinions: “[W]e should treasure dissenting opinions because ‘[i]f the opinion is right, [we] are deprived of the opportunity of exchanging error for truth; if wrong, [we] lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.’” *Id.* at 1759–60 (quoting JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., Hackett Publ’g Co. 1978) (1859)).

⁸⁰ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RSCH. J. 521, 528, 536, 566 (1977). Professor Blasi is quick to clarify that the checking value is a “supplement to, not a substitute for, the values that have been at the heart of twentieth-century thinking about the First Amendment,” including the value of freedom of speech as essential to individual autonomy; the view that the marketplace of ideas (or as he calls it, “diversity of expression”—expression free of government regulation) is of social benefit; and the view that the rich public debate insured by the First Amendment is a key to self-governing democracy. *Id.* at 528, 544–67.

checking value or even to political speech.⁸¹ Dissent serves more broadly as “a crucial institution for challenging unjust hierarchies and for promoting progressive change.”⁸² The right of free speech is there “to encourage and protect [all] those who speak out against established customs, habits, institutions, and authorities.”⁸³

The germination and growth of the concepts of protest and dissent in the law of free speech—and in particular, active, disruptive protest and dissent—is first seen in the political and labor strife at the start of the twentieth century, as discussed below.⁸⁴ The cases decided up through the Second World War involving political protests developed much of the doctrine and many of the themes (often in dissenting opinions) found today in First Amendment jurisprudence relating to protest and dissent.⁸⁵ The later cases arising out of the civil rights era and the Vietnam War protests discussed below, while in many instances being less doctrinal in their exposition than earlier opinions, solidified and expanded the role of active dissent at the heart of the First Amendment.⁸⁶ A significant proportion of those cases involved raucous, disruptive protests by students, both on and off college campuses, shining a light on the Supreme Court’s protection of such dissenting speech and expressive conduct under

⁸¹ See SHIFFRIN, *supra* note 4, at xi, 41.

⁸² *Id.* at xii, 17.

⁸³ *Id.* at 128. Professor Richard Delgado succinctly summarizes Professor Shiffrin’s position: Although Shiffrin does not believe that a general theory of the First Amendment is possible, he nevertheless urges that dissent should occupy the center of any appropriate theory of free speech. Asserting that combating injustice is the primary purpose of the First Amendment, Shiffrin holds that criticism of existing customs, traditions, institutions, and authorities should receive special protection because of the tendency of entrenched interests to perpetuate unjust hierarchies of power. Even though much speech is valuable, Shiffrin writes, constitutional protection is especially required for the whistleblower, iconoclast, or heretic voicing unpopular views.

Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 779–80 (2000) (citations omitted).

⁸⁴ The development of First Amendment law in the twentieth century has been well catalogued. The discussion below focuses specifically on those events and decisions that established the law and principles of protest and dissent at the heart of the First Amendment, and that show protection is afforded even in cases where that protest and dissent is tumultuous and disruptive. As to the development of First Amendment law more broadly, see generally LEE C. BOLLINGER & GEOFFREY R. STONE, *THE FREE SPEECH CENTURY* (2019); HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 135–526 (2004) [hereinafter STONE, *PERILOUS TIMES*]; Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 828–1017 (2008).

⁸⁵ See, e.g., STONE, *PERILOUS TIMES*, *supra* note 84, at 236–37; discussion *infra* Sections III.A.–B.

⁸⁶ See, e.g., STONE, *PERILOUS TIMES*, *supra* note 84, at 428; discussion *infra* Section III.C.

the First Amendment and pointing up the wrongheadedness of current critics of student activism, including the FIRE Rankings.⁸⁷

A. Protest at the Turn of the Twentieth Century—Labor Strife and Antiwar Protest

The labor movement in the United States became an active political force toward the end of the nineteenth century.⁸⁸ The wealth disparity between the rich and the working class in that time period was tremendous, working conditions and wages were poor, and industry and the government were at best unsympathetic to workers—all conditions conducive to labor organizing and protest.⁸⁹ Thus, much of the social activism and protest in this era revolved around workers and labor actions.⁹⁰ That activism, and the government's response, increased after the turn of the twentieth century,⁹¹ with the United States' entry into the Great War in the second decade of the century leading to antiwar protests.⁹² These developments—labor protests and antiwar dissent—were catalysts in the initial development of modern free speech law in the United States.

1. Workers Use “Free Speech Fights” as a Protest Tactic

In the first decade of the twentieth century, with millions of Americans living in poverty and facing harsh working conditions, a radical labor group, the International Workers of the World (IWW), formed a new union.⁹³ That union, unlike the thirty-year-old American Federation of Labor (AFL), admitted both unskilled and

⁸⁷ See discussion *infra* Part V.

⁸⁸ See LAURA M. WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 23 (2016).

⁸⁹ See ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976* 23 (2001); RALPH YOUNG, *AMERICAN PATRIOTS: A SHORT HISTORY OF DISSENT* 29–30 (2024).

⁹⁰ The newly-formed American Federation of Labor was ascendant in this time period, and labor strikes, although often meeting with little success, were common in the 1890s. GOLDSTEIN, *supra* note 89, at 42, 44–48.

⁹¹ See DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 25, 71 (1997). A group of libertarian radicals and anarchists organized the Free Speech League in 1902 to advocate for “free speech for all viewpoints.” *Id.* at 25. Although the Free Speech League never gained broad support in the pre-war years, it did organize protests and assist in the legal defense of anarchists and other dissidents prosecuted for political advocacy. *Id.* at 48–49, 64, 71. The Free Speech League also assisted the International Workers of the World union in their “free speech fights.” *Id.* at 70–71; see also *infra* note 96 and accompanying text.

⁹² See YOUNG, *supra* note 89, at 62 (“[World War I] was the most heavily protested war in American history up to that time . . .”).

⁹³ See WEINRIB, *supra* note 88, at 15, 26; YOUNG, *supra* note 89, at 29, 49–51.

skilled workers, and workers of all races.⁹⁴ Much of the IWW's organizing took place in the western United States, where it leaned on speech as a protest and organizing tactic.⁹⁵ The “Wobblies,” as the IWW members were called, engaged in “free speech fights” in which speakers literally stood on soapboxes on street corners in western towns such as Missoula, Montana; Spokane, Washington; and San Diego, California, extolling the IWW and its worker-organizing efforts to assembled crowds and passers-by.⁹⁶ Speech, however, enjoyed no special protection at this time; the courts were hostile to free speech claims, and speech was essentially treated no differently than conduct.⁹⁷ Thus, the speakers were invariably arrested under state and local speaking bans, garnering publicity for the IWW and furthering their organizing.⁹⁸

As a result of the IWW's actions, as well as labor violence and the increase in “radical laborers agitating for improved conditions and greater power over their work,” Congress in 1912 formed a Commission on Industrial Relations (Commission) to look into the causes of labor unrest and possible solutions.⁹⁹ The Commission heard from a number of witnesses (among them the lawyer and future Supreme Court Justice Louis Brandeis) regarding the causes of the unrest, including testimony on poor wages and “horrendous working conditions.”¹⁰⁰ Witnesses also testified that the suppression of speech fueled the dissent and was a partial cause of violence.¹⁰¹ The Commission's final report, issued in 1915, did not include a majority report, but was comprised of three separate principal reports, with the “most memorable” report—the so-called “Manly report”—written by Basil Manly and joined by Chairman Frank Walsh.¹⁰² A section of that report devoted to free speech “described

⁹⁴ See WEINRIB, *supra* note 88, at 26 (“[T]he IWW recruited the unskilled masses, regardless of race, ethnicity, and religion.”).

⁹⁵ See *id.* at 27–28.

⁹⁶ *Id.*; Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's “First Freedom,” 1909–1931*, 40 WM. & MARY L. REV. 557, 566–69 (1999).

⁹⁷ See WEINRIB, *supra* note 88, at 26 (quoting *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895) (Holmes, J.) (“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”)).

⁹⁸ WEINRIB, *supra* note 88, at 27–28. Part of this strategy was to overwhelm the local governments; “[t]he wave of arrests that followed flooded the city's jails, draining the resources of the courts and correctional system.” See *id.*; see also RABBAN, *supra* note 91, at 80–83.

⁹⁹ Bobertz, *supra* note 96, at 572; see WEINRIB, *supra* note 88, at 24.

¹⁰⁰ Bobertz, *supra* note 96, at 573; see also WEINRIB, *supra* note 88, at 24.

¹⁰¹ WEINRIB, *supra* note 88, at 29; see also Bobertz, *supra* note 96, at 575. Clashes between the police and the IWW in their “free speech fights” were a focus of the Commission's final report. RABBAN, *supra* note 91, at 106–09.

¹⁰² WEINRIB, *supra* note 88, at 44, 46.

the police suppression of unpopular ideas, in public and in private halls, as ‘one of the greatest sources of social unrest.’”¹⁰³ Although the Commission “accomplished little in the way of concrete legislation or policy change[,] . . . the Manly report served as an organizing tool and rallying cry for disillusioned workers.”¹⁰⁴ As a result, “[a]t the outbreak of war, when dissenters were faced with aggressive state and private repression, they had a vocabulary to draw on.”¹⁰⁵ In addition to testifying before the Commission, Brandeis supported its initial establishment,¹⁰⁶ and may have been influenced by the Manly Report in his concurring opinion in *Whitney v. California*,¹⁰⁷ discussed below.

2. The Supreme Court Rejects Protection for Dissident Speech

With America’s entry into the Great War in 1917, labor strife and protests were soon overtaken in the headlines by protests against America’s involvement in the war.¹⁰⁸ Congress sought to crack down on those protests and passed the Espionage Act of 1917, which made it illegal during wartime to, among other things, willfully “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States,” or willfully “obstruct the recruiting or enlistment services of the United States.”¹⁰⁹ That statute was amended the next year to add the

¹⁰³ *Id.* at 47 (quoting Basil M. Manly, *Report of Basil M. Manly, Director of Research and Investigation*, in FINAL REPORT OF THE COMMISSION ON INDUSTRIAL RELATIONS, S. DOC NO. 415, at 150 (1st Sess. 1916) [hereinafter *Manly Report*]).

¹⁰⁴ WEINRIB, *supra* note 88, at 49.

¹⁰⁵ *Id.* at 52.

¹⁰⁶ See RABBAN, *supra* note 91, at 359.

¹⁰⁷ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Whitney*, Justice Brandeis stated, in words that appear to echo and expand on the Manly Report, that “repression breeds hate; . . . hate menaces stable government; . . . the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and . . . the fitting remedy for evil counsels is good ones.” Compare *id.*, with *Manly Report*, *supra* note 103, at 151 (“It is axiomatic that a Government which can be maintained only by the suppression of criticism should not be maintained. Furthermore, it is the lesson of history that attempts to suppress ideas results only in their more rapid propagation. Not only should every barrier to the freedom of speech be removed . . . but every reasonable opportunity should be afforded for the expression of ideas and the public criticism of social institutions.”).

¹⁰⁸ STONE, *PERILOUS TIMES*, *supra* note 84, at 137.

¹⁰⁹ See *id.* at 137, 151–52 (noting that the Espionage Act of 1917 was “the first federal legislation against disloyal expression since the Sedition Act of 1798”). Judge Learned Hand, interpreting the Espionage Act in *Masses Pub. Co. v. Patten*, 244 F. 535, 537–41, 543 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917), enjoined the postmaster from refusing to accept for mailing a magazine with antiwar messages, holding that the statute was “limited to the direct advocacy of resistance to the recruiting and enlistment service.” In that case, Judge Hand was construing the statute and not engaging in constitutional interpretation. RABBAN, *supra* note

Sedition Act of 1918, which, among other things, prohibited during wartime any “utter[ing], print[ing], writ[ing], or publish[ing] [of] disloyal, profane, scurrilous, or abusive language about the form of government of the United States, . . . or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States.”¹¹⁰

In most cases, prosecutions under the Espionage and Sedition Acts “were for speaking or writing against American involvement in the war, not espionage or sabotage,”¹¹¹ and many protesters, including IWW members, were targeted by the government and prosecuted and convicted under these statutes for promoting and participating in street protests and demonstrations against the war.¹¹² Free speech claims were raised as a defense in such prosecutions, and the Espionage Act served as the basis of the first major decision handed down by the Supreme Court on the meaning of the First Amendment, *Schenck v. United States*,¹¹³ followed shortly thereafter by *Frohwerk v. United States*¹¹⁴ and *Debs v. United States*.¹¹⁵ In each of those decisions, the defendant was charged with violating the Espionage Act for speech opposing the war.¹¹⁶ Justice Holmes was the author of those opinions, in which the defendants’ First Amendment claims were rejected, and each defendant’s conviction was upheld on the basis of his speech.¹¹⁷ Without question, these decisions were, in the words of Professor Lee Bollinger, “an inauspicious start for the

91, at 265. Nevertheless, and although his decision was reversed, Judge Hand’s view that “direct advocacy of resistance” to the government was required for the restriction on dissenting speech influenced the Supreme Court years later in *Brandenburg*, 395 U.S. 444, discussed in Section III.C.5. below. See STONE, PERILOUS TIMES, *supra* note 84, at 522–23.

¹¹⁰ STONE, PERILOUS TIMES, *supra* note 84, at 185–86. Professor Stone characterizes the amendments as “the most repressive legislation in American history.” *Id.* at 185.

¹¹¹ Jay, *supra* note 84, at 831.

