

Free Speech Absolutism

Why The Constitution Of The United States Makes Free Speech Its Most Important Right

by

Nathan Goetting

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2026

Ethics International Press, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (Hardback): 978-1-83711-649-2

ISBN (Ebook): 978-1-83711-650-8

Acknowledgements

I owe many people thanks for their support during the production of this book.

Nadine Strossen's work has helped guide my views on freedom of expression for decades. My admiration for her, even more as a human being than a scholar, is boundless.

Jennifer Tiedemann was my editor at *Discourse* magazine for three years before she took her extraordinary talents to *National Review Online*. Jen supported both my ideas and my writing style and helped bring them both to life. I can't imagine a better editor or a kinder person.

I also want to thank Karl Henn, Anthony Knopps, Jeremy Poindexter, and Anthony Saliccioli for reviewing the manuscript. Any errors you encounter are entirely my own.

Past National Lawyers Guild President David Gespass helped get my writing career started many years ago when, as editor-in-chief of *Guild Practitioner* (now *National Lawyers Guild Review*), he accepted a paper I'd just written on the prosecution of Eugene V. Debs while in law school, a revised and updated version of which has become Chapter 3 of this book. David became a friend and mentor with whom I had countless conversations on freedom of expression, the Constitution, and a million other things.

In recent years, as my interest in individual liberties has displaced my enthusiasm for partisan politics, my activity in the Guild has declined. However, I will always retain a certain fondness for the Guild because of the warmth, goodness, and integrity of David and his wife, attorney Kathy Johnson, two of my favorite people. When I was recently asked to speak at a Guild event it occurred to me that, even if they were semi-retired on the other side of the country and unaware of the engagement, I couldn't turn down an opportunity to stand, however indirectly, in solidarity with David and Kathy. Along with their humor, selflessness, and good nature, their extraordinary efforts to use the law as a shield against those who use it as a weapon will be their legacies.

Adrian College President Jeffrey R. Docking and Vice President of Academic Affairs Andrea R. Milner have encouraged my efforts to promote academic freedom and freedom of expression for years. While administrators at other schools chilled speech and promoted cancel culture, President Docking and Vice President Milner showed courage and leadership by fostering intellectual exploration and helping me to sponsor the series of wide-ranging debates on Adrian College's campus described in Chapter 7.

I've taught courses for ten years at the University of Toledo College of Law, including many on the First Amendment. These courses have helped me explore, refine, and develop many of the ideas included in this book. My UToledo students have often kept me on my toes in ways that have forced me to think more clearly and deeply. I'm grateful to former Associate Dean for Academic Affairs Geoffrey Rapp (now Dean of the DePaul University College of Law) for hiring me. UToledo Law's current dean, Rebecca E. Zietlow, and my UToledo colleagues continue to make

the law school a great place to teach, think, and share ideas. UToledo also gave me permission to use the picture on the back cover of this book. It's a privilege to work with such people.

The Institute for Constitutional Studies and Leadership at the University of Toledo, where I'm a Faculty Fellow of Civil Liberties, has put me in the company of a team of extraordinary intellectuals. It also aided my teaching and scholarship, for which I'm grateful.

I'd be remiss if I didn't also thank Dan Thompson and Christine Adams of Adrian College's Information Technology Department. While I hoarded discarded library books and shook my fist at a fast-moving world that's going paperless, Dan and Christine used their tech expertise to make things a little easier for me. I'm similarly grateful to Maria Melssen, Assistant Director of the LaValley Law Library at the UToledo Law, who taught me via email correspondence how to prevent "link rot" by archiving online sources cited in this book. I was able to archive nearly all of the links in the pages that follow thanks to her help.

I'd also like to thank the National Lawyers Guild, the Mercatus Institute at George Mason University (formerly the home of *Discourse* magazine), and the Koeze Business Ethics Initiative at Grand Valley State University for allowing me to adapt content originally written for and published by them into this book.

