Dædalus

Journal of the American Academy of Arts & Sciences

Summer 2024

The Future of Free Speech

Lee C. Bollinger & Geoffrey R. Stone
guest editors

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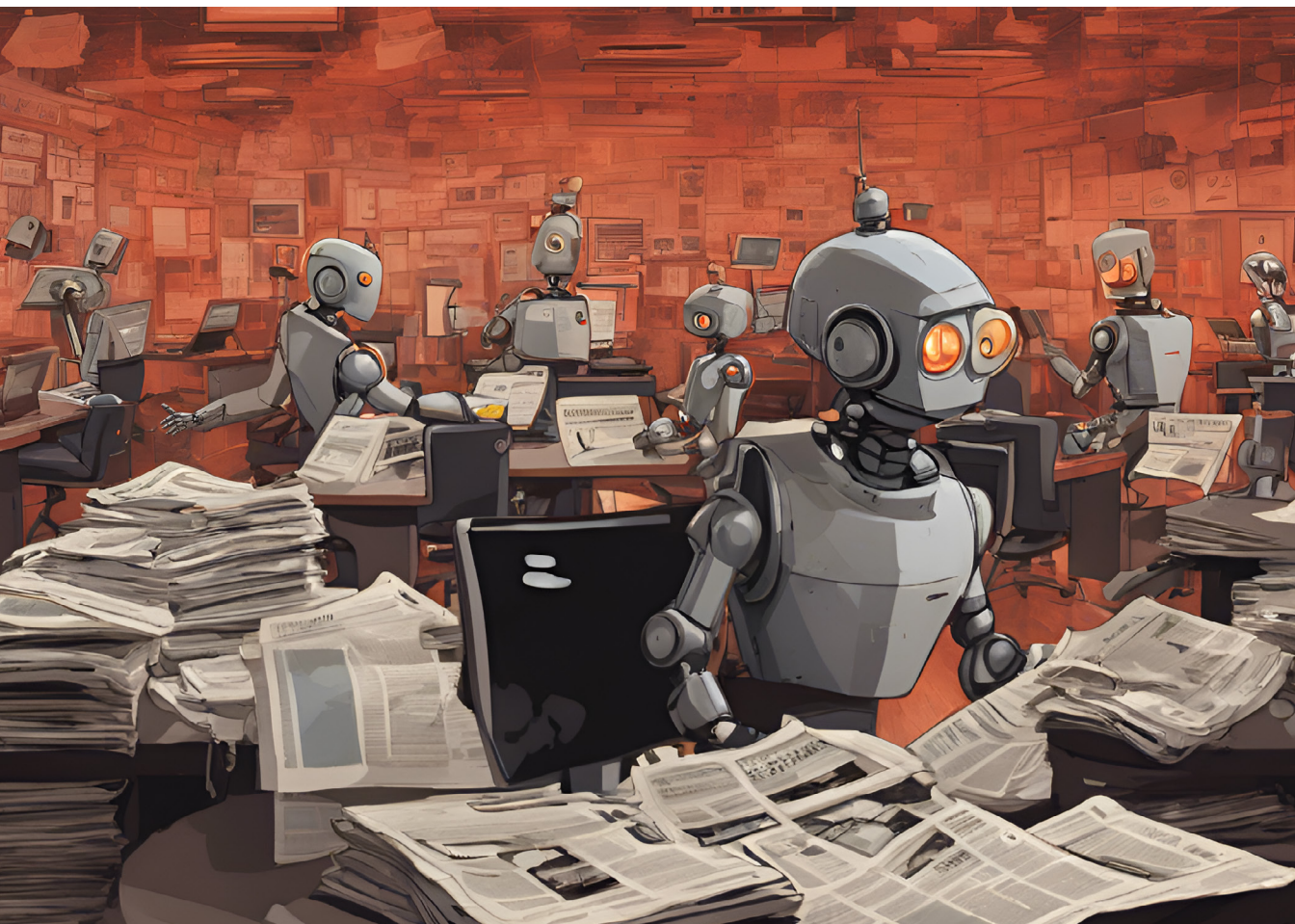

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"The Future of Free Speech"
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Lee C. Bollinger & Geoffrey R. Stone, Guest Editors
Phyllis S. Bendell, Editor in Chief
Peter Walton, Senior Editor

Inside front cover: (top) "Make it EARLY–Make it ACCURATE!" reads a sign above journalists at work in the editorial offices of *The Daily Express*, London, January 1968. Photo by Express Newspapers/Stringer/Getty Images. *(bottom)* A vision of our automated media future, made using DreamStudio, July 2024.