¹¹² See *id.* at 830. IWW members were active in the antiwar effort, leading to a “federal conspiracy prosecution of the IWW leadership,” followed by their conviction and imprisonment. WEINRIB, *supra* note 88, at 82, 98. In addition to the federal prosecutions, IWW activism prompted state legislative responses in the form of criminal syndicalism statutes. See Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 655–56 (1988).

¹¹³ *Schenck v. United States*, 249 U.S. 47, 48–49, 51 (1919).

¹¹⁴ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

¹¹⁵ *Debs v. United States*, 249 U.S. 211, 215 (1919).

¹¹⁶ See *Schenck*, 249 U.S. at 48–49; *Frohwerk*, 249 U.S. at 205–06; *Debs*, 249 U.S. at 212.

¹¹⁷ See *Schenck*, 249 U.S. at 48–49; *Frohwerk*, 249 U.S. at 205–06, 210; *Debs*, 249 U.S. at 212, 215–16. In *Schenck*, the defendants had printed and distributed flyers that “intimated” in “impassioned language” that the draft “was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few,” and urged its readers to assert their rights. See *Schenck*, 249 U.S. at 51. The defendants in *Frohwerk* similarly protested the war by way of a newspaper publication. See *Frohwerk*, 249 U.S. at 205–07. The Socialist Party leader Eugene Debs was prosecuted for a speech given during his campaign for President in which he praised the courage of draft resisters. See *Debs*, 249 U.S. at 212–13.

constitutional right of freedom of speech and press.”¹¹⁸ Despite its subsequent demise, the *Schenck* decision remains a point of reference, as it was there that Holmes articulated the clear and present danger test, stating:

The question [of whether speech is protected by the First Amendment] in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.¹¹⁹

That test was subsequently cast (by Holmes and others) in speech-protective terms, and became central to the Supreme Court’s First Amendment jurisprudence up through the Second World War.¹²⁰

3. Holmes and Brandeis Change Course

Less than eight months after *Schenck* and its companion cases were decided, Justice Holmes reversed his views on the First Amendment and wrote a dissent (joined by Justice Brandeis) in *Abrams v. United States*.¹²¹ The *Abrams* case, like the free speech cases that preceded it, centered on antiwar protests directed at the country’s involvement in World War I.¹²² The defendants had been convicted of conspiracy to violate the Espionage Act as amended by the Sedition Act for their role in printing and distributing leaflets

¹¹⁸ BOLLINGER & STONE, *supra* note 84, at 1.

¹¹⁹ See *Schenck*, 249 U.S. at 52.

¹²⁰ See *infra* notes 121–22 and accompanying text. As to the status of the clear and present danger test today, see, for example, Frederick Schauer, *Free Speech Overrides*, 2020 U. CHI. LEGAL F. 255, 258, 261, 270–71 (2020) (discussing the ongoing applicability of the clear and present danger test).

¹²¹ See *Abrams v. United States*, 250 U.S. 616, 624–31 (Holmes, J., dissenting). Holmes’s dissent in *Abrams* is widely considered the seminal opinion in First Amendment jurisprudence. See, e.g., Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 NOTRE DAME L. REV. 1343, 1343 (1997) (noting that Holmes’s dissent in *Abrams* “may be the single most influential judicial opinion ever written on [the] subject” of free speech); THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA* 249 (2013) (“In nearly every area of First Amendment law, [Holmes’s] *Abrams* dissent continues to make its presence felt.”). Professor Healy describes the development and change of Justice Holmes’s views of the First Amendment, leading to the dissent in *Abrams*. *Id.* at 198–210 (recounting the “intense lobbying effort” over the summer of 1919 by Justice Holmes’s “closest friends and admirers,” including Judge Learned Hand and Professor Zechariah Chafee Jr., urging him to rethink his views on the First Amendment); see also RABBAN, *supra* note 91, at 350–55 (describing developments and events in this time period that may have made Justice Holmes “more sensitive to the value of free speech”).

¹²² See *Abrams*, 250 U.S. at 616–17.

opposing the wartime actions of the United States.¹²³ The leaflets called for a general strike and stated, among other things: “Workers of the World! Awake! Rise! Put down your enemy and mine! Yes, friends, there is only one enemy of the workers of the world and that is CAPITALISM.”¹²⁴ In affirming the convictions, the Court, per Justice Clarke, stated that “the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war.”¹²⁵ The defendants’ First Amendment challenges to the convictions and to the Espionage Act itself were cursorily dismissed by the Court under its prior decisions in *Schenck* and *Frohwerk*.¹²⁶

In his dissent, Justice Holmes distinguished Abrams’s case from the prior decisions on which Justice Clarke relied, and expressed his view, now central to First Amendment theory, that “the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”¹²⁷ From there, Holmes stated: “we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”¹²⁸ Holmes went on to state a point central to his newly-formed view, that penalizing speech critical of the government—the law of seditious libel—has no place under the First Amendment:

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 . . . by repaying fines that it had imposed.¹²⁹

¹²³ *Id.* The indictment, following the language of the statute, charged the defendants among other things with conspiring to “unlawfully utter, print, write and publish . . . ‘disloyal, scurrilous and abusive language about the form of government of the United States,’” and with the use of language “intended to bring the form of government of the United States into contempt . . . and disrepute” and “encourage resistance to the United States in said war.” *Id.*

¹²⁴ *Id.* at 620.

¹²⁵ *Id.* at 624.

¹²⁶ *Id.* at 627 (citing *Schenck v. United States*, 249 U.S. 47, 48 (1919); *Frohwerk v. United States*, 249 U.S. 204, 205 (1919)).

¹²⁷ *Abrams*, 250 U.S. at 630.

¹²⁸ *Id.*

¹²⁹ *Id.*

As Professor Blasi has noted, a central tenet of Justice Holmes's view of the First Amendment was "that false or dangerous general beliefs about [the] government can never constitute 'substantive evils that Congress has a right to prevent.'"¹³⁰ Those "dangerous beliefs" included beliefs related to "the acceptable methods for bringing about political change."¹³¹ In Holmes's view, the Constitution calls for us to "respect and empower . . . the perpetually nascent forces of political displacement."¹³²

B. The Law of Protest Under the First Amendment Takes Shape

Holmes's dissent in *Abrams* initially did not move other members of the Court to his view of the First Amendment, and for years he and Brandeis stood alone in their interpretation.¹³³ It was not until the 1930s that a majority of the Court began to articulate a view protective of protest under the First Amendment.¹³⁴ In the interim, Holmes and Brandeis issued dissenting and concurring opinions, which ultimately proved to be profoundly significant in the development of the law.¹³⁵

1. Holmes and Brandeis Continue to Stand Alone: The *Gitlow* and *Whitney* Opinions

A few years after the *Abrams* decision, Benjamin Gitlow, a Communist former member of the New York Assembly, was prosecuted in New York state court for advocating criminal anarchy.¹³⁶ His crime was printing his "Left Wing Manifesto" in which he advocated for the overthrow of the government and its replacement by "the system of Communist Socialism."¹³⁷ His challenge to his conviction was decided by the Supreme Court in 1925.¹³⁸ In an opinion authored by Justice Sanford, the Court affirmed that conviction under the authority of *Schenck* and *Debs*.¹³⁹

¹³⁰ Blasi, *supra* note 121, at 1353 (quoting *Schenck*, 249 U.S. at 52).

¹³¹ Blasi, *supra* note 121, at 1353.

¹³² *Id.* at 1354.

¹³³ Bobertz, *supra* note 96, at 632; see discussion *infra* Section III.B.1.

¹³⁴ See discussion *infra* Section III.B.2.

¹³⁵ See discussion *infra* Sections III.B.1.–2.; sources cited *supra* note 84.

¹³⁶ *Gitlow v. New York*, 268 U.S. 652, 658–59 (1925).

¹³⁷ *Id.*; see WEINRIB, *supra* note 88, at 139.

¹³⁸ *Gitlow*, 268 U.S. at 652.

¹³⁹ *Id.* at 671–72 (citing *Schenck v. United States*, 249 U.S. 47, 51 (1919); *Debs v. United States*, 249 U.S. 211, 215–16 (1919)). The Court in *Gitlow* addressed whether the First Amendment's protection of freedom of speech is a right "protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow*, 268 U.S. at 666. While holding that there

Justice Holmes, once again joined by Justice Brandeis, dissented.¹⁴⁰ Responding to the argument that “this manifesto was more than a theory, . . . it was an incitement,”¹⁴¹ Justice Holmes stated:

Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker’s enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.¹⁴²

Thus, in Justice Holmes’s view, it was only that speech which threatened a “present conflagration” that escaped protection of the First Amendment.¹⁴³ Absent such a risk, dissenters “should be given their chance and have their way” in espousing their views, no matter how contrarian.¹⁴⁴

Two years later, in *Whitney v. California*,¹⁴⁵ the Court considered and upheld the conviction of Anita Whitney under the California Syndicalism Act, which, among other things, prohibited joining together with others to teach or advocate the use of “unlawful acts of force and violence . . . as a means of accomplishing a change in industrial ownership or control, or effecting any political change.”¹⁴⁶ In his concurrence, Justice Brandeis noted the breadth of the statute: “The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach

was no constitutional violation, *Gitlow* has subsequently come to be cited as the case establishing that the Fourteenth Amendment incorporates those rights protected by the First Amendment. *E.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (citing *Gitlow*, 268 U.S. at 652).

¹⁴⁰ *Gitlow*, 268 U.S. at 672 (Holmes, J., dissenting).

¹⁴¹ *Id.* at 673.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Whitney v. California*, 274 U.S. 357, 372 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

¹⁴⁶ *Id.* at 359–60. Justice Sanford delivered the opinion of the Court. *Id.* at 359.

it.”¹⁴⁷ Justice Brandeis saw that this aspect of the statute was of particular offense to free speech principles, stating:

[The country’s founders] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹⁴⁸

The concurrence in *Whitney* reaffirmed and expanded upon the parameters of First Amendment doctrine that Justices Holmes and Brandeis had articulated in their earlier dissents:

To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one [E]ven advocacy of violation [of the law], 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.¹⁴⁹

It is this view of the First Amendment that was later adopted by the Court and still holds today.¹⁵⁰

Professor Blasi points out two themes in Brandeis’s concurrence that have subsequently come to be viewed as foundational for the role of dissent in First Amendment theory: character and courage.¹⁵¹ Again referencing the Founders, Brandeis stated:

¹⁴⁷ *Id.* at 373 (Brandeis, J., concurring). Justice Brandeis concurred (rather than dissented) on procedural grounds, as the issue before the Court had not been raised below in the state trial court, and therefore was not properly before the Court. *See id.* at 380. Justice Holmes joined in Justice Brandeis’s opinion. *Id.*

¹⁴⁸ *Id.* at 375–76.

¹⁴⁹ *Id.* at 376.

¹⁵⁰ *See, e.g.,* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (quoting *Brandenburg*, 395 U.S. at 447); STONE, PERILOUS TIMES, *supra* note 84, at 522–23.

¹⁵¹ *See* Blasi, *supra* note 112, at 669, 676, 684.

[T]hey knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.¹⁵²

In Professor Blasi's view, this passage—and in particular the statement that “it is hazardous to discourage hope, thought and imagination”—presents an uplifting view of dissent as a source of the First Amendment's power:

[Brandeis] believed that in a political community personal qualities such as hope and imagination tend to be contagious and reciprocal. If the marginal, powerless members of the community retain some semblance of spirit, the mainstream is more likely to sustain its own vitality. . . . The passage is not primarily about consequences or tactics; it is about character.¹⁵³

The other theme in the concurrence is courage. Brandeis stated: “Those who won our independence by revolution were not cowards. They did not fear political change . . . [They were] courageous, self[-]reliant men, with confidence in the power of free and fearless reasoning . . .”¹⁵⁴ Professor Blasi calls “the ideal of civic courage expressed in the *Whitney* opinion . . . one of the generative ideas of the [F]irst [A]mendment tradition,” adding:

To Brandeis, the measure of courage in the civic realm is the capacity to experience or anticipate change—even rapid and fundamental change—without losing perspective or confidence. . . . [T]he freedom of speech may be most valuable for its indirect effect, salutary even if subtle, on public

¹⁵² *Whitney*, 274 U.S. at 375. As noted above, this passage would appear to amplify on the findings of the final *Manly Report* issued by the Commission on Industrial Relations in which Justice Brandeis participated before the onset of World War I, and which warned of social unrest caused by suppression of speech. See *supra* note 107 and accompanying text.

¹⁵³ Blasi, *supra* note 112, at 669, 676. See also RABBAN, *supra* note 91, at 343 (“[Whereas] Holmes invoked the economic metaphor of the free market as his model to defend the free competition of ideas unrestrained by the state . . . Brandeis emphasized the role of free speech in developing the individual character traits essential to the proper operation of a democratic society.”).

¹⁵⁴ *Whitney*, 274 U.S. at 377.

attitudes toward change. . . . The essence of civic courage is a healthy mentality regarding change.¹⁵⁵

2. The Court Adopts Holmes's and Brandeis's Views

The soaring rhetoric of Brandeis and Holmes in their dissents (and the *Whitney* concurrence), although later forming the basis of First Amendment law, was at the time no more than a statement of their individual opinions.¹⁵⁶ Speech remained essentially unprotected until, in the years following *Whitney*, the Court issued a series of First Amendment decisions supportive of the free speech rights of dissenters and protesters,¹⁵⁷ culminating in *West Virginia State Board of Education v. Barnette*¹⁵⁸ and *Terminiello v. City of Chicago*.¹⁵⁹ *Barnette* was a seminal First Amendment case affirming an injunction against enforcement of a state regulation requiring students to salute and pledge allegiance to the flag.¹⁶⁰ In prohibiting the state from requiring such an oath, the Court, in a 6–3 decision authored by Justice Jackson, confirmed that Justice Holmes's view had become the law: “It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.”¹⁶¹ The Court also affirmed the importance of dissent as a First Amendment principle, stating: “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.”¹⁶² The opinion in many ways crystallized the free speech

¹⁵⁵ Blasi, *supra* note 112, at 684, 690–91.