The previously published materials from which the book is adapted include:

Lies in the Land of Confusion, Discourse Magazine (August 26, 2025);

<https://web.archive.org/web/20251207011253/https://www.discoursemagazine.com/p/lies-in-the-land-of-confusion>

Obscenity and Free Speech: An Awkward Coexistence, Discourse Magazine (June 11, 2025); <https://web.archive.org/web/20251018074906/https://www.discoursemagazine.com/p/obscenity-and-free-speech-an-awkward>

What It Means to Be a Free Speech Absolutist, Discourse Magazine (February 19, 2025); <https://web.archive.org/web/20251206235113/https://www.discoursemagazine.com/p/what-it-means-to-be-a-free-speech>

January 6 and America's Slippery Slope on Free Speech, Discourse Magazine (April 29, 2024); <https://web.archive.org/web/20260123173316/https://www.discoursemagazine.com/p/january-6-and-americas-slippery-slope>

A College Free Speech Crisis: Highway to the (Intellectual) Danger Zone, Discourse Magazine (March 12, 2024); <https://web.archive.org/web/20251107095906/https://www.discoursemagazine.com/p/a-college-free-speech-crisis-highway>; Adapted from "Our Emersonian First Amendment," published on the Grand Valley State University Koeze Business Ethics Initiative website and from written testimony submitted to the Ohio House of Representatives' Higher Education Committee.

A College Free Speech Crisis: The Supreme Court's Big Hand in the Campus Free Speech Crisis, Discourse Magazine (January 24, 2024);

<https://web.archive.org/web/20250910010021/https://www.discoursemagazine.com/p/a-college-free-speech-crisis-the-d63>. Adapted from Our Emersonian *First Amendment* and Written Testimony for the Ohio House of Representatives Committee on Higher Education on the Ohio Higher Education Enhancement Act (H.B. No. 151), listed below.

A College Free Speech Crisis: The Challenge of Complicit Administrators, Discourse Magazine (November 16, 2023);

<https://web.archive.org/web/20260123173703/https://www.discoursemagazine.com/p/a-college-free-speech-crisis-the>; Adapted from *Our Emersonian First Amendment* and Written Testimony for the Ohio House of Representatives Committee on Higher Education on the Ohio Higher Education Enhancement Act (H.B. No. 151), listed below.

A College Free Speech Crisis: When Safety Becomes Dangerous,

Discourse Magazine (October 16, 2023); <https://web.archive.org/web/20231206151132/https://www.discoursemagazine.com/p/a-college-free-speech-crisis-when>; Adapted from *Our Emersonian First Amendment* and Written Testimony for the Ohio House of Representatives Committee on Higher Education on the Ohio Higher Education Enhancement Act (H.B. No. 151), listed below.

Written Testimony for the Ohio House of Representatives Committee on Higher Education on the Ohio Higher Education Enhancement Act (H.B. No. 151). June 14, 2023. Available at <https://www.legislature.ohio.gov/legislation/135/hb151/committe>

e. Adapted from “A First Amendment Giant Offers a Way Out of Our Free Speech Crisis” and “Our Emersonian First Amendment,” which are cited immediately below.

A First Amendment Giant Offers a Way Out of Our Free Speech Crisis, Discourse Magazine (April 14, 2022); <https://web.archive.org/web/20231207161213/https://www.discoursemagazine.com/p/a-first-amendment-giant-offers-a-way-out-of-our-free-speech-crisis>; Revised and Abridged version of *Our Emersonian First Amendment*, listed below.

Our Emersonian First Amendment, Grand Valley State University Koeze Business Ethics Initiative (Jan. 13, 2022), <https://web.archive.org/web/20260203090342/https://www.gvsu.edu/seidman/ethics/module-news-view.htm?siteModuleId=9C6681B1-92E9-F4F1-7B4DF17EDBE5D2DC&storyId=5165E280-0A92-DF0C-602FB8F4F642B401>.

Thomas I. Emerson: Brave During the Scare, 69 Nat'l Law. Guild Rev. 146 (2012).

Book Review: *Freedom for the Thought That We Hate: A Biography of the First Amendment* by Anthony Lewis. 66 Nat'l Law. Guild Rev. 176 (2009).

A Perfect Peace Too Horrible to Contemplate: Justice Holmes and the Perpetual Conviction of Eugene Victor Debs, 63 Guild Prac. 135 (2006).

Dedication

This book is dedicated to Michael DeWilde, Rudolf J. Siebert, and Philip J. Prygoski, educators who, in the spirit of Mark Twain, helped ensure I got an education even while doing my schoolwork.

“Too many men are being driven to become government-fearing and time-serving because the Government is being permitted to strike out at those who are fearless enough to think as they please and say what they think. This trend must be halted if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great heritage of freedom which they sacrificed so much to leave to us. The choice is clear to me. If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free.”