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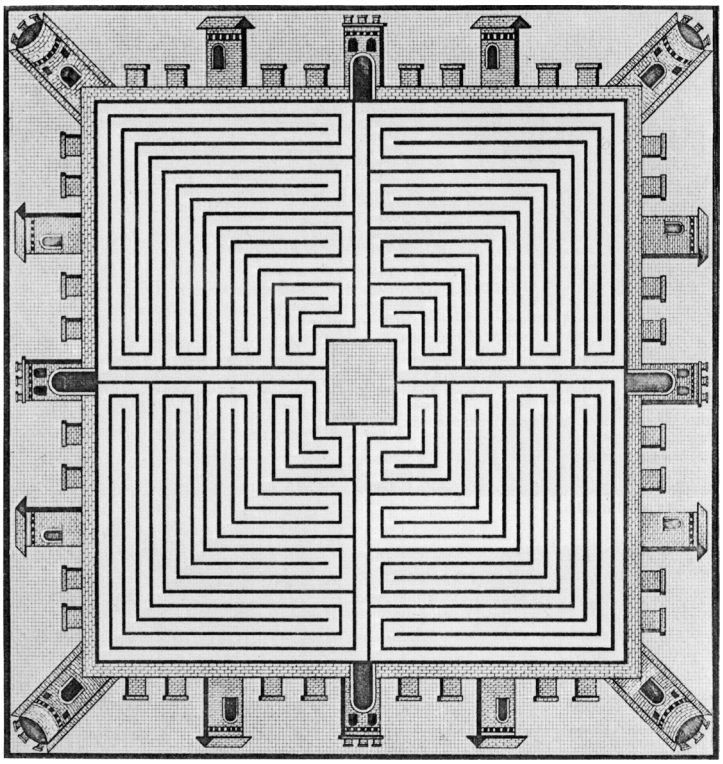

Nineteenth-century depiction of a Roman mosaic labyrinth, now lost, found in Villa di Diomede, Pompeii

Dædalus was founded in 1955 and established as a quarterly in 1958. Its namesake was renowned in ancient Greece as an inventor, scientist, and unriddler of riddles. The journal's emblem, a labyrinth seen from above, symbolizes the aspiration of its founders to "lift each of us above his cell in the labyrinth of learning in order that he may see the entire structure as if from above, where each separate part loses its comfortable separateness."

The American Academy of Arts & Sciences, like its journal, brings together distinguished individuals from every field of human endeavor. It was chartered in 1780 as a forum "to cultivate every art and science which may tend to advance the interest, honour, dignity, and happiness of a free, independent, and virtuous people." Now in its third century, the Academy, with its more than five thousand members, continues to provide intellectual leadership to meet the critical challenges facing our world.

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Opening Dialogue

Lee C. Bollinger & Geoffrey R. Stone

Lee C. Bollinger

To set the stage for the excellent essays that make up this volume on the future of free speech, let's begin where we often do when thinking together about the First Amendment: with some basic facts and fundamental observations about the constitutional command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1]

Of course, in the United States, "free speech" is not only part of the constitutional Bill of Rights; it is also a cultural and social norm by which we choose to live. Several of the essays in this volume therefore take note of how the meaning and health of "free speech" depend both on judicial interpretations of the First Amendment and on how all citizens and institutions interpret and abide by the general principle. Still, in our highly legalized, and constitutionalized, national culture, it is only natural that the interpretation of the constitutional right drives both the public and the private spheres in which "free speech" operates.