¹⁵⁶ See WEINRIB, *supra* note 88, at 112–13 (“The overwhelming majority of civil liberties cases decided during this period [the 1920s] privileged state security over expressive freedom. At the Supreme Court, Justices Oliver Wendell Holmes Jr. and Louis D. Brandeis awoke to the democratic value of free speech. Their dissents, however, were only that. Their persistent and impassioned insistence that the First Amendment encompassed subversive speech failed to persuade their fellow justices and afforded no protection to disfavored speakers.”).

¹⁵⁷ See, e.g., *Stromberg v. California*, 283 U.S. 359, 360, 369–70 (1931) (reversing conviction for display of red flag as a symbol of “opposition to organized government.”); *Near v. Minnesota*, 283 U.S. 697, 703–04, 723 (1931) (reversing prior restraint on antisemitic newspaper report accusing public officials of corruption); *De Jonge v. Oregon*, 299 U.S. 353, 362, 365 (1937) (reversing state court syndicalism conviction for assisting in the conduct of a public meeting “under the auspices of the Communist Party.”).

¹⁵⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁵⁹ *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

¹⁶⁰ *Barnette*, 319 U.S. at 626–30, 642.

¹⁶¹ See *id.* at 624–25, 633. The Court had earlier invoked the clear and present danger test in *Herndon v. Lowry*, 301 U.S. 242, 261, 264 (1937) (reversing the state law insurrection conviction of a Communist party organizer), and other cases. See RABBAN, *supra* note 91, at 375–76.

¹⁶² *Barnette*, 319 U.S. at 641.

value of dissent; “[a]gainst the levelling power of conformity challenged in that case, which demanded the expression of allegiance from every child, the [F]irst [A]mendment intervened and taught respect for the value of dissent.”¹⁶³

Professor Blasi and Professor Seana Shiffrin state that this principle, prohibiting the compelled recitation of a pledge, is central to the First Amendment because “the successful operation of an ongoing, stable freedom of speech culture” requires a commitment to furthering character ideals such as “concern for the truth, sincerity, and . . . intellectual independence.”¹⁶⁴ Allowing students to opt out of the pledge furthers these democratic character ideals not just for the dissenters, but for all involved.¹⁶⁵ “One might even consider the practice of dissenters publicly asserting their right to be excused from the patriotic catechism to be character building in the First Amendment sense, both for the dissenters themselves and for the other students who witness conscientious objection in action.”¹⁶⁶ Dissent in many cases—and certainly in the case of laws that require “public adherence to an ideological point of view [that the dissenter] finds unacceptable”¹⁶⁷—can thus promote those virtues of truth, sincerity, and intellectual independence both for the actors and those who bear witness.

In 1949, the Court issued its decision in *Terminiello*, overturning the conviction of a defendant charged with disorderly conduct in connection with a hateful speech to which much of the gathered crowd reacted raucously.¹⁶⁸ The jury instruction in that case, in relevant part, called for conviction for breach of the peace for action that “stirs the public to anger, invites dispute, brings about a

¹⁶³ Lee C. Bollinger, *The Meaning of Dissent*, 89 MICH. L. REV. 1382, 1384–85 (1991) (describing Professor Steven Shiffrin’s view of *Barnette*).

¹⁶⁴ Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES 433, 460 (Michael C. Dorf ed., 2004).

¹⁶⁵ See *id.* at 474.

¹⁶⁶ *Id.*

¹⁶⁷ See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In *Wooley*, the Court upheld the right of an objector to tape over the motto “Live Free or Die” on his New Hampshire license plate. See *id.* at 705, 708, 717. The Court held that, under *Barnette*, requiring the driver to display those words violated his First Amendment right not to speak, stating: “The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.” See *id.* at 715; see also Blasi & Shiffrin, *supra* note 164, at 467–68 (citing *Wooley*, 430 U.S. at 705).

¹⁶⁸ See *Terminiello v. City of Chicago*, 337 U.S. 1, 2–3, 6 (1949). *Terminiello* was “a professional rabble-rouser” and his speech to a sympathetic audience in the auditorium where he spoke was deeply offensive to the crowd assembled outside, which reacted with hostility. See KALVEN, *supra* note 84, at 82.

condition of unrest, or creates a disturbance.”¹⁶⁹ The Court, in a 5–4 decision written by Justice Douglas, held that the defendant’s speech was protected under the First Amendment regardless of the riotous response that it received from the audience, stating:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.¹⁷⁰

The Court’s decision in *Terminiello* was in its time a high-water mark for the First Amendment’s protection for dissident speech.¹⁷¹ It was followed by a period in which the Court grew less protective of First Amendment rights, as Senator Joseph McCarthy and others led witch hunts against real and imagined Communist party members and sympathizers.¹⁷² That era was followed by a renaissance of First Amendment law with the ascendance of the Warren Court, described below.¹⁷³

C. Protest, Dissent, and Free Expression During the Civil Rights Era and the Vietnam War

The Supreme Court issued a number of opinions addressing the nonviolent civil rights sit-ins and marches of the 1960s and the Vietnam War protests of the 1960s and early 1970s.¹⁷⁴ Those decisions greatly expanded First Amendment protections for protests and demonstrations, including by increasing protections for

¹⁶⁹ See *Terminiello*, 337 U.S. at 4.

¹⁷⁰ *Id.* (citation in text omitted) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); *Bridges v. California*, 314 U.S. 252, 262 (1941); *Craig v. Harney*, 331 U.S. 367, 373 (1947)).

¹⁷¹ See also *KALVEN*, *supra* note 84, at 81.

¹⁷² The erosion of free speech rights and civil liberties in this time period is described in *STONE*, *PERILOUS TIMES*, *supra* note 84, at 311–426, and *GOLDSTEIN*, *supra* note 89, at 286–412.

¹⁷³ See discussion *infra* Section III.C.

¹⁷⁴ See CHRISTOPHER W. SCHMIDT, *THE SIT-INS: PROTEST & LEGAL CHANGE IN THE CIVIL RIGHTS ERA* 114–51 (2018); Dawn Nunziato, *First Amendment Protections for “Good Trouble”*, 72 *EMORY L. J.* 1187, 1191–1214 (2023).

expressive conduct (such as sit-ins, picketing, and marches); recognizing the role of collective action; affirming the right to criticize the government and to advocate for change; and protecting dissonant and offensive speech.¹⁷⁵ Many of these cases, as seen in the discussion below, involved student protesters, both on and off the college campus, and frequently involved disruptive and raucous speech and conduct.¹⁷⁶ Lunch counter protests in particular—whereby Black people sat peaceably at “whites only” lunch counters in protest of segregation—had by 1960 become a widespread “student sit-in movement” that was “a new phase of the Civil Rights Movement, one in which mass participatory direct-action protest would become the leading edge of the movement’s demand for social and political change.”¹⁷⁷ At its inception, the largely student-driven lunch counter sit-in movement was entirely independent of established civil rights groups such as the NAACP Legal Defense Fund (LDF).¹⁷⁸ Those protests were subsequently endorsed and furthered by the LDF and other civil rights groups.¹⁷⁹ As discussed below, the cases addressing these and other civil rights protests, although initially decided on due

¹⁷⁵ See, e.g., Nunziato, *supra* note 174, at 1191–1214.

¹⁷⁶ See, e.g., cases cited *infra* notes 181, 186, 195, 201, 210, 215. The Court’s cases included striking down efforts by state and local governments to stop protesters through prior restraints on demonstrations, and through vague and overbroad criminal regulations, such as ordinances prohibiting disturbing the peace. Nunziato, *supra* note 174, at 1191–1207.

¹⁷⁷ Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 98–99 (2015). Although sit-ins protesting racial segregation had been undertaken sporadically throughout the country in the 1940s and 1950s, the sit-in movement was sparked in February 1960 when the “Greensboro Four”—Ezell Blair, Franklin McCain, Joseph McNeil, and David Richmond, four freshman students at North Carolina Agricultural and Technical College—sat in at a Woolworth lunch counter in Greensboro, North Carolina. *Id.* at 97; SCHMIDT, *supra* note 174, at 16–19. The sit-in protests spread across the South in the ensuing months. SCHMIDT, *supra* note 174, at 21–24. Professor Stewart Jay describes these protests:

Dissidents would assemble in some place that was a symbol of their remonstrance, such as a segregated lunch counter or bus station, and remain there passively until arrested.

At times the immediate objective was to fill the jails to capacity, which took a page from the IWW’s game plan some sixty years earlier.

Jay, *supra* note 84, at 974.

¹⁷⁸ SCHMIDT, *supra* note 174, at 51–52. In fact, according to contemporaneous reports, Thurgood Marshall (the President of the LDF at the time) initially thought the sit-ins to be “tactically ill-advised.” Schmidt, *supra* note 177, at 121–22. Marshall’s concern apparently stemmed from the fact that the protests occurred on private property rather than in publicly-owned facilities (where equal protection law clearly applied). *Id.* at 122.

¹⁷⁹ See SCHMIDT, *supra* note 174, at 53–54 (Thurgood Marshall and his fellow LDF lawyers soon “became leading proponents of the argument that the students had a claim based not only on the immorality of segregation in public accommodations, but also on its unconstitutionality”). Professor Christopher Schmidt notes that “[t]he sit-in movement also led to the creation of a vibrant new civil rights organization, the Student Nonviolent Coordinating Committee (SNCC), which grew out of an April 1960 meeting of student protest leaders.” Schmidt, *supra* note 177, at 100.

process grounds, came to be viewed by the Court through a First Amendment lens.¹⁸⁰

1. Protest as Expressive Conduct: Sit-Ins and Symbolic Speech

The question of what protection should be afforded to protests in the form of sit-ins came before the Court in *Garner v. Louisiana*.¹⁸¹ There, a group of Black students from Southern University sat peacefully at whites-only lunch counters in a department store in Baton Rouge in March 1960 to protest racial segregation.¹⁸² The students remained seated after being told they could sit elsewhere and subsequently being told by the police to leave; they were thereafter arrested for and convicted of disturbing the peace.¹⁸³ Absent any evidence of a breach of the peace, the Supreme Court reversed the convictions on due process grounds.¹⁸⁴ Although Justice Warren's opinion for the Court did not invoke the free speech clause, in a concurring opinion, Justice Harlan relied on the concept of expressive conduct in concluding that the defendants' conduct was protected under the First Amendment, stating:

[P]etitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country. Such a demonstration, in the circumstances of [this case], is as much a part of the "free trade in ideas" as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion" just as much as, if not more than, a public oration delivered from a soapbox at a street corner.¹⁸⁵

¹⁸⁰ See *infra* Section III.C.1. Indeed, the turn to the First Amendment in the cases described below can be viewed as a rationale adopted by the Court "to vindicate civil rights protestors." RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* 140 (2016) ("The justices' willingness to decide cases on First Amendment grounds suggested that they had begun to view civil rights protestors as a new set of free speakers deserving of protection.")

¹⁸¹ *Garner v. Louisiana*, 368 U.S. 157 (1961). The *Garner* decision involved three separate cases based on similar facts. The facts of one of those cases, *Hoston v. Louisiana*, described here, form the basis of the Court's opinion. *Id.* at 159–60.

¹⁸² *Id.* at 159–60; see also *id.* at 201 (Harlan, J., concurring).

¹⁸³ *Garner*, 368 U.S. at 160–61.

¹⁸⁴ *Id.* at 173–74.

¹⁸⁵ *Id.* at 201 (Harlan, J., concurring) (citations in text omitted) (first quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); and then quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

The decision in *Garner* was followed by *Brown v. Louisiana*.¹⁸⁶ In that case, five Black men staged a peaceful sit-in in March 1964 in the reading room of the Audubon Regional Library in Clinton, Louisiana.¹⁸⁷ Their intent was to protest segregation in the public library system.¹⁸⁸ They were charged with and convicted of disturbing the peace after they were asked to leave but remained in the library.¹⁸⁹ In a plurality decision authored by Justice Fortas, the Supreme Court reversed the convictions.¹⁹⁰ Justice Fortas stated that, as in *Garner*, due process could not support the charges of disturbing the peace in the case of a peaceful protest.¹⁹¹ Following Justice Harlan's concurrence in *Garner*, however, Justice Fortas also determined that the prosecution of the defendants violated their rights "under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances."¹⁹² Justice Fortas stated, "[T]hese rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."¹⁹³

Following the decisions in *Garner* and *Brown*, the law of expressive conduct was further developed in a number of cases involving antiwar protests.¹⁹⁴ In *Tinker v. Des Moines Independent Community*

¹⁸⁶ *Brown v. Louisiana*, 383 U.S. 131 (1966).

¹⁸⁷ *Id.* at 136–37.

¹⁸⁸ *Id.* at 141.

¹⁸⁹ *Id.* at 137–38.

