



FREE EXPRESSION AND PROTESTS

How does your community balance the First Amendment rights of speech and assembly with the need for public safety?

The text of the First Amendment provides:

“ Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. ”

That fourth freedom, to peaceably assemble, is perhaps the least discussed freedom protected by the First Amendment. In recent years, however, demonstrations, marches, and rallies have become more regular features of American political expression. As the U.S. Supreme Court Justice Thurgood Marshall noted, “To protest against injustice is the foundation of all our American democracy.” Nevertheless, assemblies of individual and protests can, in extreme situations, present a risk to public safety. In some cases, law enforcement may intervene to protect individual and community safety and security—but, hopefully, without trampling on the First Amendment.



SAMPLE PROMPTS FOR CIVIL CONVERSATIONS

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FIRST AMENDMENT IS NOT ABSOLUTE

It is often noted, correctly, that the First Amendment freedoms are not absolute—meaning that government bodies can and often do limit the exercise of the rights listed in the First Amendment, including speech, press, and assembly. And in many cases, the judicial system will uphold those restrictions depending on their purpose and execution. For example, in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the U.S. Supreme Court held that a state could prohibit the use of fighting words—those uttered face to face that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” But the decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), protected the Ku Klux Klan leader whose incendiary speech was broadcast on TV because only the “incitement of imminent lawless action” was punishable expression.

FREE SPEECH AND PROTEST – ANYTIME, ANYWHERE?

The U.S. Supreme Court has generally protected political speech and assembly (with very few exceptions) in many different forms and settings, including in recent decades the right of neo-Nazis to march down the streets of Skokie, Illinois, a community heavily populated by Jewish residents and Holocaust survivors (*National Socialist Party v. Skokie*, 1977) and the right of residents and even gang members to assemble (or loiter) on the streets of Chicago (*Chicago v. Morales*, 1999). Most recently, the Court in a 9-0 decision upheld the free expression rights of a church to picket at a funeral even though the expression was considered offensive and outrageous (*Snyder v. Phelps*, 2011). These decisions have been fueled, in part, by notions that our First Amendment freedom of speech is an absolute right allowing people to speak or write anything they want, anytime, anywhere.

IF A PROTEST BECOMES A RIOT

The Supreme Court has said that someone who causes a riot that leads to illegal conduct may be punished for inciting that riot. The punishments will vary widely under state or local law, or perhaps federal law, depending on where the riot takes place. A person who is present at a riot but does not participate and does not engage in illegal action should not be punished. But sometimes it is a gray area as to when someone was merely present or even trying to get away and when someone took part in illegal activity. Sometimes police will round up everyone present until they can sort out who was involved in illegal activity and who was not. Unfortunately, it may be difficult at times to show that you were just a bystander and not a participant.





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PROTECTING THE PUBLIC SQUARE

The “public square” is at the heart of American democracy. It is both a metaphorical symbol of our commitment to First Amendment freedoms of speech, assembly, press, and religion, and a robust collection of real places where debates, political expression, and protests take place. In settings as diverse as street corners, shopping malls, town halls, barber shops, colleges, and outside of abortion clinics and funeral services for soldiers, Americans from different walks of life come together to listen, discuss, debate, and protest. The practices of democracy, however, are often messy. Protesters become loud and unruly, and groups with opposing points of view try to shout each other down. Scuffles, violence, and arrests sometimes ensue. Special interests choose locales to gather and march that are designed to offend the targets of their protest. The language, signs, and symbols of the public square are often nasty, offensive, and indeed uncivil. As historians remind us, however, the lack of civility in the public square is not new—it was also present as far back as colonial times and the early days of the Republic (recall The Alien and Sedition Acts of 1798). Not every democratic encounter looks like the idyllic townhall meeting in New England or has the tranquility of a (staged) stop for modern campaign for local office.

*This prompt is adapted in 2022 from: (1) Civility and Free Expression in a Constitutional Democracy: Conference Report, American Bar Association Division for Public Education, 2012; (2) ABA Civil Rights Civics Institute, Free Speech and Free Press <https://www.americanbar.org/groups/crsj/projects-and-initiatives/civil-rights-civics-institute/freespeechqanda/>, (3) Kaplan, Howard, Ed., *That Delicate Balance II: Our Bill of Rights, Instructor’s Guide*, American Bar Association, Special Committee on Youth Education for Citizenship, 1994.*