To begin, here are several observations worthy of note for those not fully steeped in the First Amendment. First, the idea of a First Amendment right of free speech, as we understand it today, is a relatively recent invention. The Supreme Court's jurisprudence on the First Amendment dates back to only a little more than a century ago.[2] Although the First Amendment has been part of the Constitution since 1791, the Court did not begin interpreting its meaning until 1919, in cases arising out of World War I.[3] (To mark the centennial of that moment, in 2019, we convened a group of prominent scholars, judges, and lawyers to create a collection of provocative and insightful essays in a book we called *The Free Speech Century*.)[4]

Since 1919, there have been thousands of judicial decisions about "free speech" and "free press," which together constitute a massive and complex jurisprudence around the subject of the First Amendment. You and I are the professorial by-product of that development. When we began teaching as law professors in 1973, the First Amendment was merely one part of a conventional course on Constitutional Law. Within a few years, though, the Supreme Court's First Amendment jurisprudence became so dense and complex as it decided ever-more cases on these issues that law schools and constitutional law scholars thought it appropri-

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ate to subdivide the field of constitutional law into separate, free-standing courses, one of the most important of which focused exclusively on the First Amendment.

Over the past century, the scope of protections afforded citizens under the First Amendment has ebbed and flowed, although for the most part it has expanded dramatically. At the very beginning, in 1919, in the context of the hysteria surrounding World War I and the Bolshevik Revolution, the U.S. government prosecuted and punished people who merely dissented from the government's prevailing views, especially about the war and the draft.[5] Looking back on that era today, it is surprising that the Supreme Court chose not to use the First Amendment to protect those who challenged the government's policies from often severe censorship. From the standpoint of how our nation now views the First Amendment, this was an inauspicious beginning indeed.

Over the next few decades, though, as the Court gradually came to understand its earlier failures, the scope of First Amendment protections deepened. Then, in the 1950s, with the rise of McCarthyism, the nation slipped back into a period of severe intolerance and, once again, the Supreme Court assented.[6] But the arrival of the civil rights era, along with national upheavals around the Vietnam War and other highly divisive issues, led the Court, which once again learned from its earlier mistakes, to embrace the rigorous and now bedrock interpretations of the freedoms of speech and press that have since defined our nation's approach to these fundamental principles – at least until the present.[7]

This general framework has several defining features. For example, speech advocating illegality is now protected by the Constitution unless serious criminal acts are imminent.[8] What is now called "hate speech" has today been held to be fully within the bounds of the First Amendment, as are falsehoods (especially falsehoods about public officials and figures, which are protected unless they are made with knowledge of the falsehood or with reckless disregard for the truth).[9] Indeed, the doctrines currently limiting government interference with public discussion of public issues are highly speech protective, and over the past half-century, the Supreme Court has created a constitutional framework for the First Amendment that is more protective of speech than that of any other nation in the world, and, in fact, in history.

Not all of these doctrines are universally accepted as "correct." But that is the central point of the right to question and to criticize. That is precisely what the First Amendment is about.

The question now, though, is what will come of all this in the decades ahead. Knowing that our highly protective free speech jurisprudence is all quite recent, that it has ebbed and flowed over time, that it is often quite controversial, and that we are an outlier among nations, may lead one to ask whether, for better or for worse, we should prepare now for a significant retrenchment.

Although there are important issues internal to our current First Amendment jurisprudence on which mainstream conservatives and liberals often sharply dis-

agree (*Citizens United* is a good example), a fairly remarkable development of the last half-century is a general convergence of agreement about the basic framework of our free speech jurisprudence even among these often competing groups.[10] Our overall First Amendment jurisprudence does not today pose the often radical disagreement between liberals and conservatives that characterizes the Supreme Court's rulings about such issues as abortion, affirmative action, and sexual orientation. Hopefully, the earlier periods in our history during which our nation and our courts too-often succumbed to intolerance in their suppression of free speech will continue to stand as lessons rather than as temptations.

The authors in this volume take stock of where we are and where we might be headed. The problem is that the United States is not at a "normal" point in our history. What I have just described as a sort of classic framing of free speech in America is potentially thrown into question by the unnerving current state of our politics and by the continued viability of Donald Trump as a presidential candidate. Trump's return to the White House could once again hand the nation's highest office over to someone who increasingly sounds, and acts, like the totalitarian figures who defined the European tragedy of the early to mid-twentieth century. How might that affect our nation's current commitment to the core principles of free speech, and how should we address this potential threat to our democracy should it come to pass?