¹⁹⁰ *Id.* at 133, 138. Justice Fortas's opinion was joined by Chief Justice Warren and Justice Douglas. *Id.* at 133. Justice Brennan concurred, stating that the breach of peace statute at issue was unconstitutionally overbroad, sweeping up First Amendment activities, and that therefore the convictions must be reversed under *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965) (discussed below). *Brown*, 383 U.S. at 143–44 (Brennan, J., concurring). Justice White concurred on equal protection grounds. *Id.* at 150–51 (White, J., concurring). Justices Clark, Harlan, and Stewart joined in a dissenting opinion authored by Justice Black, who stated that he saw no statutory or constitutional violation in the record. *Id.* at 151–52, 159–60 (Black, J., dissenting).

¹⁹¹ *See id.* at 139 (majority opinion).

¹⁹² *See id.* at 141.

¹⁹³ *Id.* at 141–42.

¹⁹⁴ In one of those cases, *U.S. v. O'Brien*, David Paul O'Brien and three others violated federal law by burning their draft cards in front of a Boston courthouse to express their opposition to the Vietnam War. *United States v. O'Brien*, 391 U.S. 367, 369–70 (1968). Chief Justice Warren delivered the Court's opinion rejecting O'Brien's First Amendment challenge to that law, stating that even if his conduct were to be deemed "symbolic speech" within the ambit of the First Amendment, "it does not necessarily follow that the destruction of a registration certificate [i.e., draft card] is constitutionally protected activity." *Id.* at 376. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations

School District,¹⁹⁵ Christopher Eckhardt, a sixteen-year-old high school student; Mary Beth Tinker, a thirteen-year-old junior high school student; her fifteen-year-old brother, John Tinker; and other students wore black armbands to school in December 1965 to protest the Vietnam War.¹⁹⁶ They were suspended “based upon [the school authorities’] fear of a disturbance.”¹⁹⁷ The students challenged their suspensions in court, contending that their First Amendment rights had been violated.¹⁹⁸ The Supreme Court, in a 7–2 decision written by Justice Fortas, agreed, stating that the wearing of the armbands was symbolic speech “closely akin to ‘pure speech’” and therefore protected under the First Amendment.¹⁹⁹ The Court stated that there was no disturbance or threat of disturbance as a result of the protest, and that “the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to [the war] in Vietnam.”²⁰⁰

In another expressive conduct case, *Spence v. Washington*,²⁰¹ Harold Spence, a college student, hung a United States flag from his apartment window in Seattle.²⁰² He hung the flag upside down with a peace symbol attached to it, in protest of the recent U.S. invasion of Cambodia and the killings at Kent State University.²⁰³ He was arrested, and was charged and convicted under a Washington State statute that prohibited placing any mark or design on a United States flag.²⁰⁴ In a per curiam decision, the Court held that Spence’s conduct was clearly protected speech: “[H]is message was direct,

on First Amendment freedoms.” *Id.* The Court cited the administrative interest in maintaining draft cards to establish the government’s interest, *id.* at 379–80, in setting out a test under which, in an expressive conduct case, a government regulation can trump free speech rights where that regulation furthers an important government interest; is unrelated to the suppression of speech; and where the impact on the right to speak is no greater than necessary to further that interest, *id.* at 377.

¹⁹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

¹⁹⁶ *Id.* at 504.

¹⁹⁷ *Id.* at 508.

¹⁹⁸ *See id.* at 504–05.

¹⁹⁹ *Id.* at 504–06. Justices Harlan and Black dissented. *Id.* at 515 (Black, J., dissenting); *id.* at 526 (Harlan, J., dissenting).

²⁰⁰ *Id.* at 509–10 (majority opinion).

²⁰¹ *Spence v. Washington*, 418 U.S. 405 (1974).

²⁰² *Id.* at 406.

²⁰³ *Id.* at 406, 408. Spence hung the flag and was arrested the same day, May 10, 1970, *see id.* at 406, six days after the Ohio National Guard fired their guns into a group of Kent State University demonstrators, killing four and wounding thirteen, STONE, PERILOUS TIMES, *supra* note 84, at 465. President Nixon had announced on April 30, 1970, that U.S. troops were invading Cambodia. *Id.*

²⁰⁴ *Spence*, 418 U.S. at 406–08.

likely to be understood, and within the contours of the First Amendment.”²⁰⁵ Finding this to be “a case of prosecution for the expression of an idea through activity,”²⁰⁶ the Court reversed the conviction.²⁰⁷

2. Street Protests and Demonstrations

The protection of expressive conduct in the form of street protests and demonstrations was also repeatedly affirmed by the Warren Court.²⁰⁸ In a number of decisions, the Court called out arbitrary action and improper use of disturbing the peace ordinances by government officials in the course of recognizing that mass demonstrations and protests were protected activity under the First Amendment.²⁰⁹ Thus, in *Edwards v. South Carolina*,²¹⁰ a group of 187 Black high school and college students—including twenty-year-old South Carolina State College student James Clyburn, who years later would go on to represent the state in the U.S. Congress—gathered on the morning of March 2, 1961, at Zion Baptist Church in Columbia, South Carolina, and marched to the State House to protest discrimination in the state.²¹¹ After marching through the State House grounds, the protesters were told to disperse or be arrested, whereupon they “sang patriotic and religious songs after one of their leaders had delivered a ‘religious harangue.’”²¹² The protesters were then arrested and subsequently convicted for disturbing the peace.²¹³ The Court held that the state’s action in prosecuting the students for a peaceful street protest “infringed the petitioners’ constitutionally

²⁰⁵ *Id.* at 405, 415.

²⁰⁶ *Id.* at 411. Justice Rehnquist dissented, in an opinion joined by Chief Justice Burger and Justice White. *Id.* at 416 (Rehnquist, J., dissenting); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (overturning state court conviction for burning American flag as protected expression); *United States v. Eichman*, 496 U.S. 310, 314 (1990) (affirming dismissal of federal charges for flag-burning); cf. *Street v. New York*, 394 U.S. 576, 594 (1969) (reversing defendant’s criminal conviction for speaking words critical of the flag).

²⁰⁷ *Spence*, 418 U.S. at 415.

²⁰⁸ See Nunziato, *supra* note 174, at 1189–1207.

²⁰⁹ See *id.* Despite the numerous decisions in this era striking down the improper use of breach of peace and disorderly conduct ordinances against peaceful demonstrators, police continue to use these charges to arrest protesters even where it is clear those charges may not “ultimately hold up in court.” Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Speech*, 80 MO. L. REV. 961, 977 (2015).

²¹⁰ *Edwards v. South Carolina*, 372 U.S. 229 (1963).

²¹¹ *Id.* at 229–30. With regard to Congressman Clyburn’s role in the march, see, for example, Carolyn Click, *Capitol March Cemented Constitutional Rights*, THE STATE (Mar. 13, 2013, 12:42 AM), <https://www.thestate.com/news/local/civil-rights/article14422673.html> [<https://perma.cc/Z2U6-XN42>].

²¹² *Edwards*, 372 U.S. at 235–36.

²¹³ *Id.* at 233–34.

protected rights of free speech, free assembly, and freedom to petition for redress of their grievances,” and accordingly reversed the convictions.²¹⁴

In *Cox v. Louisiana*,²¹⁵ the Reverend B. Elton Cox led a group of approximately 2,000 Southern University students in December 1961 in a protest at the Baton Rouge courthouse directed at the earlier arrest of a group of twenty-three college students.²¹⁶ Those twenty-three students had been arrested, and were now detained at the courthouse, for protesting by means of picketing at stores that maintained segregated lunch counters.²¹⁷ Reverend Cox led the students in a march to the courthouse, where he gave a speech and the students sang hymns.²¹⁸ At lunchtime, Reverend Cox announced that the demonstrators would proceed downtown for a sit-in at the segregated lunch counters, which apparently caused unrest (“muttering” and “grumbling”) among the “white onlookers.”²¹⁹ The sheriff testified that Reverend Cox’s “appeal to the students to sit in at the lunch counters” was “inflammatory” and that he ordered the protesters to break up.²²⁰ The demonstrators failed to do so, and dispersed only when the police exploded tear gas into the crowd.²²¹ Reverend Cox was thereafter arrested and convicted of picketing near a courthouse with the intent, inter alia, of “influencing any judge, juror, witness, or court officer.”²²² Although it held that the picketing statute itself was facially valid and appropriately drafted, the Court

²¹⁴ See *id.* at 235, 238. Justice Stewart authored the Court’s opinion. *Id.* at 229. Justice Clark dissented, stating that he read the record to show an imminent threat of violence, permitting police intervention to preserve order. *Id.* at 238–45 (Clark, J., dissenting).

²¹⁵ *Cox v. Louisiana* (Cox I), 379 U.S. 536 (1965). A companion case, *Cox v. Louisiana* (Cox II), 379 U.S. 559 (1965), involved the same facts as *Cox I*, and the two cases were tried in Louisiana state court as one case. See *Cox I*, 379 U.S. at 537–38. In *Cox I*, Reverend Cox and the students were convicted of disturbing the peace and obstructing public passages; in *Cox II*, Reverend Cox and the students were convicted of illegal picketing of a courthouse. Under Louisiana procedure, however, the conviction in *Cox I* was reviewed by the Louisiana Supreme Court on certiorari, and the conviction in *Cox II* was reviewed on appeal, resulting in two separate judgments (both affirming the convictions below) and two separate appeals to the U.S. Supreme Court. *Id.* at 538. In both cases, the Supreme Court reversed the convictions on First Amendment grounds. *Id.* at 552, 558; *Cox II*, 379 U.S. at 574–75.

²¹⁶ *Cox I*, 379 U.S. at 538–40.

²¹⁷ *Id.* at 538, 542.

²¹⁸ *Id.* at 540–42.

²¹⁹ *Id.* at 542–43.

²²⁰ *Id.* at 543. Concurring in *Cox I* and dissenting in *Cox II*, Justice Clark stated that Reverend Cox “agitated and led a mob of over 2,000 students in the staging of a modern Donnybrook Fair across from the courthouse and jail.” *Cox v. Louisiana*, 85 S. Ct. 466, 472 (Clark, J., concurring and dissenting).

²²¹ *Cox I*, 379 U.S. at 543–44.

²²² *Cox II*, 379 U.S. at 560. As noted above, Reverend Cox was also charged with disturbing the peace and obstructing public passages. *Cox I*, 379 U.S. at 538.

determined that as applied, the conviction under the statute could not stand because Reverend Cox had received permission from the police to stage the protest and the subsequent demand to disperse was issued arbitrarily.²²³ In so holding, the Court reaffirmed the First Amendment’s protection of political protest, stating, “[O]ur constitutional command of free speech and assembly is basic and fundamental, and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society.”²²⁴

3. Collective Action and Political Boycotts

The Court’s 1982 decision in *NAACP v. Claiborne Hardware Co.*,²²⁵ regarding a civil rights protest that started sixteen years earlier in Port Gibson, Mississippi, addressed the protections for collective action in the form of a political boycott.²²⁶ In that case, Black citizens working through the local NAACP joined together to petition the local government, presenting a list of demands that included, among other things, the integration of the schools and public facilities.²²⁷ Dissatisfied with the response, they voted to boycott the white merchants in the city and county.²²⁸ The merchants sued in 1969 to enjoin the boycott, and sought damages.²²⁹ The litigation in the Mississippi courts took years, with the Mississippi Supreme Court

²²³ *Cox II*, 379 U.S. at 564, 572–73.

²²⁴ *Id.* at 574; *see* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (stating that “use of the streets and public places” for assembly and “discussing public questions . . . must not, in the guise of regulation, be abridged or denied” (citing *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Thornhill v. Alabama*, 310 U.S. 88 (1940); and then quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939))); *see also* *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (holding that a march and protest through the streets of Chicago that riled up onlookers “[f]ell well within the sphere of conduct protected by the First Amendment”). As articulated in *Cox* and seen throughout the cases addressing street protests and demonstration, the Court’s protection is based on the expressive aspect of protester conduct, limiting the extent of the protection. *See, e.g., Cox I*, 379 U.S. at 554. Professor Tabatha Abu El-Haj proffers that:

[T]he Court’s failure to clearly articulate that nonviolent disruptive assembly [in addition to speech] is constitutionally protected, when combined with rote acceptance of advance regulation of outdoor assembly [i.e., permit requirements] and the sheer volume of regulation governing access to and use of public spaces [i.e., time, place and manner restrictions], renders the scope of the right of peaceable assembly today shockingly thin.

Tabatha Abu El-Haj, *How the Liberal First Amendment Under-Protects Democracy*, 107 MINN L. REV. 529, 561 (2022). Nevertheless, the Court’s precedents protecting street protests and demonstrations remain at the heart of First Amendment jurisprudence (as thin as the protection may be).

²²⁵ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

²²⁶ *See id.* at 889.

²²⁷ *Id.* at 898–99.

²²⁸ *Id.* at 900.

²²⁹ *Id.* at 889.

issuing a decision in December 1980 upholding the trial court's imposition of tort liability on the boycotters for "malicious interference with the plaintiffs' businesses" and rejecting their First Amendment defense.²³⁰ The Supreme Court reversed, holding that the actions of the NAACP and its members were protected under the First and Fourteenth Amendments.²³¹ Reaffirming that peaceful picketing, marching and demonstrating are "protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances,"²³² the Court stated:

The [B]lack citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."²³³

The Court in *Claiborne Hardware* recognized that regulation of otherwise protected activity may be justified under certain circumstances where the effect on speech is incidental.²³⁴ The Court determined, however, that because the defendants' peaceful conduct was undertaken as a political protest, and did not arise from "parochial economic interests," the boycott retained its First Amendment protection.²³⁵ In noting that acts of violence were alleged in the lawsuit, the Court also held that individual members of the NAACP could not be liable based simply on their membership in the organization, stating:

Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that

²³⁰ *Id.* at 890–91, 894–95. The Mississippi Supreme Court rejected the merchants' state law antitrust and secondary boycott claims. *Id.* at 894.