--Associate Justice Hugo Black

Contents

Foreword by Nadine Strossen	xv
Chapter 1: What it means to be a Free Speech Absolutist	1
Chapter 2: The Philosopher of Full Protection	30
Chapter 3: Incitement and the Left-Wing Radical	56
Chapter 4: Incitement and the Right-Wing President	81
Chapter 5: Abolish the Truth Police.....	103
Chapter 6: Political Censorship of the Libido.....	125
Chapter 7: Highway to the Intellectual Danger Zone	154
Afterword by Jennifer Tiedemann.....	211

Foreword

By Nadine Strossen¹

Unqualified First Amendment Language Versus Qualified Enforcement

What do President Donald Trump, former Socialist Party of America Presidential candidate Eugene Debs, and Black Lives Matter leader DeRay Mckesson all have in common?

As Nathan Goetting vividly chronicles, despite the dramatically different political views of these three leaders, they were all subject to court rulings that denied First Amendment protection to their public speeches about important policy issues. Goetting lays out strong arguments that all three of these widely diverse leaders were denied what he hails as “the constitutional liberty most essential to our democratic process –the right to criticize one’s government.” (Debs criticized the World War I military draft; Mckesson criticized police officers’ killings of Black male criminal suspects in the process of arresting them; and Trump criticized Congress’s certification of state election results that he contended to be fraudulent.) Moreover, these rulings doubly infringed on First Amendment rights, since that amendment protects not only a speaker’s right to convey information and ideas, but also the public’s right to receive them. After all, as the Supreme Court has observed, “Speech concerning public affairs is more than [individual] self-expression; it is the essence of self-government.”²

The courts' failure to protect Debs's First Amendment rights occurred a full century before they failed to protect these rights for Trump and Mckesson, and in the interim the Supreme Court adopted speech-protective principles that should have shielded Trump's and Mckesson's speeches behind a strong presumption of protection. Nonetheless, even in these two recent cases, too many of the courts³ – including the Supreme Court itself – failed to vigorously enforce the governing speech-supporting principles. Instead, Goetting makes a persuasive case that many of the lower courts paid only lip service to these principles,⁴ and the Supreme Court did not resolve the serious First Amendment issues raised by the lower courts' holdings.

These three cases illustrate the general problem that Goetting stresses throughout his illuminating book: that if courts do not unqualifiedly enforce the unqualified language of the First Amendment's Free Speech Clause—which decrees that government “shall make no law abridging the freedom of speech”—they will inevitably deny protection to unpopular speakers and ideas, thus simultaneously contravening fundamental principles of liberty, equality, and democracy alike.

Although Goetting describes himself as a free speech “absolutist,” he does recognize that government may – and, indeed, should – restrict speech that, considered in its overall context (rather than being judged for its unpopular message), directly causes or imminently threatens certain specific harms independent of its ideas; examples that Goetting cites include extortionate expression, perjury in a court of law, and fraudulent impersonation of a government official. Beyond that, though, Goetting forcefully rejects the constant calls, coming from all across the

ideological spectrum, to expand the concept of constitutionally punishable speech through one or both of two major strategies: (1) by broadening the cognizable harms that justify speech restrictions, to include psychic or emotional suffering; and/or (2) by loosening the required connection between the speech and the feared harm to permit restrictions on speech with a more attenuated, speculative connection to potential harm.

Since even staunch free speech proponents, including Supreme Court Justices, recognize that government may restrict speech for viewpoint-neutral reasons, some of us prefer to describe ourselves as “viewpoint absolutists,” rather than “free speech absolutists.” The Court has saluted the viewpoint neutrality principle as the “bedrock principle”⁵ undergirding its robust speech protection. No matter how widely and deeply despised the speech’s views, ideas, or messages might be, that factor alone can never justify government restriction. In contrast, government may restrict speech when the restriction is not based solely on disapproval of the speech’s viewpoint, but rather is based on other, contextual factors: if the speech violates a reasonable, viewpoint-neutral time, place, or manner regulation; or if the speech directly causes certain specific serious harm, such as the above-cited examples from Goetting’s book or (to cite additional examples) when it directly addresses and intentionally threatens or harasses a specific individual.