Before handing this over to you, Geof, let me note one other truly historical change we are currently undergoing and what consequences this change might pose for the future of free speech. Again, going back to when you and I began as First Amendment scholars, one major question was how to address the risk of monopolization of the media in this context. This was true first in the world of print media and then in the next technology of communications, broadcasting. This problem resulted in a bifurcated approach, both in public policy and in Supreme Court precedents, which forbade government regulation of print media but allowed it in the realm of broadcasting.[11]

Today, the new communications technology of the internet and especially its social media platforms have produced a public sphere governed by private business monopolies with a financial interest in keeping their content decisions unregulated by government. Moreover, state and nonstate actors are continuously discovering new ways to manipulate the platforms to promote their interests, suppress their opposition, and deceive the public, including through AI-supported deepfake technologies. This is a profoundly complex and important state of affairs requiring that we consider just how long this arrangement should last, what consequences might follow from doing nothing, and what "remedies," if any, might be preferable to leaving it all largely unregulated. Not surprisingly, many of our authors in this volume address these challenges.

Geoffrey R. Stone

Wow, that's quite a start, Lee. Let me go back to the beginning of this project. As you've already made clear, and as we both well know, a nation's guarantee of freedom of speech and of the press is always perilous. It is important that our nation not take those rights for granted. They are, after all, essential both to our democracy and to our individual autonomy as free people. It is therefore critical that we be aware of the importance of those freedoms, of their vulnerability, and of how much we rely on them to be who we are, both as individuals and as a nation.

Are we currently in a moment of peril? I would say "no." But we are in a moment of risk. The concept of freedom of speech and of the press seems great in the abstract. But when it comes to strong disagreements among citizens, there is an almost inevitable inclination to believe that "I am right and you are wrong" and that "if I let you say what you want, that will endanger me, my values, my children, and my nation. So shut the hell up!"

It is important to recognize that resisting that response does not come naturally. To the contrary, tolerance and open-mindedness must be learned and practiced and constantly celebrated if we are to have a free and open society. If we think about our own history and look around the world today, it should be obvious that this set of values – both in individuals and in our nation – should never be taken for granted. It is something we need constantly to practice and to encourage.

Of course, you (that is the reader, not you, Lee) are completely free to disagree with this and to call me an idiot. But you should not be free to shut me up. After all, when all is said and done, I might be right and you might be wrong, and it is the fundamental understanding of potentially misplaced "certainty" that rests at the very core of our current free speech jurisprudence.

In constructing this volume, we brought together some of our nation's most insightful thinkers – from many different perspectives – about these and other issues around freedom of expression. These issues are not easy, except when stated in the abstract, as I did above. But how should these values of freedom of speech, freedom of the press, and freedom of inquiry play out in the current world and in the world of the future?

How should we deal with constantly changing technology such as social media and artificial intelligence? Of course, at least in the abstract, this is not a "new" challenge. After all, as you noted, Lee, we have had to deal in the past with the inventions of the printing press, telegraph, movies, telephones, radio, television, videos, cable, and so on. Are social media and artificial intelligence any different? What challenges, if any, do they pose that we haven't faced in the past?

And how should we deal with speech that many people find offensive, hateful, and dangerous? Are the solutions "we" reached over the past half-century still realistic and appropriate? Are things different today because of social media? Have

people become less tolerant of what they deem to be "offensive" speech than they were in the past? Have they become more aggressive in using "offensive" speech than in the past? What is best for our democracy and for our commitment to human dignity?

How do changes in modern technology affect our national security? Are we more vulnerable to potentially dangerous surveillance than in the past? Should the decisions we reached half a century ago about national security remain in place today? Recall the Pentagon Papers decision.[12]

And what about issues of education, both for children and for students in colleges and universities? Why have things gotten so much more explosive in recent years? How do we protect the core values of the educational process at a time when parents, children, government officials, teachers, professors, and college students often now have sharply different views about the proper goals of education, of the nature of the educational environment, and of the importance of tolerating speech that they find hurtful, offensive, wrong-headed, and destructive?