²³¹ *Id.* at 907, 934. Justice Stevens authored the Court's opinion, with Justice Rehnquist concurring in the result. Justice Marshall did not participate in the consideration or decision of the case. *Id.* at 888, 934.

²³² *Id.* at 909 (first citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940); and then citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

²³³ *Claiborne Hardware*, 458 U.S. at 907–08 (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981)).

²³⁴ *Claiborne Hardware*, 458 U.S. at 912 (citing *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968)).

²³⁵ *Claiborne Hardware*, 458 U.S. at 912–15.

the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.²³⁶

Similarly, in *Healy v. James*,²³⁷ the Supreme Court reversed Central Connecticut State College’s denial of recognition of the local Students for a Democratic Society group based on the national group’s “philosophy of violence and disruption.”²³⁸ The Court held in relevant part that affiliation with a group involved in disruptive and violent activity is not a sufficient reason to deny the First Amendment right to associate with that group.²³⁹

4. Criticizing the Government: “Protecting Serious Radical Criticism” Becomes “Constitutional Doctrine”

One of the most significant First Amendment cases in this time period protecting the right to dissent—specifically, the right to criticize the government—was *New York Times Co. v. Sullivan*.²⁴⁰ That case involved a fundraising advertisement in the *New York Times* that described police attacks on the Reverend Martin Luther King Jr. and other demonstrators in the course of civil rights protests in Montgomery, Alabama.²⁴¹ The advertisement criticized local government officials for their handling of the protests.²⁴² In response to the advertisement, L.B. Sullivan, the police commissioner for Montgomery, sued the newspaper for defamation in Alabama state court based on errors in some of the statements in the advertisement.²⁴³ Although Sullivan was not named in the advertisement, and although the newspaper had printed a retraction correcting the erroneous statements, Sullivan prevailed in the trial court and the Alabama Supreme Court affirmed.²⁴⁴ The U.S.

²³⁶ *Id.* at 920. With regard to risks to the continuing vitality of this aspect of the *Claiborne* decision, see Section III.D. below, discussing *Doe v. McKesson*, 71 F.4th 278, 292–93 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 913 (2024).

²³⁷ *Healy v. James*, 408 U.S. 169 (1972). Justice Powell authored the decision in *Healy*, Chief Justice Burger and Justice Douglas concurred, and Justice Rehnquist concurred in the result. *Id.* at 170; *id.* at 195 (Burger, C.J., concurring); *id.* at 196 (Douglas, J., concurring); *id.* at 201 (Rehnquist, J., concurring in the judgment).

²³⁸ *Id.* at 187 (majority opinion).

²³⁹ *Id.* at 187–88.

²⁴⁰ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). Justice Brennan delivered the opinion of the Court. *Id.* at 256. Justices Black and Goldberg authored concurring opinions, with Justice Douglas joining both concurrences. *Id.* at 293 (Black, J., concurring); *id.* at 297 (Goldberg, J., concurring in the judgment).

²⁴¹ *See id.* at 256–57.

²⁴² *Id.* at 257–58.

²⁴³ *Id.* at 256–58.

²⁴⁴ *Id.* at 256, 258, 261.

Supreme Court reversed, stating that the advertisement was “an expression of grievance and protest on one of the major issues of our time.”²⁴⁵ The Court held that the First Amendment required a finding that the defendant acted with either knowledge of the falsity of the allegedly libelous statements or reckless disregard for the truth in the case of statements regarding the official conduct of a public official.²⁴⁶ In so holding, the Court noted 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.”²⁴⁷ The Court also held that in accord with the “broad consensus,” it was rejecting “restraint[s] . . . imposed upon criticism of government and public officials” reflected in the Sedition Act of 1798.²⁴⁸

Professor Kalven, praising the decision, stated that it turns the concept of “protecting serious radical criticism” into “constitutional doctrine.”²⁴⁹ Addressing the significance of the Court’s rejection of the doctrine of seditious libel, he stated:

[D]efamation of the government is an impossible notion for a democracy. . . . [T]he presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics.²⁵⁰

5. Dissenting Speech and Aggressive Advocacy

The Court’s decision in *Brandenburg v. Ohio*²⁵¹ was yet another milestone in the First Amendment law of protest. In that case, the defendant, Arthur Brandenburg, a Ku Klux Klan member, had been convicted of criminal syndicalism in Ohio state court under a statute that prohibited, among other things, advocating the duty, necessity

²⁴⁵ *Id.* at 271, 292.

²⁴⁶ *Id.* at 279–80.

²⁴⁷ *Id.* at 270 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

²⁴⁸ *Sullivan*, 376 U.S. at 276; *see also* *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (holding that statements “criticizing public policy” are protected under *Sullivan*).

²⁴⁹ KALVEN, *supra* note 84, at 229.

²⁵⁰ Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 205 (1964); *see also* Blasi, *supra* note 80, at 575 (“[S]editious libel is an impossible notion in a free society.”).

²⁵¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

or propriety of crime or violence to accomplish political reform.²⁵² The defendant had addressed about a dozen hooded and armed Ku Klux Klan members gathered around a burning wooden cross in an Ohio field; the event was captured on film by a local news station and later broadcast locally and nationally.²⁵³ Brandenburg stated to the group, “[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken,” adding that, “We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups [and marching on to other cities].”²⁵⁴ In reversing the conviction in a per curiam opinion, the Court held that the “constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁵⁵ The Court thereby overruled *Whitney v. California*, which had upheld the conviction of Anita Whitney under a similarly-worded California syndicalism statute,²⁵⁶ and produced what is “generally considered to be the most protective standard for free speech adjudication ever developed by the Supreme Court.”²⁵⁷

In *Hess v. Indiana*,²⁵⁸ in a per curiam decision, the Supreme Court reversed the disorderly conduct conviction of Gregory Hess, an antiwar protester who was arrested at a “demonstration on the campus of Indiana University . . . [involving] 100 to 150 . . . demonstrators [who] moved onto a public street and blocked the passage of vehicles.”²⁵⁹ It was in the course of the police efforts to disperse the crowd that Hess yelled, “‘We’ll take the fucking street later,’ or [‘again’].”²⁶⁰ Those events followed the earlier arrests of

²⁵² *Id.* at 444–45.

²⁵³ *Id.* at 445.

²⁵⁴ *Id.* at 446. Although the defendant’s use of the outmoded word “revengeance” was later mocked, and his lawyer stated that Brandenburg’s remarks were “stupid and silly,” as one commentator has noted, “[T]hat’s the thing about white supremacists: their rhetoric is mostly self-evident stupidity and silliness nestled between bursts of horrific vitriol. As cathartic as it can feel to mock, said silliness doesn’t make their rhetoric any less deadly serious. Or less deadly.” Moriel Rothman-Zecher, *The Upside of Brandenburg v. Ohio*, *PARIS REV.* (Jan. 6, 2020), <https://www.theparisreview.org/blog/2020/01/06/the-upside-of-brandenburg-v-ohio> [https://perma.cc/WV32-JFM2].

²⁵⁵ *Brandenburg*, 395 U.S. at 447.

²⁵⁶ See *Whitney v. California*, 274 U.S. 357, 360, 372 (1927).

²⁵⁷ RABBAN, *supra* note 91, at 380.

²⁵⁸ *Hess v. Indiana*, 414 U.S. 105 (1973). Justice Rehnquist dissented, in an opinion joined by Chief Justice Burger and Justice Blackmun. *Id.* at 109 (Rehnquist, J., dissenting).

²⁵⁹ *Id.* at 106 (majority opinion).

²⁶⁰ *Id.* at 106–07.

other students in the course of police action to clear hundreds of demonstrators from blocking the doorways of a campus building.²⁶¹ Reversing the conviction and citing to *Brandenburg*, the Court stated: “At best, . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some future indefinite time. This is not sufficient to permit the State to punish Hess’ speech.”²⁶²

6. Dissonant and Offensive Speech: The Right to “Speak Foolishly and Without Moderation”

One of the signature cases from the antiwar movement was *Cohen v. California*,²⁶³ where Paul Robert Cohen was arrested for wearing a jacket in the Los Angeles County courthouse on which the words “Fuck the Draft” were written.²⁶⁴ Cohen’s conviction for disorderly conduct was overturned by the Supreme Court on First Amendment grounds.²⁶⁵ The Court explained why it found even the coarse speech presented by this protester to be protected:

[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 . . . [and] that emotive function . . . practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, “[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.”²⁶⁶

Professor Kalven, in discussing *Cohen* and other Court decisions dealing with “the problem of disorder in the public forum,” noted that “whatever its reticence toward bold, clear assertions of principle in

²⁶¹ *Id.* at 109 (Rehnquist, J., dissenting).

²⁶² *Id.* at 108–09 (majority opinion) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

²⁶³ *Cohen v. California*, 403 U.S. 15 (1971).

²⁶⁴ *Id.* at 16. Justice Harlan authored the Court’s opinion in *Cohen*; Justice Blackmun dissented, joined by Chief Justice Burger and Justice Black. *Id.* at 15; *id.* at 27 (Blackmun, J., dissenting). Justice White concurred in that portion of Justice Blackmun’s dissent indicating that the case should be remanded to the state court for reconsideration in light of a subsequent state court interpretation of the applicable statute. *Id.* at 28.

²⁶⁵ *Id.* at 26.

²⁶⁶ *Id.* (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944)).

this area, the Court has shown remarkable empathy for dissident speech, however vulgar, unpatriotic, or abrasive.”²⁶⁷

D. Protest, Dissent and Free Expression in the Twenty-First Century

The twenty-first century has arguably been less kind to the law of protest than the prior century. The Supreme Court under Chief Justice Roberts, while noted for issuing speech-protective decisions in the area of campaign finance, has generally evinced antipathy to those challenging authority.²⁶⁸ Professor Erwin Chemerinsky has observed that the Roberts Court cannot be fairly described as a “free speech Court,”²⁶⁹ stating:

The Roberts Court has consistently ruled against free speech claims when brought by government employees, by students, by prisoners, and by those who challenge the government’s national security and military policies. The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.²⁷⁰

The Court’s decision in *Holder v. Humanitarian Law Project*, for example, upheld on national security grounds the constitutionality of a statute that prohibits “the provision of ‘material support or resources’ to certain foreign organizations that engage in terrorist activity.”²⁷¹ The statute thereby prohibits speech (in the form of teaching or consulting, for example) even where the speech does not advocate terrorism or teach how to engage in terrorism.²⁷²

The Fifth Circuit’s decision in *Doe v. McKesson*, followed by the Supreme Court’s denial of certiorari in that case,²⁷³ also raises troubling questions related to the First Amendment law of protest. In that case, the defendant, DeRay McKesson, allegedly led a Black Lives Matter protest in Baton Rouge, Louisiana, in which a police

²⁶⁷ KALVEN, *supra* note 84, at 115–16.

²⁶⁸ Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 725 (2011).

²⁶⁹ *Id.* at 724; see also Gregory P. Magarian, *Kent State and the Failure of First Amendment Law*, 65 WASH. UNIV. J.L. & POL’Y 41, 54–55 (2021) (discussing the Roberts Court’s refocus of “First Amendment protection away from marginal, vulnerable, and dissenting speakers and toward mainstream, wealthy, and institutional speakers”).

²⁷⁰ Chemerinsky, *supra* note 268, at 725 (discussing *Garcetti v. Ceballos*, 547 U.S. 410, 413–14 (2006) (government employee); *Morse v. Frederick*, 551 U.S. 393, 401 (2007) (high school student); *Beard v. Banks*, 548 U.S. 521, 530–31 (2006) (prisoner); and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (national security)).

²⁷¹ *Holder*, 561 U.S. at 7.

²⁷² Chemerinsky, *supra* note 268, at 730. In a dissenting opinion, Justice Breyer pointed out that the Court’s decision runs counter to the holding in *Brandenburg*. *Holder*, 561 U.S. at 44 (Breyer, J., dissenting) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

²⁷³ *Doe v. McKesson*, 71 F.4th 278 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 913 (2024).

officer was seriously injured as a result of a hard object thrown at him by an unidentified person in the course of that protest.²⁷⁴ The Fifth Circuit held that McKesson could be held civilly liable for the officer's injuries under a negligence theory.²⁷⁵ In dissent, Judge Willett, citing *Claiborne Hardware*, stated that "a protest leader's simple negligence is far too low a threshold for imposing liability for a third party's violence."²⁷⁶ Judge Willett added that allowing a negligence theory of liability for protest leaders "would have enfeebled America's street-blocking civil rights movement, imposing ruinous financial liability against citizens for exercising core First Amendment freedoms."²⁷⁷ Justice Sotomayor issued a statement respecting the denial of certiorari in which she briefly set out the facts of the case, referenced the points made by Judge Willett noted above, and stated:

Less than two weeks after the Fifth Circuit issued its opinion, this Court decided *Counterman v. Colorado* . . . [wherein] the Court made clear that the First Amendment bars the use of "an objective standard" like negligence for punishing speech, and it read *Claiborne* and other incitement cases as "demand[ing] a showing of intent." The Court explained that "the First Amendment precludes punishment [for incitement], whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder." Although the Court determined that a less-demanding recklessness standard was sufficient to punish speech as a "true threat," it emphasized that an objective standard like negligence would violate the First Amendment.²⁷⁸

²⁷⁴ *Id.* at 281–82.