Justifications For Free Speech Absolutism – and Associated Responsibilities

While Goetting forthrightly acknowledges the concerns that prompt advocacy of increased speech restrictions, including

physical safety and mental health, he steadfastly maintains that our society must continue to “prioritize freedom of expression above every other social interest.” That conclusion is supported by several considerations. As already noted, Goetting cites the Free Speech Clause’s plain language, with its categorical statement that Congress shall make “no law” that “abridg[es] the freedom of speech.” As former Supreme Court Justice Hugo Black famously declared: “‘No law’ means *no law*.”⁶ In contrast, other Bill of Rights guarantees contain qualified language; for example, the Fourth Amendment bars only “unreasonable searches and seizures.”

The Free Speech Clause’s absolutist language is buttressed by an originalist argument, which Justice Black also stressed. He opposed the *ad hoc* balancing that his fellow Justices too often engaged in to “balance away” free speech protection (as well as other constitutional rights) in favor of the government’s asserted countervailing national security or public safety concerns.. Black recognized that “the decision to provide a constitutional safeguard for a particular right, such as ... the right of free speech..., involves a balancing of conflicting interests.” But he also insisted that “the Framers themselves did this balancing” when they adopted the First Amendment’s absolutist terms. Further explaining how contemporary *ad hoc* balancing is preempted by the framers’ own categorical balancing, he commented:

They appreciated the risks involved and they decided that certain rights should be guaranteed regardless of these risks. Courts have neither the right nor the power to review this original decision of the Framers and to attempt to make a different evaluation of the importance of the rights granted in the Constitution.⁷

In a landmark 2010 ruling, authored by Chief Justice John Roberts, the Supreme Court fully embraced Justice Black's stance, albeit without citing him. The U.S. government had urged the Court to reject the First Amendment challenge to a federal statute outlawing certain depictions of animal cruelty based on an *ad hoc* balancing analysis, but the Court emphatically rebuffed that argument with unusually strong language:

[T]he Government points to Congress's "legislative judgment that ... depictions of animals being intentionally tortured and killed [are] of such minimal redeeming value as to render [them] unworthy of First Amendment protection," ... and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an *ad hoc* balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.⁸

Although this important decision accords with the Black/Goetting absolutist approach, as Goetting's book details, the Court has

failed to consistently enforce such a speech-protective approach in subsequent cases, including the *Mckesson* case noted above.

In addition to the textualist and originalist considerations that favor free speech absolutism rather than balancing, Goetting spells out a further such consideration: a pragmatic or strategic one. He explains that increased speech restrictions would have a net negative impact, because “the short-term harms” from “tolerating harmful speech are ultimately redeemed by long-term benefits that will make us a freer, happier, and more advanced society.” For example, while recognizing that lies can and do cause harm, he wisely observes that “lies and censorship inflict the same injury: They push those seeking the truth further away from it.” In short, the asserted societal benefits of censorship are generally just assumed, whereas in actual impact the censorship too often is at best ineffective, at worst counterproductive.⁹

Goetting’s staunch defense of freedom of speech for “We the People,” so that we can effectively wield our sovereign political power, is complemented by an equally strong exhortation to all of us about our speech-related “civic duty.” He urges us to carry out our “shared social and political responsibility” to exercise our free speech rights conscientiously—for example, by countering lies and other harmful speech, and urging our fellow citizens to do likewise.

Goetting shares the faith that the framers of the First Amendment—not to mention the framers of the Constitution itself—demonstrated in all of us citizens: “that our capacity for reason, resilience, and delayed self-gratification is strong enough to remove the coercive power of the state from our intellectual, social,

and political disputes.” While underscoring that this speech-protective approach is indeed “ultimately a matter of faith,” and hence risky, Goetting makes a compelling case that the speech-restrictive alternative has been shown as a matter of fact to be actually dangerous.

Prominent Progressive Champions of Free Speech Absolutism

Although Goetting’s book joins many recently published books that explain and endorse modern U.S. law’s robust concept of free speech—thus countering the constant output of books assailing that concept—his book is especially noteworthy in one respect that I would like to highlight, especially since Goetting himself does not explicitly do so.

Prominent recent critiques of freedom of speech have consistently come from scholars and activists on the left end of the political spectrum, attacking it for purportedly amplifying the voices of those who are already privileged and powerful, and hence reinforcing the status quo. Although Goetting’s book does not indicate his own ideological inclinations, biographical research reveals that he has been a longtime member of the National Lawyers Guild (“Guild”), whose website describes it as “the nation’s oldest and largest progressive bar association,” with a mission to use law...in the service of the people by valuing human rights and the rights of ecosystems over property interests.” Among other Guild positions, Goetting served as Editor-in-Chief of the *National Lawyers Guild Review* (formerly *Guild Practitioner*) from 2010 to 2019, authoring or co-authoring prefaces for every

issue during that period. He also held other editorial roles with this flagship Guild publication dating back to 2008.