How might we address increasingly successful efforts to shield students from ideas and information that they, their parents, their teachers, their administrators, and public officials want to suppress, either because they believe those ideas to be hurtful or simply wrong? To what extent would successful efforts to suppress the expression of certain ideas and opinions benefit or damage the educational process and, ultimately, our democracy? What are the arguments on all sides of these issues?

Another important issue concerns the opportunities available to individuals to have the freedom to speak effectively. We are well beyond the world of leafleting and giving talks in public parks. How do we ensure that individuals from varying experiences and perspectives today and in the future have reasonable opportunities to express their views to others? To what extent in today's world do the rich and powerful (including corporations) get to dominate public discourse, and is there any way to create a more equal political and expressive environment in order to protect the fundamental democratic principles of free speech for all and, ultimately, of "one person, one vote"?

I could go on and on and on, but if you take a look at the table of contents and the wide array of essays in this volume, you'll get the picture.

We very much hope that this collection of widely varying perspectives from a range of eminent scholars will both challenge you and lead you to talk and argue openly with friends and foes about our past, our present, and our future. What, after all, are the goals of allowing free and open discourse and disagreement, even when such a bold commitment to free speech can have significant negative as well as positive effects? As always, the stakes are, indeed, high.

Bollinger

I want to pick up on your first observations about how we need to think about free speech and press: in particular, with how counterintuitive it is; how in the actual lived experience our inclination is to censor, not to be tolerant; and how it takes repeated practice and determination to live in a society that embraces the principle. This is such an important starting point. And, as you and I both know well, it was articulated so beautifully and powerfully by the great Justice Oliver Wendell Holmes, Jr., in that seminal judicial period of 1919–1920, when he first began, though in dissent, to express the reasons for giving the kind of meaning to the First Amendment that we now hold dear. These were his famous words:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.[13]

There are so many things to say about the significance of this profound understanding of human nature. It grounds the constitutional meaning in a recognition that, as people, we are prone to a bad impulse that can interfere not only with discussion necessary for reaching truth, as Holmes (and others, notably John Stuart Mill) observed, but also for building a self-governing democracy, or for achieving a good life, or for any number of decisions and choices we must make as we struggle to work with others who do not see things as we do. And it's an impulse that may lead to bad speech as well as bad censorship of speech, which leads us to the further point (one also to be found in many of the essays in this volume) that the principles of "free speech" and "free press" are more than just limits on the reach of government censorship of speech: they are presented through the now elaborate jurisprudence, and in our ongoing discussions, as venues for understanding the ends of politics, social engagement, and life itself.

But, speaking less philosophically, and perhaps grandiosely, there are certainly very practical lessons in this fundamental observation. Since we are not born believing in free speech, since it is not our natural state and we must work at it, it follows that every new generation must go through some process of acquiring

both the realization that this is a better way to live, and that the capacity to live this way was hard-won, when the going gets tough. Thus, we might not worry quite so much, or be quite so shocked, when we find a new generation lacking in full appreciation of the fundamental principles of the First Amendment. And we might profitably spend more time thinking about how best to build that commitment. This should make us even more focused on how the courts, and especially the Supreme Court, talk about the First Amendment in the cases that come before them. And, perhaps most important of all, we should be all the more insistent that our educational system, in all its parts, from the beginning all the way through college and graduate school, carry the responsibility of providing both the educational opportunities and institutional behavior that will help facilitate this critical process.

Stone

So true it is, or at least we think so. But who knows for sure? Let us now turn to the brilliant essays in this volume that explore, at a moment of great risk, these and other issues central to our democracy, our culture, and our hopefully respectful approach to disagreement, debate, and uncertainty – even though free speech is not without danger.

ABOUT THE AUTHORS

Lee C. Bollinger, a Member of the American Academy since 1992, is President Emeritus of Columbia University and the first Seth Low Professor of the University. Prior to Columbia, he served as Provost of Dartmouth College and as President of the University of Michigan. His most recent books include *In Search of an Open Mind: Speeches & Writings* (forthcoming 2024); *Roe v. Dobbs: The Past, Present, and Future of a Constitutional Right to Abortion* (co-edited with Geoffrey R. Stone, 2024); *A Legacy of Discrimination: The Essential Constitutionality of Affirmative Action* (with Geoffrey R. Stone, 2022); and *Social Media, Freedom of Speech, and the Future of our Democracy* (co-edited with Geoffrey R. Stone, 2022).