²⁷⁵ *Id.* at 297 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

²⁷⁶ *McKesson*, 71 F.4th at 306 (Willett, J., concurring in part and dissenting in part).

²⁷⁷ *Id.* at 313.

²⁷⁸ *McKesson*, 144 S. Ct. at 913 (Sotomayor, J., statement respecting the denial of certiorari) (third and fourth alterations in original) (citation in text omitted) (citing *Counterman v. Colorado*, 600 U.S. 66, 76, 78, 79 n.5, 81–82 (2023)). In *Counterman*, the defendant allegedly stalked a woman, harassing her with multiple Facebook messages. *Counterman*, 600 U.S. at 70. The defendant was charged under a Colorado statute that made it unlawful to communicate repeatedly with another person "in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer [such] distress." *Id.* The trial court held that the State had to prove only that a reasonable person would have viewed the messages as threatening, and that no subjective intent to threaten was necessary. *Id.* at 71. Vacating the conviction, the Supreme Court, in an opinion authored by Justice Kagan, held that a criminal conviction for making "true threats" of violence against another "requires proof that the defendant had some subjective understanding of the threatening nature of his statements . . . but that a mental state of recklessness is sufficient." *Id.* at 69.

Justice Sotomayor, noting that the Fifth Circuit did not have the benefit of the *Counterman* opinion at the time of its decision in *McKesson*, stated that she expects the lower courts “to give full and fair consideration to arguments regarding *Counterman*’s impact in any future proceedings in this case.”²⁷⁹ Although Justice Sotomayor’s statement may be read to provide some hope that the protections of the Court’s decision in *Claiborne Hardware* will remain in place going forward, as it stands now the *McKesson* case raises serious questions, especially for protesters in the Fifth Circuit.

In addition to these cases, a number of states have taken steps to limit the right to demonstrate through anti-protest bills, including measures limiting where and when protests can be held, enhancing penalties for conduct involved in protests, and creating new crimes related to public demonstrations.²⁸⁰ More recently, as noted above, the House Education Committee has focused on free speech on campus, and held a series of hearings in response to pro-Palestinian protests on college campuses.²⁸¹ The committee issued a report specifically stating that it was looking at federal legislation to address disruptive protests on campus.²⁸²

Despite these decisions, hearings, and legislative actions aimed at limiting protest and dissent, relevant First Amendment precedent in this area remains largely intact.²⁸³ The Roberts Court, for example, issued a speech-protective decision reaffirming the centrality of protest to the First Amendment in *Snyder v. Phelps*.²⁸⁴ There, the Court set aside a jury verdict that imposed tort liability on the

²⁷⁹ *McKesson*, 144 S. Ct. at 913–914 (citing *Counterman*, 600 U.S. 66).

²⁸⁰ See, e.g., Allison M. Freedman, *Arresting Assembly: An Argument Against Expanding Criminally Punishable Protest*, 68 VILL. L. REV. 171, 188–211 (2023) (documenting state legislative efforts to criminalize protests); David L. Hudson Jr., *Protest Unrest: Is the Right to Assemble and Demonstrate Under Threat?*, 107 A.B.A. J. 18, 18–19 (2022) (noting that eighty-nine state and federal protest bills were introduced in 2021, including measures to limit locations for protests; enhance penalties for protests; impose fees on public demonstrations; create new or expand existing crimes regarding protests, including taunting of police officers; and to grant immunity to drivers who injure protesters); Tabatha Abu El-Haj, *Defining Nonviolence as a Matter of Law and Politics*, in 62 PROTEST AND DISSENT: NOMOS 201, 215–20 (Melissa Schwartzberg ed., 2020) (describing various proposed state laws circumscribing protests).

²⁸¹ See *supra* notes 9–13 and accompanying text.

²⁸² See EDUC. COMM. REP. ON FREE SPEECH, *supra* note 11, at 1.

²⁸³ The Court’s approach to protest and dissent under the First Amendment has, of course, not been uniform, as shown by its decisions following the First World War and during the McCarthy era—periods when dissent was “sadly unrespected . . . when dissent’s need for respect was highest.” See Bollinger, *supra* note 163, at 1385. Nevertheless, the principles and precedent found in those cases discussed in Sections III.B.–C., above, largely remain in force today. See *infra* text accompanying notes 284–294.

²⁸⁴ See *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

Westboro Baptist Church (WBC) for intentional infliction of emotional distress in a case where WBC was alleged to have picketed a veteran's funeral with signs carrying offensive messages.²⁸⁵ In upholding WBC's right to protest, the Court said, "[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."²⁸⁶

The lower courts have largely maintained existing First Amendment protections in cases involving protest and dissent. In *Black Lives Matter D.C. v. Trump*,²⁸⁷ protesters had assembled on June 1, 2020, in Lafayette Square across from the White House "to protest racial injustice after the death of George Floyd and other Black people at the hands of law enforcement."²⁸⁸ The police allegedly cleared the protesters from the area through the use of force without adequate warning.²⁸⁹ While dismissing the *Bivens* claims²⁹⁰ against the President and other federal officials, the district court permitted the plaintiffs' claims against state and local law enforcement agents that the police action unconstitutionally restricted their speech in violation of the First Amendment, as well as the claims that the action constituted illegal retaliation against the protesters for exercising their First Amendment rights.²⁹¹ The court stated that based on the allegations in the complaint, the police, without any rational basis, "prohibit[ed] all expressive activities" in the Square and left no alternative channel of communication open.²⁹² Those

²⁸⁵ *Snyder*, 562 U.S. at 447–48, 450, 459. The signs included hateful messages such as "God Hates the USA/Thank God for 9/11," "Thank God for IEDs," "Thank God for Dead Soldiers," "God hates Fags," "You're Going to Hell," and "God Hates You." *Id.* at 448.

²⁸⁶ *Id.* at 458 (second alteration in original) (quoting *Boos v. Barry*, 485 U.S. 312, 322 (1988)). The Court in *Snyder* noted that WBC's "funeral picketing is certainly hurtful and its contribution to public discourse may be negligible." *Snyder*, 562 U.S. at 460.

²⁸⁷ *Black Lives Matter D.C. v. Trump*, 544 F. Supp. 3d 15 (D.D.C. 2021) (Friedrich, J.), *aff'd on other grounds sub nom.* *Buchanan v. Barr*, 71 F.4th 1003 (D.C. Cir. 2023).

²⁸⁸ *Id.* at 26.

²⁸⁹ *See id.*

²⁹⁰ *See id.* at 52–53. The Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), allows damages claims against federal officers for constitutional violations under certain circumstances. The district court found that the *Bivens* remedy was unavailable on the claims alleged by the plaintiffs in *Black Lives Matter D.C.*, and dismissed those claims while upholding the First Amendment claims under 42 U.S.C. § 1983 against the state and local police. *Black Lives Matter D.C.*, 544 F. Supp. 3d at 52–53. The plaintiffs appealed the dismissal of the *Bivens* claims, which was affirmed by the D.C. Circuit. *Buchanan*, 71 F.4th at 1005–06 (citing *Bivens*, 403 U.S. 388)). The First Amendment claims under § 1983 were not raised or addressed in that appeal. *See Buchanan*, 71 F.4th at 1005–10.

²⁹¹ *Black Lives Matter D.C.*, 544 F. Supp. 3d at 44–47.

²⁹² *Id.* at 44–45 (alteration in original) (quoting *White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1526 (D.C. Cir. 1984)).

facts, the court held, clearly state a claim, finding, “[I]t is a violation of foundational First Amendment rights to forcibly end a peaceful protest in a traditional public forum without any legitimate justification for doing so.”²⁹³ Other recent cases adjudicating similar claims indicate that the civil rights era case law cited above in Section II.C. continues to stand as precedent today.²⁹⁴

IV. PROTEST AND DISSENT ARE OFTEN RAUCOUS AND DISRUPTIVE

From the IWW’s free speech fights through 2024’s pro-Palestinian campus encampments, political dissent has been and continues to be effectuated through discordant and clamorous demonstrations and protests. The case law shows the central role of such dissent in the development of First Amendment law. The FIRE Rankings, by assigning lower rankings to schools where such protests occur, run directly contrary to this history in failing to credit disruptive and uncivil protest and dissent that the Supreme Court has held warrant First Amendment protection.²⁹⁵

With demonstrations and protests, “activism pushes dissent ‘into the world, in a demonstrative and strategically and tactically chosen fashion.’”²⁹⁶ That activism is often loud and disruptive, as can be seen in the cases discussed above, which frequently involved raucous protest.²⁹⁷ Arthur Terminiello’s hate-filled speech in a Chicago auditorium led to harsh and hateful remarks in his audience, and an “angry and turbulent” crowd protesting outside the auditorium.²⁹⁸ Gregory Hess’s curse-laden yell of “tak[ing] the . . . street later” was

²⁹³ *Black Lives Matter D.C.*, 544 F. Supp. 3d at 45 (citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

²⁹⁴ See, e.g., *Ferris v. District of Columbia*, No. 23-cv-481, 2023 WL 8697854, at *7–8 (D.D.C. Dec. 15, 2023) (Lamberth, J.) (denying motions to dismiss civil rights claims arising out of several Black Lives Matter protests; finding that police action to shut down protests “because of disagreement with the message” was an impermissible time, place, or manner restriction; and stating that “[i]t is axiomatic that ‘protest, picketing, and other like activities lie at the core of free speech guaranteed by the First Amendment’” (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); and then quoting *Terry v. Reno*, 101 F.3d 1412, 1421–22 (D.C. Cir. 1996)); *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 268, 273–75 (S.D. Ohio 2021) (finding First Amendment violation where police tear-gassed peaceful protesters; issuing preliminary injunction against city and police prohibiting further First Amendment violations; and stating that “[o]rganized political protest is a form of ‘classically political speech’” (quoting *Don’t Shoot Portland v. City of Portland*, 465 F. Supp. 3d 1150, 1155 (D. Or. 2020)); *Don’t Shoot Portland*, 465 F. Supp. 3d at 1155 (“Activities such as demonstrations, protest marches, and picketing are clearly protected by the First Amendment.” (quoting *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996))).

²⁹⁵ See discussion *infra* Part V.

²⁹⁶ See COLLINS & SKOVER, *supra* note 2, at 38 (quoting Professor Todd Gitlin).

²⁹⁷ See generally discussion *supra* Part III.

²⁹⁸ *Terminiello v. City of Chicago*, 337 U.S. 1, 2–3, 22 (1949).

in the midst of a tumultuous antiwar protest.²⁹⁹ Reverend Cox “agitated and led a mob of over 2000 students in the staging of a modern Donnybrook Fair,”³⁰⁰ and his “inflammatory” speech and the crowd’s refusal to disperse were followed by a volley of tear gas shells from the police.³⁰¹ In *Edwards*, there was evidence in the record that:

[T]he manner in which [the protesters] exercised [their First Amendment] rights was by no means the passive demonstration which [the majority] relate[d]; rather, as the City Manager of Columbia testified, “a dangerous situation was really building up” which South Carolina’s courts expressly found had created “an actual interference with traffic and an imminently threatened disturbance of the peace of the community.”³⁰²

And cases from *Cohen* through *Snyder* have affirmed First Amendment protection for protests that employ language that can fairly be characterized as extremely offensive.³⁰³

The civil rights era lunch counter sit-ins were viewed by many at the time as “unnecessarily disruptive or confrontational.”³⁰⁴ In fact, those sit-ins, marches, and other direct actions, as the Reverend Martin Luther King Jr. later reflected in his *Letter from Birmingham Jail*, “sought ‘to create such a crisis and foster such a tension’ that the country would be ‘forced to confront the issue [of racial injustice].’”³⁰⁵ As Dr. King’s words indicate, that disruption was intentional.³⁰⁶ Sit-ins and street demonstrations “fostered [B]lack agency much better than did litigation, which encouraged [B]lack[people] to place faith in elite [B]lack lawyers and white judges rather

²⁹⁹ *Hess v. Indiana*, 414 U.S. 105, 106–07 (1973).

³⁰⁰ *Cox v. Louisiana*, 85 S. Ct. 466, 472 (1965) (Clark, J., concurring and dissenting).

³⁰¹ *Cox v. Louisiana* (Cox I), 379 U.S. 536, 543–44 (1965).

³⁰² *Edwards v. South Carolina*, 372 U.S. 229, 238–39 (1963) (Clark, J., dissenting).

³⁰³ See *Cohen v. California*, 403 U.S. 15, 16, 26 (1971); *Snyder v. Phelps*, 562 U.S. 443, 448, 458 (2011); COLLINS & SKOVER, *supra* note 2, at 28 (“Profane, vulgar, and abusive language and gestures are often the very staple of public dissent in modern America.”).

³⁰⁴ Schmidt, *supra* note 177, at 135. Contemporaneous accounts of the lunch counter sit-ins report former President Truman’s public remarks that the protests were “pushed on” by Communists, as well as on the “fear of wider unrest” created by the student protesters’ actions. *Truman Repeats Charge on Sit-Ins*, N.Y. TIMES (June 13, 1960), <https://timesmachine.nytimes.com/timesmachine/1960/06/13/109600806.html> [<https://perma.cc/PF7N-967V>]; Claude Sitton, *Negro Sitdowns Stir Fear of Wider Unrest in South*, N.Y. TIMES (Feb. 14, 1960), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0201.html> [<https://perma.cc/NU2L-U7HE>].