Founded in 1937, the Guild has been dedicated to defending free speech and other civil liberties specifically in the service of leftist political goals. It has expressly eschewed the neutral defense of civil liberties for all, which has been the signature mission of the American Civil Liberties Union (ACLU) since its founding in 1920. In the late 1970's, when the ACLU successfully—but controversially—defended free speech even for neo-Nazis who sought to demonstrate in Skokie, Illinois—a city with a large Jewish population, including many Holocaust survivors—the Guild denounced the ACLU's "poisonous evenhandedness."¹⁰ Likewise, the Guild's more recent pronouncements have continued to prioritize its social justice policy goals over free speech principles;¹¹ Guild leaders have described its work in the free expression realm as limited to "support[ing] free speech and assembly for all progressive and radical movements," and "defend[ing] activists who challenge fascism," while expressly "refus[ing] to support white supremacists" and apparently maintaining that "far-right extremists" have no free speech rights.¹²

In light of Goetting's past work for the Guild, and the Guild's rejection of the viewpoint neutrality principle—which also has been rejected by many other left-leaning individuals and groups—it is remarkable that Goetting's book wholeheartedly endorses that principle. For the same reason, also noteworthy is the book's spotlighting of other important progressive social justice activists and intellectuals, beyond Goetting himself, who likewise have championed this core First Amendment precept.

Thurgood Marshall

In fact, the Supreme Court's first explicit articulation of the viewpoint neutrality principle was issued by the Justice who is probably the most prominent social justice activist ever to have graced the Court's bench: Thurgood Marshall, the legendary civil rights lawyer (and onetime Guild member) who long led the NAACP (National Association for the Advancement of Colored People) Legal Defense and Educational Fund, serving as lead counsel for the landmark *Brown v. Board of Education* litigation, before he became the Court's first Black Justice. (The only other Justice who could be a serious contender for the role as the Court's preeminent social justice activist would be Louis Brandeis, who was—along with Marshall—one of the Court's foremost free speech champions.) What's more, Marshall laid out the viewpoint neutrality principle in a decision that upheld the free speech rights of a Black postal employee who had been trying to protest anti-Black racial discrimination by a Chicago public school. As Marshall declared:

Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.¹³

Notably, before he became a federal judge, Marshall served on the ACLU's National Board of Directors, and he actively supported the ACLU's defense of free speech for racists, as well as anti-racists. As legal historian Samantha Barbas explained in a recent article:

Marshall denounced *Beauharnais v. Illinois*, in which the Supreme Court in 1952 upheld an Illinois hate speech law that had been used to convict a white supremacist. Marshall filed an amicus brief along with the ACLU, asking the Court to reconsider the decision. It agreed with the dissenting opinion of Justice Hugo Black, who noted that if racists could be forbidden from voicing their perspectives under a hate speech law, the same standard, speech “offensive to the community,” could be used by a Southern state to outlaw civil rights activists from voicing their opinions.¹⁴

Thomas I. Emerson

Notwithstanding the Guild’s criticism of the viewpoint neutrality principle—which is shared by many current progressive free speech critics—Goetting’s book documents the staunch support of that principle by none other than the progressive scholar and activist who was a major Guild founder and long-time leader: Yale Law School Professor Thomas I. Emerson, who had been a “quintessential New Deal attorney.” Goetting recounts that, “[d]uring the Guild’s great internecine battle of 1939-41 between radicals and moderates...[the] moderate faction was led by Guild co-founder and ACLU leader Morris Ernst,” who ultimately left the Guild, while Emerson led the Guild’s radical faction and remained at its helm (while also remaining actively engaged with the ACLU in important leadership roles, including as a founder of the ACLU’s Connecticut branch).

Despite the disagreements between Emerson and Ernst, paralleling those between the Guild and the ACLU, Emerson himself steadfastly championed the very same absolutist approach to free speech that the ACLU has exemplified, as epitomized by

the Skokie case. Goetting's book devotes its first specific chapter (after an introductory overview chapter) to Emerson. Entitled "The Philosopher of Full Protection," this chapter celebrates Emerson as "the great free speech absolutist"; Goetting states that the book's following chapters "are inspired by and largely seek to apply Emerson's teaching, which I regard as foundational, to... contemporary political censorship."