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ENDNOTES

[1] U.S. Constitution, Amendment I.

[2] See, for example, *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919); and *Abrams v. United States*, 250 U.S. 616 (1919).

[3] Ibid.

[4] Geoffrey R. Stone and Lee C. Bollinger, eds., *The Free Speech Century* (Oxford: Oxford University Press, 2018).

[5] See *Schenck v. United States*, 249 U.S. (1919); *Debs v. United States*, 249 U.S. (1919); and *Abrams v. United States*, 250 U.S. (1919).

[6] See, for example, *Dennis v. United States*, 341 U.S. 494 (1951); and *Barenblatt v. United States*, 360 U.S. 109 (1959).

[7] See, for example, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times Co. v. United States*, 403 U.S. 713 (1971); and *Cohen v. California*, 403 U.S. 15 (1971).

[8] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[9] *Matal v. Tam*, 582 U.S. 218 (2017) (protecting hate speech); and *New York Times Co. v. Sullivan*, 254 (1964) (protecting false statements about public officials unless those false statements were made with knowledge of their falsity or reckless disregard for the truth).

[10] *Citizens United v. FEC*, 558 U.S. 310 (2010).

[11] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (permitting the regulation of public broadcasting); and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974) (holding that a statute that regulated the content of a newspaper was unconstitutional).

[12] *New York Times Co. v. United States*, 403 U.S. (1971).

[13] *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Oliver Wendell Holmes, Jr., dissenting).

Is John Stuart Mill's *On Liberty* Obsolete?

Vincent Blasi

In On Liberty, *published in 1859, John Stuart Mill argues for the "absolute" protection of the "liberty of thought and discussion." Ever the empiricist, he maintains that such uncompromised freedom, not for all communication or self-expression but for the subset of those activities that qualifies as thought and discussion, would generate the best overall consequences for societies such as Great Britain and the United States. The advent of digital technology has altered how thought and discussion is generated, distributed, and received in ways that might problematize some of the empirical assumptions upon which Mill's argument in* On Liberty *is based. This essay explores whether the reasons he advances for the absolute liberty of thought and discussion continue to have purchase in the face of the changed empirical domain in which Mill's cherished activities of inquiry and persuasion now operate.*

Without a doubt, the most widely read and closely studied argument for the freedom of speech ever written appears in John Stuart Mill's *On Liberty*. Marking in 1959 the centennial of the essay's publication, Isaiah Berlin opined that Mill's "words are today alive and relevant to our own problems; whereas the works of James Mill, and of Buckle and Comte and Spencer, remain huge, half-forgotten hulks in the river of nineteenth-century thought."[1] According to Berlin:

> Mill's central propositions are not truisms, they are not at all self-evident. . . . They are still assailed because they are still contemporary. . . . Mill looked at the questions that puzzled him directly, and not through spectacles provided by any orthodoxy. . . . One of the symptoms of this kind of three-dimensional, rounded, authentic quality is that we feel sure that we can tell where he would have stood on the issues of our day. . . . Surely that alone is some evidence of the permanence of the issues with which Mill dealt and the degree of his insight into them. Because . . . his conception of man was deeper, and his vision of history and life wider and less simple than that of his utilitarian predecessors or liberal followers, he has emerged as a major political thinker in our own day.[2]

Berlin's "day" was the middle of the twentieth century. My question is whether sixty-five years later he plausibly could have maintained Mill's contemporaneity in the face of the various ways that digital technology has altered the dynamics of human belief formation and persuasion.

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To address this question, I identify the distinctive concerns, assumptions, concepts, objectives, and derivations that have given Mill's argument its preeminence for a century and a half. Then I canvass the changes wrought by digital technology in how speakers formulate their messages and generate attention to them, and how audiences notice, receive, and potentially act on such messages. Finally, I assess whether, in the light of such changes, *On Liberty* remains an instructive resource for thinking about what Mill terms "the liberty of thought and discussion" and its cognate liberties.[3]

Mill's argument is presented in friendly, unpretentious prose. It claims to be based on "one very simple principle." It has enjoyed a large readership generation after generation, partly due to its secure place in the higher-education canon. It is not in the least bit dogmatic; it encourages the reader to push back. One mark of its appeal is that it has never been out of print since it was first published in 1859.