³⁰⁵ 303 *Creative LLC v. Elenis*, 600 U.S. 570, 613 (2023) (Sotomayor, J., dissenting) (quoting MARTIN LUTHER KING, JR., *LETTER FROM BIRMINGHAM JAIL 2* (1963)).

³⁰⁶ See KING, *supra* note 305, at 2.

than in themselves.”³⁰⁷ Moreover, “direct-action protest more reliably created conflict and incited opponents’ violence, which ultimately proved critical to transforming national opinion on race.”³⁰⁸

Student protesters engaging in sit-ins in the early 1960s received a reception similar to that received by today’s protesters. James Lawson, then a theology student at Vanderbilt University, and later a national civil rights leader and confidant of Dr. King, was expelled from school for leading peaceful sit-ins in the city of Nashville in 1960.³⁰⁹ Civil rights activist Zoharah Simmons, an undergraduate at Spelman College, was arrested twice for participating in sit-ins: “Spelman accused her of being a Communist and suspended her scholarship. Only because of student protest [of her suspension] was she reinstated.”³¹⁰ In this era, “[C]ivil rights activists were regarded as dangerous and reckless by many and as downright seditious by others. The movement was pushed forward by young people, who made many people nervous sixty years ago, just as they do today.”³¹¹ Similarly, the antiwar protests of the mid-1960s, largely peaceful and nonviolent, were often met by “hostile, sometimes violent responses” and those protesters, despite their pacifism, were widely viewed by the public as dangerous and disloyal.³¹² Disruption and crisis were both drivers for and the result of those protests which are the basis for much of the Court’s free speech jurisprudence from that time period.³¹³

³⁰⁷ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 467 (2004).

³⁰⁸ *Id.*

³⁰⁹ THOMAS E. RICKS, WAGING A GOOD WAR: A MILITARY HISTORY OF THE CIVIL RIGHTS MOVEMENT 1954–1968 57, 295 (2022). With regard to similar consequences for students involved in pro-Palestinian protests, see, for example, Katherine Mangan, *Pro-Palestinian Protesters Stuck in Disciplinary and Legal Limbo*, CHRON. HIGHER EDUC. (July 5, 2024), <https://www.chronicle.com/article/pro-palestinian-protesters-stuck-in-disciplinary-and-legal-limbo> [<https://perma.cc/7CWM-94PK>] (reporting on suspensions and other disciplinary cases stemming from pro-Palestinian protests and encampments on campuses).

³¹⁰ THEOHARIS, *supra* note 1, at 176.

³¹¹ *Id.* at 25. Professor Theoharis adds:

The popular fable of the [1960s era civil rights] movement makes it seem like most decent people were in favor of the movement. They were not. The civil rights movement was deeply unpopular and most Americans did not support it. They thought it was going too far, that movement activists were being extreme.

Id. at 173, 177 (noting that in a May 1961 Gallup survey, “57 percent of Americans said that the sit-ins at lunch counters . . . and other demonstrations by Negroes were hurting the Negro’s chances of being integrated in the South”).

³¹² STONE, PERILOUS TIMES, *supra* note 84, at 442, 451 n.119.

³¹³ See COLLINS & SKOVER, *supra* note 2, at 38. So too, today, the campus protests after October 7, 2023, although largely peaceful, are widely viewed as not only disruptive, but dangerous and confrontational. See Christopher Sprigman, *Why Universities Have Started Arresting Protesters*, INTELLIGENCER (May 23, 2024), <https://nymag.com/intelligencer/article/real-reason-colleges-are-arresting-student-protesters.html> [<https://perma.cc/C2VT-KC5E>]; Lois Beckett,

In short, disruption should be expected as a part of protest, including protest that falls under the shield of the free speech clause. Professor Abu El-Haj states that “disruptive, angry demonstrations are no less part of the venerable American tradition of public protest from the Boston Tea Party to the . . . Occupy movement than the nonviolent marches led by Martin Luther King that we have come to idealize.”³¹⁴ As Professor Jeremy Waldron articulates in discussing protests in the form of mass demonstrations:

[A] demonstration seeks to upend the terms of public debate. That’s why demonstrations have to be understood as troublesome, as disruptive of ordinary routines like traffic on the streets or peace in the park. This means that disorder and disruption are not pathological versions of demonstrating, as though a civically virtuous protest would be self-effacing. . . . [D]emonstrations . . . [are] “noisy, annoying, costly and disruptive.” But disrupting ordinary routines is what demonstrating is about. “The whole purpose of protest is to interrupt your daily life, to interrupt the previously scheduled programming so you pay attention to something new.”³¹⁵

Professor Anton Ford similarly states: “[P]rotest is essentially disruptive; if it’s not disruptive, it’s not a protest. While not all protests are equally disruptive, all aim to disrupt normal life at least to some extent.”³¹⁶ Professor Abu El-Haj argues that disruption is in fact the essence of protest and dissent: “The ability to disrupt the ordinary is essential to the political power of dissent—at the very least, it indicates a withdrawal of consent to the norms of an existing political order.”³¹⁷

Some have suggested that protest on a college campus is different, and that tighter restrictions, including restrictions on disruptive

Nearly All Gaza Campus Protests in the US Have Been Peaceful, Study Finds, GUARDIAN (May 10, 2024), <https://www.theguardian.com/us-news/article/2024/may/10/peaceful-pro-palestinian-campus-protests> [https://perma.cc/NHT7-9NSA].

³¹⁴ Abu El-Haj, *supra* note 209, at 969.

³¹⁵ Jeremy Waldron, *What Demonstrations Mean* 27 (Oct. 1, 2020) (unpublished manuscript), N.Y.U. Pub. L. Rsch. Paper No. 20-41, <https://ssrn.com/abstract=3664849> [https://perma.cc/3BQZ-XJ9Z] (citations omitted).

³¹⁶ Anton Ford, *The Chicago Principles Are Undemocratic: Freedom of Expression Must Include the Right to Deliberate, and to Protest*, CHRON. HIGHER EDUC. (May 6, 2024), <https://www.chronicle.com/article/the-chicago-principles-are-undemocratic> [https://perma.cc/HHU3-VPXJ].

³¹⁷ Abu El-Haj, *supra* note 280, at 222. Professor Abu El-Haj notes, “Disruption certainly does not require violence or the threat of violence. In fact, some of the most striking protests have been nothing but peaceful.” Abu El-Haj, *supra* note 209, at 984.

protest and speech, may and should be applied in the campus context.³¹⁸ That is certainly not the case as to public colleges and universities, which are bound by the First Amendment in the same manner as any public institution. As the Court stated in *Healy v. James*:

[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”³¹⁹

There is some nuance as to what public institutions, including public colleges and universities, may do to regulate speech, but as a general matter, it is fair to say that the First Amendment governs such regulation outside of the classroom.³²⁰ That is, in the classroom setting, teaching is paramount and the mandates of academic freedom permit faculty to control speech and conduct as appropriate and necessary. Outside of the classroom context, however, the First Amendment applies, and limits on speech and expressive conduct generally must fall within the parameters set out in the case law discussed above in Part III.³²¹ As Professors Chemerinsky and Gillman state:

We should think of campuses as having two different zones of free expression: a *professional zone*, which protects the expression of ideas but imposes an obligation of responsible discourse and responsible conduct in formal educational and scholarly settings; and a larger *free speech zone*, which exists outside scholarly and administrative settings and where the only restrictions are those of society at large. Members of the campus community may say things in the free speech zones

³¹⁸ See, e.g., Letter from Jenny Martinez, Richard E. Lang Professor of Law & Dean of Stanford Law School, to the Stanford Law School Community (Mar. 1, 2023), <https://law.stanford.edu/wp-content/uploads/2023/03/Next-Steps-on-Protests-and-Free-Speech.pdf> [<https://perma.cc/GP97-ZFYB>].

³¹⁹ *Healy v. James*, 408 U.S. 169, 180 (1972) (second alteration in original) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

³²⁰ See Walker, *supra* note 17, at 104–08. As noted above, although private colleges and universities, which generally are not governed by the First Amendment, may be able to limit expressive conduct and speech in the context of student protests and otherwise, many have committed to following free speech principles. See *supra* text accompanying note 29.

³²¹ Walker, *supra* note 17, at 105–06.

that they would not be allowed to say in the core educational and research environment.³²²

Of course, time, place and manner restrictions can be applied consistent with free speech principles,³²³ and protests and demonstrations that “materially disrupt” classroom instruction or other academic work may be prohibited.³²⁴ But the campus setting does not otherwise call for, or allow (at least as to public universities), restrictions on speech beyond those found in public forums. This principle applies in particular to dissenting speech and expressive conduct, which hold a central place in our colleges and universities, as discussed below.

V. THE MISMEASURE OF SPEECH

Any assessment and any purported measure of free speech must account for protest and dissent, including raucous, turbulent, and disruptive protest and dissent. That is especially true in the context of higher education. Dissent is not simply incidental to free speech; it is a foundational block in our First Amendment edifice.³²⁵ It brings with it those principles that inspired Justices Brandeis, Holmes and

³²² Erwin CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 77 (2017). Although the concept of the “larger free speech zone” articulated here by Professors Chemerinsky and Gillman does not address the Supreme Court’s forum analysis cases, that concept does broadly capture an important distinction consistent with the case law governing free speech on public university campuses. See Thomas Healy, *Return of the Campus Speech Wars*, 117 MICH. L. REV. 1063, 1075 (2019). The “larger free speech zone” captures in particular the conceptual loci for protests and demonstrations held out-of-doors on campus. See CHEMERINSKY & GILLMAN, *supra*, at 126 (“[S]tudents and faculty have the right to express themselves on a broad range of topics, and have the right to use campus grounds for personal and political expression. Campuses thus must make efforts to accommodate this expression in ways that make it meaningful and that allow members of the campus community to find an audience. Campuses cannot separate protestors from all potential audiences by restricting them to marginal areas.”). University speaker events held in a classroom or auditorium, by contrast, will often best be characterized as a “limited public forum” under Supreme Court precedent, meaning that the university may restrict access to certain speakers or to certain subjects and need not keep the forum open indefinitely. See Walker, *supra* note 17, at 104–08; Christian Legal Soc’y of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 (2010). Even in that context, however, restrictions must be reasonable and viewpoint-neutral. See *Martinez*, 561 U.S. at 679.

³²³ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984); citing *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981))).

³²⁴ See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 118, 120 (1972) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

³²⁵ See *supra* notes 157–63 and accompanying text.

Jackson—dissent is courageous,³²⁶ it encourages “hope and imagination,”³²⁷ and it builds character and intellectual independence.³²⁸ Few would disagree that those are principles to be encouraged, not suppressed, in our colleges and universities.³²⁹

The FIRE Rankings, however, do not just ignore the concept of disruptive protest and dissent as a component of free speech—to the contrary, they count disruptive protests as a negative in assessing freedom of speech on college campuses.³³⁰ As noted above, the rankings deduct points from schools that have disruptive protests, or protests that successfully “deplatform” speakers, or even those that simply have students who opine that disruptive protest is acceptable in some cases.³³¹ FIRE scores disruptive protests in the negative column because it views protesters who disrupt and object to speakers as hindering free expression.³³² Nowhere in the rankings does FIRE address the idea that student protesters’ speech is in and of itself protected speech, and that such speech directed at a speaker is a matter of speech countering speech, rather than censorship.³³³ As Professor Franks states:

Given that the majority of protests on college campuses have been nonviolent, it is perplexing that they should be denounced as spectacles of intolerance instead of being praised as strategies of counter-speech. . . . Visitors to public institutions have First Amendment rights, but so do the institution’s students and faculty. A speaker’s rights do not trump those of his audience. The right to peaceful protest is an essential aspect of the right of free speech, and peaceful

³²⁶ See *Whitney v. California*, 274 U.S. 357, 377 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Blasi, *supra* note 112, at 684.

³²⁷ See *Whitney*, 274 U.S. at 375; Blasi, *supra* note 112, at 676.

³²⁸ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943); Blasi & Shiffrin, *supra* note 164, at 460, 474.

³²⁹ See *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995) (discussing “risks [to] the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses”).

³³⁰ See FIRE RANKINGS, *supra* note 12, at 42.

³³¹ *Id.*; see discussion *supra* Section II.A.

³³² See FIRE RANKINGS, *supra* note 12, at 42.

³³³ See, e.g., *id.* at 15, 35, 42; Mark Tushnet, *What the Constitution Says Berkeley Can Do When Controversial Speakers Come Knocking*, VOX (Sept. 23, 2017, 12:45 PM), <https://www.vox.com/the-big-idea/2017/9/22/16346330/free-speech-week-first-amendment-constitution-bannon> [perma.cc/6ETV-J5W3] (“[A]s far as the First Amendment is concerned[,] it is okay” if “a raucous crowd shouts down the speaker. . . . The opponents aren’t the government, so even if they prevent the speaker from getting his message across, that’s just too bad—or it’s speech countering speech.”).

protest on college campuses is a long and respected tradition in America.³³⁴

Regardless of one's view of the merits of such protests, so long as they are peaceful, without threats, harassment, or incitement, they constitute activity protected by the First Amendment, and should be demarcated as free speech events.³³⁵

Professor Gregory Magarian provides a cogent example of FIRE's errant view on protest. Discussing "preemptive protest"—that is, "student protest against invited campus speakers" involving "nonviolent, nonobstructive action that makes a case for why a speaker shouldn't be heard"—he notes that FIRE "condemns all disinvitation efforts, without qualification, as contributing to 'a culture of censorship on college campuses.'"³³⁶ Professor Magarian explains why "[t]hat charge doesn't hold water":

Preemptive protest doesn't betray or undermine a system of free expression. Rather, preemptive protest works squarely within and honorably serves a system of free expression. Students have substantially less power in universities than administrators. Trying to persuade administrators to disinvite a speaker or potential audience members to boycott a speech leverages students' limited power through argument. Argument is exactly what First Amendment law and free speech norms are supposed to protect and promote. To be sure, preemptive protest argues bluntly and harshly that certain speech isn't worth hearing and doesn't deserve a platform. But challenging the value or legitimacy of an opponent's ideas, or even the opponent's character or integrity, is a valid, familiar, and often highly persuasive mode of argument.³³⁷

Similarly, protester counterspeech, including heckling that disrupts a speaker—activity roundly condemned by the FIRE Rankings³³⁸—is protected speech under the First Amendment.³³⁹ Protesters are not government actors, and the speaker on stage with the microphone, relative to the protester engaging in counterspeech, has no greater

³³⁴ FRANKS, *supra* note 70, at 142 (citations omitted).