Eugene V. Debs

In addition to Emerson, the book also fascinatingly features another left-wing luminary, who also unwaveringly supported an absolutist free speech protection: Eugene V. Debs, the longtime labor leader and leader of the Socialist Party of America, who was its Presidential candidate five times. Debs's unqualified defense of free speech is especially remarkable because it preceded the Supreme Court's speech-protective rulings, which the Court did not issue (with very few exceptions) until the second half of the twentieth century. Even more remarkably, Debs's unflinching support of the proverbial "freedom even for the thought that we hate"¹⁵ also preceded the pathbreaking pro-free-speech dissenting opinions by contemporary Justices Oliver Wendell Holmes and Louis Brandeis (the first of which was issued in 1919). As Debs proclaimed in 1918:

I would not, under any circumstances, gag the lips of my bitterest enemy. I would under no circumstances suppress free speech. It is far more dangerous to attempt to gag the people than to allow them to speak freely of what is in their hearts.¹⁶

Debs—as well as Marshall and Emerson—were fully aware of the especially dire consequences specifically for left-leaning speakers

when government officials are granted latitude to restrict speech on any ground inconsistent with a strict speech-protective approach: disapproval of its viewpoint; or vague, speculative fear that it might lead to serious harm, such as inciting violence; or concern about its adverse emotional/psychic impact. All of these social justice crusaders had endured the invoking of these rationales as purportedly justifying the suppression of their own speech, and that of their progressive allies. Consider, for example, this 1918 statement by Debs:

Socialists' meetings have been broken up all over this country. Socialist speakers have been arrested by hundreds and flung into jail, where many of them are lying now. In some cases not even a charge was lodged against them—guilty of no crime except the crime of attempting to exercise the rights guaranteed to them by the Constitution of the United States.¹⁷

David Cole

A century later, the pattern that Debs decried was underscored by David Cole, a prominent progressive lawyer and scholar, who also has consistently resisted calls by fellow progressives to rein in speech—specifically, speech by those on the right—that they feared might contribute to violence, but fell short of the Court's high bar for punishable speech. For example, Cole issued an important warning about censorship's adverse impact specifically on progressive expression in September 2017, just a few weeks after right-wing "Unite the Right" demonstrators had clashed with anti-racist counter-demonstrators in Charlottesville, Virginia, erupting in violence. The individuals and organizations who had actually committed the violence, or conspired to do so, were duly punished. However, Cole and the ACLU (as well as the federal

judge who ruled on the issue) maintained that demonstrators could not be punished solely for their discriminatory, insulting words. As Cole wrote:

Our history illustrates that unless very narrowly constrained, the power to restrict the advocacy of violence is an invitation to punish political dissent. A. Mitchell Palmer, J. Edgar Hoover, and Joseph McCarthy all used the advocacy of violence as a justification to punish people who associated with Communists, socialists or civil rights groups.¹⁸

Significantly, in his then-capacity as the ACLU's national Legal Director, in 2020 David Cole represented DeRay Mckesson before the Supreme Court, urging the Court to overturn the lower court decision that had held Mckesson culpable for an unknown assailant's injury of a police officer because the assault followed Mckesson's impassioned speech excoriating unjustified police violence against unarmed Black men. This was the very case in which, as noted above, the Court alas did not resolve the weighty First Amendment issue.

Conclusion

Goetting's book vividly demonstrates that most people, including politicians of all stripes, tend to support "freedom of speech for *me*, but not for *thee*." Correspondingly, he makes a compelling case for the obverse approach, which has also been espoused by other leading lights of the left, including Thomas I. Emerson and Eugene V. Debs. Goetting aptly summarizes the rationale for this preferred approach as follows: "Until the First Amendment protects everything, we can't be completely confident that it will protect anything."

¹ John Marshall Harlan II Professor of Law Emerita, New York Law School; Senior Fellow, FIRE (Foundation for Individual Rights and Expression); and former national President, American Civil Liberties Union (1991-2008).

² *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

³ In the *Mckesson* litigation, two of the lower court rulings, issued by the U.S. District Court for the Middle District of Louisiana, did uphold *Mckesson*'s First Amendment rights.