All of that is disarming. The argument is intricate, subtle, easily misunderstood, elusive in key places. It has generated a plethora of conflicting interpretations by knowledgeable devotees claiming fidelity to the text. It is extremely ambitious, and anything but airtight. It resists succinct summary.

For present purposes, there is no need to engage the key disputes in the sophisticated secondary literature about *On Liberty*. It will suffice to identify some of the most important discrete propositions advanced or implied in the essay that play a major role in Mill's argument under any plausible reading. Then we can scrutinize them for possible obsolescence.

One such proposition is that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . His own good, either physical or moral, is not a sufficient warrant." This is Mill's "very simple principle."[4]

We might question whether that principle can do much work in resolving disputes over speech that carries the potential to cause serious harm. After all, speakers are seldom punished to protect them from themselves. Almost always, the worry is that their speech will, in one way or another, injure other people or society as a whole. Unless supplemented by additional principles governing disputes involving speech, Mill's antipaternalism principle would allow societal interference with harm-causing speech, as it does for all other harm-causing conduct, if "the general welfare" would be advanced by such interference.[5]

Indeed, shortly after he introduces his antipaternalism principle, Mill adds a supplementary principle that he specifies should be applicable to a certain subset of speech. There must be, he states, "absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological."[6]

A striking feature of *On Liberty* is its emphasis on the supreme importance of high-quality opinion formation throughout the population in order to advance the well-being of society. Mill's study of modern history convinced him that the key variable determining which societies in what eras flourished and which stagnated was the quality of their public opinion: what their "average human beings," not just their "great thinkers," believed and acted upon.[7] And the feature of public opinion that matters most in shaping the course of a society, he found, is whether its "errors are corrigible." "The whole strength and value of human judgment" depends, he says, "on the one property, that it can be set right when it is wrong."[8] The open mind is the key, individually and collectively. That is why freedom of opinion deserves special treatment.

Unlike many theories of free speech, Mill's argument is not concerned only with the limits of governmental authority; "compulsion and control" of speakers by private actors is also his subject, at least when those private actors add up to "society" or "public opinion." In fact, he says that the private regulation of opinion amounts to "a social tyranny more formidable than many kinds of political oppression" because "it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."[9]

Mill's "freedom of opinion" encompasses more than simply a privilege to hold opinions privately, resist inquiries about them, and be free from having to affirm publicly sentiments that one does not entertain. Crucially, in light of the importance he attaches to public opinion, he argues also for the "absolute" freedom to express and publish one's opinions. He concedes that the latter freedom "may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people." Nevertheless, the freedom to express and publish opinions "being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."[10]

At first pass, this seems like a non sequitur. Certainly, as a matter of practical classification, it is not difficult to differentiate silently holding an opinion from communicating it to others. Normatively, why aren't the two kinds of acts different in light of the importance Mill attaches, in four different chapters of *On Liberty*, to whether a person's conduct affects others? What then is the source of this "practical" inseparability?

Mill apparently considered holding an opinion and expressing it to be activities that are inevitably bound up with each other. We need to be able to express our opinions to know if we really hold them. And communicating an opinion to others often helps to determine its final formulation, even in the absence of feedback. In those regards, Mill's phrase "thought and discussion" refers to a single activity rather than two distinct activities with separate claims to the highest level of protection.

That still does not explain why the integrated activity of thought and discussion should be immune from being regulated in order to prevent harm. Clearly, the act of forming opinions about matters of general interest, including by testing them on others, is for Mill a qualitatively different endeavor from acts of communication that do not amount to "thought and discussion." In his scheme, the latter communications do not receive the same level of protection that is extended to freedom of opinion, but rather are subject to limitation when they harm other individuals or the society as a whole and the general welfare would be advanced by the limitation. Only the liberty of thought and discussion receives "absolute" protection without regard to the harm it may cause. The reason is that Mill considers thought and discussion as he narrowly defines it to be uniquely valuable.