³³⁵ *See id.*

³³⁶ Magarian, *supra* note 17, at 563–64 (quoting *User's Guide to FIRE's Disinvitation Database*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (June 9, 2016), <https://www.thefire.org/how-to-use-the-disinvitation-database/> [<https://perma.cc/RG9U-GUSQ>]). Although Professor Magarian was writing before the FIRE Rankings were first promulgated in 2020, FIRE continues to maintain its Disinvitation Database today, and the FIRE Rankings categorize attempts to disinvite speakers under "Deplatforming Attempts." *See* FIRE RANKINGS, *supra* note 12, at 19.

³³⁷ Magarian, *supra* note 17, at 564.

³³⁸ *See* FIRE RANKINGS, *supra* note 12, at 35.

³³⁹ Walker, *supra* note 17, at 88–89, 98–108.

right to the audience, at least as far as the First Amendment is concerned.³⁴⁰

The FIRE Rankings are fundamentally flawed because they nowhere recognize that preemptive protest and other forms of disruptive activism are forms of expressive conduct and protected speech.³⁴¹ Indeed, the view that such activity is censorial and antithetical to free speech is a central and defining feature of those rankings.³⁴² The FIRE Rankings obfuscate this issue by blurring the line between social sanctions and First Amendment violations.³⁴³ That is, those rankings elide the fact that disruptive speech or expressive acts by protesters, objecting to speakers who are scheduled to speak, or heckling speakers at campus events are social sanctions by private actors, distinct from censorship by government actors.³⁴⁴ This is an essential distinction.

Social sanctions—counterspeech or expressive conduct by private actors directed at others—are entitled to free speech protection as much as any other form of speech (excluding, of course, unprotected speech, such as threats, harassment, or incitement).³⁴⁵ The marketplace of ideas “relies on private actors to use their own voices to counter true ideas with false ones and to push back against dangerous speech.”³⁴⁶ The FIRE Rankings bury this concept of protected counterspeech.³⁴⁷ While frequently referencing “free speech,” “free expression,” and the “free exchange of ideas,” those terms remain undefined, and without reference to the First Amendment.³⁴⁸ These omissions are misleading and have potentially

³⁴⁰ *Id.* at 88; see also Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges, or Gibes*, 2017 SUP. CT. REV. 1, 12 (2017) (“[A] speaker with a right to free speech does not have a right to an audience; he does not have a right that others listen to him when he speaks. . . . The members of the audience are independent participants with their own rights.”). Of course, the virtues of courtesy and respectfulness in many cases may suggest a different approach. See, e.g., Healy, *supra* note 19, at 62.

³⁴¹ See FIRE RANKINGS, *supra* note 12, at 15, 35, 42.

³⁴² See *id.* at 43, 58–61.

³⁴³ See Mary Anne Franks, *The Lost Cause of Free Speech*, 2 J. FREE SPEECH L. 337, 354 (2022) (noting that FIRE and others are “vilifying counterspeech and conflating (private) reactions to speech with (governmental) restrictions of speech”).

³⁴⁴ See FIRE RANKINGS, *supra* note 12, at 35, 42.

³⁴⁵ See Healy, *supra* note 19, at 30–31; Walker, *supra* note 17, at 98–99.

³⁴⁶ Healy, *supra* note 19, at 29.

³⁴⁷ See FIRE RANKINGS, *supra* note 12, at 5, 21, 40.

³⁴⁸ See *id.* The introductory material describing FIRE notes that the organization is a nonprofit “dedicated to defending and sustaining the individual rights of all Americans to free speech and free thought.” *Id.* at 3. “These rights include freedom of speech, freedom of association . . . religious liberty, and sanctity of conscience—the most essential qualities of liberty.” *Id.* No reference is made to the First Amendment as the source of these rights, nor is any distinction drawn between these rights and the concept of social sanctions on speech.

significant consequences. Most of us, lawyers and nonlawyers alike, assume that when we are talking about free speech, we are talking about the First Amendment, and vice versa. As Professor Genevieve Lakier states:

The First Amendment dominates both popular and scholarly discussion of freedom of speech in the United States. . . . The strength and size of the modern First Amendment have given it a powerful cultural status. They also make it easy to equate the free speech tradition in the United States with the First Amendment tradition. Like the sun, the First Amendment's size and brightness tend to blot out all else.³⁴⁹

Thus, absent express clarification, it is fair to say that anyone talking about free speech will be understood to be talking about the First Amendment. It is for this reason that care is usually taken in legal discussion to make a clear distinction between social sanctions on speech imposed by private actors and legal sanctions imposed by the government.³⁵⁰ The FIRE Rankings, by ignoring this distinction, seek to validate a view of the world in which social sanctions are synonymous with censorship, as a restriction on free speech, rather than what they are: speech countering speech.³⁵¹

Conflating social sanctions, such as protesters' speech and expressive conduct, with First Amendment violations is not just a matter of sloppy discourse; it furthers a misimpression that expression by private actors (including criticism and expressions of disagreement) can and should be limited or prevented in the same way government censorship can be regulated or prohibited. But the two are fundamentally different, and social sanctions cannot be analyzed in this context in the same way as government sanctions. Limits on social sanctions necessarily result in limits on someone else's speech, and the parameters for imposing such limits are not easily determined. In the words of one commentator:

[I]t is difficult enough to suggest a principle for limiting the authority of law, which consists for the most part of a definite series of rules. It is really impossible to suggest a practicable

³⁴⁹ Lakier, *supra* note 29, at 2300–01 (footnotes omitted).

³⁵⁰ See Healy, *supra* note 19, at 22–23; Franks, *supra* note 343, at 354.

³⁵¹ See Christina E. Wells, *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment*, 89 U. COLO. L. REV. 533, 558 (2018) (“[T]he fact that speech is contentious does not make it censorial; it simply makes it contentious speech. Many Supreme Court cases involve contentious yet fully protected speech—ranging from protestors shouting at and following women entering medical clinics to those holding grossly offensive signs at funerals. Indeed, protests, which lie at the core of the First Amendment, are by definition contentious tactics.”).

principle for limiting the exercise of social pressure which is manifested not only in action but also in words, looks, tone of voice, cast of countenance, all sorts of little things often not deliberate at all.³⁵²

As Professor Waldron points out, “if we try to limit or eliminate social pressure, . . . what we are trying to eliminate just is a mass of individual moral expressions.”³⁵³ Social intolerance, in short, is wholly different from government intolerance, and although it may be subject to assessment and measurement, it is not subject to the same yardstick.

Blurring the distinction between social sanctions on speech and First Amendment legal violations opens a door to the possibility of government action to restrict the speech of protesters and activists—for if social sanctions are to be regulated, how and by whom shall that be done, other than by the government? As Professor Franks states, “The continued insistence that the actions of private entities pose an equal or greater threat to free speech than those of governmental officials eventually leads to only one result: the imposition of government censorship as the answer to private censorship.”³⁵⁴ The beginnings of such censorial efforts can be seen in the 2023 and 2024 hearings and reports of the House Education Committee and the spate of state legislation seeking to restrict protesters.³⁵⁵ Indeed, that committee has asserted that “shout downs” and “disinvitations of speakers” are all part of a “rising assault on free speech,” and has threatened potential legislation, stating “[m]ore may be required from the federal government.”³⁵⁶

The FIRE Rankings, in framing student protest as “intolerant and disruptive conduct,”³⁵⁷ also conflate civility and free speech principles.³⁵⁸ The requirements of the First Amendment and of free speech principles more generally, however, are not dictated by the norms of civil discourse.

[H]arsh criticism, condemnation, shaming, and even disassociation are not incompatible with the principle of free

³⁵² Jeremy Waldron, *Free Speech Apart from Law*, 2 J. FREE SPEECH L. 107, 124 (2022) (alteration in original) (quoting D. D. Raphael, *Liberty and Authority*, in OF LIBERTY: ROYAL INSTITUTE OF PHILOSOPHY LECTURE SERIES: 15, at 5 (A. Phillips Griffiths ed., 1983)).

³⁵³ Waldron, *supra* note 352, at 121.

³⁵⁴ Mary Anne Franks, *How Law Schools Can Fight for Fearless Speech*, 51 HOFSTRA L. REV. 613, 616 (2023).

³⁵⁵ See *supra* notes 280–82 and accompanying text.

³⁵⁶ EDUC. COMM. REP. ON FREE SPEECH, *supra* note 11, at 1, 12.

³⁵⁷ See FIRE RANKINGS, *supra* note 12, at 40.

³⁵⁸ See *id.* at 1, 42.

speech. . . . These [social] sanctions also contribute to the goals of free speech because they are, themselves, expressive. As difficult as they can be to stomach, they are essential to the effective functioning of our free speech system, which relies on counterspeech as a remedy for false and dangerous ideas.³⁵⁹

The confusion of civil discourse with free speech principles also feeds into government censorship efforts. Professor Abu El-Haj notes, for example, that state legislative efforts to tamp down protest seek “to legitimate a vision of politics as necessarily orderly, deliberative, and electoral . . . and to delegitimize nonconforming modes of dissent as un-democratic, possibly even un-American.”³⁶⁰ Nonconforming modes of dissent, however, including disruptive, rancorous, offensive dissent, are entirely legitimate and a central part of our First Amendment tradition. Intemperate speech and incivility are features, not bugs, of that tradition, and must be understood as such in any assessment.³⁶¹ Any measure, such as the FIRE Rankings, that purports to provide a framework without accounting for disorderly and raucous dissent necessarily misses its mark and provides a misleading portrayal of free speech principles.

VI. CONCLUSION

Disruptive protest gave birth to the modern First Amendment and remains at its heart. Much of the amendment’s power stems from its association with those acts of radical dissent and protest seen throughout American history, in particular in the early years of the labor movement, and the antiwar and civil rights protests that later followed.³⁶² That tradition of protest and dissent, often centered on

³⁵⁹ Healy, *supra* note 19, at 61–62.

³⁶⁰ Abu El-Haj, *supra* note 280, at 220 (discussing legislative efforts to outlaw disruptive protest tactics).

³⁶¹ See Thomas Healy, *Who’s Afraid of Free Speech*, KNIGHT FIRST AMEND. INST. (July 14, 2017), <https://www.knightcolumbia.org/content/whos-afraid-free-speech> [<https://perma.cc/7ZU8-4WEX>].

[T]he market works only if we take [our] participation seriously, if we exercise our own right of expression to combat ideas we disagree with, to refute false claims, to discredit dangerous beliefs, and to call out those who promote them. This does not mean we are required to be vicious or uncivil. But viciousness and incivility are legitimate features of our free speech tradition. Life is not a debating exercise or a seminar room, and it would be naïve to insist that individuals adhere to some prim, idealized vision of public discourse. . . . Instead of being polite and reasonable, [protesters’ speech] is frequently intemperate, mean-spirited, self-righteous, indignant, searing, and peremptory.

Id.

³⁶² See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1790 (2004) (opining that the First Amendment “provide[s] considerable rhetorical power and argumentative authority” in part

college campuses since the 1960s, is now under attack.³⁶³ Student protesters seeking to bring attention to hatred, injustice, and social and political issues of moment have become particular targets of those attacks for their counterspeech and their exercise of First Amendment rights.³⁶⁴ The FIRE Rankings are abetting those attacks by denying the legitimacy of disruptive protest and confrontation, and penalizing colleges where students opine that disruptive protest may be appropriate in certain circumstances; where student protests involve jeering, booing and heckling; or where speakers are deplatformed as a result of protests.³⁶⁵

The view embodied by the FIRE Rankings—that disruptive student protest is anathema to free speech—runs directly contrary to established precedent and practice that champion protecting and defending those engaged in protest and dissent.³⁶⁶ It is fair to question what purpose is served by a free speech ranking system that is antithetical to the very tenets on which it purports to be based. Whatever that purpose may be, those rankings not only fall short in the measurement of free speech, but also plainly provide fodder for those in Congress and in statehouses around the country who are seeking to cabin free speech and quash protest and dissent on college campuses and beyond. Our First Amendment tradition calls for more, and better, from those who hold themselves out as defenders of free speech principles.

because “events of dissent and protest, and thus freedom of speech and press—the Boston Tea Party, John Peter Zenger, Thomas Paine, John Brown, the origins of the labor movement, and the civil rights movement in the 1960s—have pride of place in the popular conception of American history”).

³⁶³ See discussion *supra* Section III.C.

³⁶⁴ See, e.g., *supra* notes 5–18 and accompanying text.

³⁶⁵ See, e.g., *supra* notes 5–18 and accompanying text.

³⁶⁶ See discussion *supra* Part V.