⁴ The Supreme Court's speech-protective standard that the courts invoked in these cases, which the Court unanimously endorsed in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), is highly fact-specific. Goetting's book makes a strong case that the evidence and analysis on which the courts relied in these cases falls short of that standard, which certainly makes these rulings problematic. Nonetheless, it remains possible that other available evidence might satisfy the standard. Especially in the Trump situation, some free speech experts and advocates have made that argument, and they have additionally contended that the speech could be restricted consistent with other Supreme Court precedents. *See, e.g.*, Brief for Floyd Abrams, Erwin Chemerinsky, Martha Minow, and Laurence H. Tribe in Support of Plaintiffs, *Swalwell v. Trump*, Case No. 1:21-cv-00586-APM (filed 07/08/21).

⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

⁶ *New York Times Co. v. United States*, 403 U.S. 713, 718 (1971) (Black, J., concurring) (quoting Solicitor General Griswold).

⁷ Hugo Black, "The Bill of Rights," 35 N.Y.U.L. Rev. 865, 879 (1960).

⁸ *U.S. v. Stevens*, 559 U.S. 460, 469-470 (2010).

⁹ *See* Nadine Strossen: *Free Speech: What Everyone Needs to Know*® (Oxford University Press 2023) at 30-37.

¹⁰ Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (Southern Illinois University Press 1990) p. 326.

¹¹ *See, e.g.*,

<https://web.archive.org/web/20170614202632/https://www.nlg.org/free-speech-on-campus-a-critical-analysis/>;

<https://web.archive.org/web/20220310221454/https://capitalresearch.org/article/a-history-of-radicalism-at-the-national-lawyers-guild/>.

¹² Nina Farnia, Rachel Lederman, and Meredith Wallis, "We Are All Antifa," *San Francisco Chronicle*, Sep. 6, 2017 (also stating that such "extremists have successfully twisted the right of free speech to cast themselves as victims"); <https://web.archive.org/web/20170906120336/http://www.sfchronicle.com/opinion/openforum/article/We-are-all-antifa-12174947.php> .

¹³ *Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁴ Samantha Barbas, "How Civil Rights Groups Defeated Hate Speech Laws," *The Bedrock Principle*, Aug. 6, 2025; <https://web.archive.org/web/20251209133705/https://www.bedrockprinciple.com/p/how-civil-rights-groups-defeated>. *Beauharnais v. Illinois* can be read at 343 U.S. 250 (1952).

¹⁵ *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting) (joined by Brandeis, J.).

¹⁶ Eugene V. Debs, "Address to the Jury," 11 September 1918 (during his 1918 federal trial in Cleveland, Ohio, where he was charged under the 1918 Espionage Act for his anti-war speech in Canton, Ohio on June 16, 1918); <https://web.archive.org/web/20190502053158/http://rhetoricalgoddess.wikidot.com/text:debs-jury>.

¹⁷ *Id.*

¹⁸ David Cole, "Why We Must Still Defend Free Speech," *New York Review of Books*, Sep. 28, 2017.

Chapter 1

What it means to be a Free Speech Absolutist

Immediately after Donald Trump's 2024 presidential election victory, Mark Zuckerberg, the billionaire CEO of Meta Platforms, publicly announced that the Biden administration had been pressuring him to create a massive censorship¹ apparatus that would remove speech the government found harmful or offensive from his social media sites. Zuckerberg described Trump's win, at least implicitly, as a liberation. Meta was now to become the forum for the free exchange of ideas its founder had always hoped it'd be. "We are going to work with President Trump to push back on governments around the world that are going after American companies and pushing to censor more,"² he pledged.

Zuckerberg's statement sparked euphoria among right-wing media. "Did Trump Just Save Free Speech?"³ asked a headline in *The Washington Times*. "Mr. Trump's re-ascension is igniting a new era of free speech and freedom..."⁴ the piece went on to claim. Not long after, Zuckerberg, who only three years before had run slick commercials encouraging young adults to embrace "content moderation,"⁵ sat on the inaugural platform next to Trump's most loyal supporters and watched the 47th president take the oath of office. He looked on as Trump vowed in his address that he would "immediately stop all government censorship and bring back free speech to America."⁶

Later that day, Trump signed an executive order titled “Restoring Freedom of Speech and Ending Federal Censorship.”⁷ The title of Susan Shelley's column in *The Orange County Register* exceeded even the optimism of the *Washington Times* piece. It claimed that “President Donald Trump has restored freedom of speech in the United States,”⁸ as if with a single signature the problem of state censorship in America had finally been solved.

Trump certainly hasn't “saved” or “restored” free speech, nor does he intend to. We know this because Trump has a long-standing habit of publicly announcing those he hopes to censor, and he does so with such frequency that the habit may even be a compulsion. Shortly before his executive order, for instance, he explained to Fox News that he hopes to imprison those who burn the American flag in protest.⁹ “You should get a one-year jail sentence if you do anything to desecrate the American flag,”¹⁰ he declared. Acknowledging the inconvenient fact that the Supreme Court had already expressly ruled flag-burning to be constitutionally protected speech, he went on to explain “Now, people will say, ‘Oh, it's unconstitutional.’ Those are stupid people.”¹¹ Given his actions during the first year of his second term, anyone who hopes for a commitment to freedom of expression more profound, or reasoning more nuanced, during the next three years should be prepared to be disappointed.¹²

Trump also wants to “open up”¹³ defamation laws so it's easier to sue news media for publishing stories that he's convinced wrongly injure his reputation, which he's been doing a lot of lately. Over the past two years he's sued *The New York Times*,¹⁴ *The Wall Street Journal*,¹⁵ *ABC News*,¹⁶ and *Paramount (CBS News)*.¹⁷ Trump is about as likely to honor his order's promise of “ending

federal censorship”¹⁸ as he is to high-five undocumented immigrants as they cross into the United States from Mexico.

Trump falsely presented himself as a free speech absolutist in his executive order by misappropriating the idealistic language of the First Amendment. Politicians have been doing this, and getting away with it, as far back as the ratification of the amendment in 1791.¹⁹ Because the freedom of speech guaranteed by the Constitution is described at a high level of abstraction and without details about how it should be applied, they speak as if they want us to enjoy all that it promises. However, Trump’s order is worse than just a false promise: It perpetuates long-standing popular confusion about what the constitutional right to freedom of speech is and how to support it. The order does so in three ways.

The first is that it continues the practice of defining free speech according to whose ox is being gored. For all my criticism, I actually support the text of the order, and I suspect it will protect some speech—for Trump and his followers. They’re entitled to the protection it describes and, in many ways, went without it during four years of online censorship from the Biden administration, described in Chapter 5. However, protecting free speech for some is a far cry from protecting free speech at all. As Justice Oliver Wendell Holmes Jr. famously explained nearly a hundred years ago, free speech means “freedom for the thought that we hate,”²⁰ not merely for “those who agree with us.”²¹ I suspect Anthony Fauci, Liz Cheney, Mark Milley, and Trump’s other political opponents found no comfort in Trump’s order, nor should they have. The order merely affirmed the adage: “Free Speech For Me—But Not For Thee.”²²

The second problem is that the order perpetuates the common tendency of not just politicians but most Americans to embrace freedom of expression²³ in the abstract while abandoning it when its application becomes challenging or inconvenient. Trump has already pointed his finger at flag-burners, antagonistic journalists, and “seditious” legislators²⁴ as beneath the First Amendment, just as his predecessor Joe Biden did with white supremacists²⁵ and vaccine skeptics.²⁶ As a Platonic ideal, freedom of expression is majestic and beautiful. In action, it can be awfully ugly—as ugly as defending the rights of those who promote Nazism²⁷ or misogynistic pornography.²⁸ Free speech absolutism means insisting on liberty both in theory and practice, on paper and in the courtroom. This is simply too much for most people. Freedom of expression is fundamentally unnatural²⁹ and counterintuitive because it requires us, to a certain degree, to defy our fundamental instinct of self-preservation.

Freedom of expression is among history’s most psychologically demanding and difficult-to-follow moral and political principles. As with other essentially unnatural ideals that sound good to many in the abstract, like “turn the other cheek,”³⁰ even the most idealistic nations during their most peaceful epochs have rarely tried it. As a political, legal and pedagogical principle (to be applied in our state³¹ colleges and universities, where the exploration of ideas and truth-seeking are most essential and free speech battles tend to rage hottest), it’s downright bizarre.

That’s because one of the core functions of governments, including college administrations, is to punish harmful actions. For that reason, every college has a student code of conduct. On well-functioning campuses, administrations seek to enforce their codes.