In chapter two, Mill presents his justly famous extended arguments for safeguarding the absolute freedom to hold and express opinions. Near the end of the chapter, he summarizes the four arguments he has developed:

> First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.
>
> Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.
>
> Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. . . .
>
> Fourthly, the meaning of [an uncontested] doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.[11]

These are epistemic arguments. The subject of each is "the silenced opinion," "the received opinion," or the "doctrine itself." Professions capable of "truth," "error," "meaning," "comprehension," "rational grounds," and "conviction" are what Mill is concerned about in this chapter. He certainly valued the freedom of individuals to express themselves and hear others on matters of exclusively personal interest, as well as their freedom to engage in and learn from communications of an immediately functional nature. However, Mill's utilitarian commitments led him to pay special attention to, and reserve his highest level of protection for, the kind of speech that is meant to influence others, and ultimately

public opinion, by means of its *epistemic* contribution to human well-being and development.[12]

As Canadian political theorist Richard Vernon notes about chapter two: "The word 'discussion' is frequently used in the chapter, as is the word 'opinion.' . . . Nowhere does he speak of freedom of expression, and he uses the word 'expression' only in the phrase 'expression of opinion.'" According to Vernon, the argument "is plausible only if we suppose that the items exchanged in the critical process are propositions about actual or desirable states of affairs in the world, propositions capable of being accumulated into larger bodies of knowledge."[13] Or, as American philosopher Piers Norris Turner puts it: "'Discussion' is Mill's consistently employed word for joint, reasoned engagement on some (usually public) matter, governed by norms of truth, fair play, and sincere attention to the general good."[14] Or, as British philosopher Christopher Macleod, a leading student of the full range of Mill's writings, observes: what constitutes "discussion" as Mill uses the term in *On Liberty* "is perhaps surprisingly narrow." Macleod explains:

> Because the argument is explicitly premised on contributions to discussion being either true, false, or partially true, it is important to note that it is applicable only to statements which are *truth-apt*: capable of being evaluated in terms of truth.[15]

Chapter two, it must be emphasized, extends its extraordinary "absolute" protection only to certain communications that enjoy a favored status on account of the special role they play in the pursuit of societal and individual well-being. These instrumentally valuable communications Mill labels "thought and discussion."

Further evidence of the productivity Mill associates with thought and discussion is his assertion that there exists a "real morality of public discussion" regarding the manner of advancing opinions that needs to be enforced by the powerful mechanism of public condemnation.[16] Any participant must be discredited, he says, "in whose mode of advocacy either want of candor, or malignity, bigotry, or intolerance of feeling manifest themselves" so long as those vices are not inferred "from the side which a person takes."[17] Conversely, audiences must accord "merited honor to everyone, whatever opinion he may hold, who has calmness to see and honesty to state what his opponents and their opinions really are, exaggerating nothing to their discredit, keeping nothing back which tells, or can be supposed to tell, in their favor."[18]

It is no wonder that Mill does not entitle chapter two "Of the Liberty of Speech" or "Of the Liberty of Expression." He entitles it "Of the Liberty of Thought and Discussion." Indeed, it is the chapter's limited coverage that allows Mill essentially to ignore examining how thought and discussion can cause harm. The chapter is devoted entirely to cataloging the ways that it generates singular, one might say priceless, value to society. Other useful forms of communication that don't make it into chapter two, such as those whose value is exclusively of a self-expressive or

transaction-facilitating nature, are protected under his general liberty principle, but only case-by-case when the price is right.

One way to avoid counting the cost of a potentially protected activity is to designate it a natural right. This course Mill explicitly disavows. He describes his argument as based on utility, albeit "utility in the largest sense, grounded on the permanent interests of man as a progressive being."[19] But even a "progressive" utilitarian is committed to counting the cost. Therefore, the best explanation for Mill's failure in chapter two to address the costs of unregulated thought and discussion is to read him as operating in that chapter – though not necessarily in the rest of *On Liberty* – at a categorical level. That would mark him as what is now known as a "rule utilitarian."[20] Mill's claim is that, as a general matter, the benefits that flow from "absolute" freedom for the subset of communication that qualifies as "thought and discussion" outweigh the harms caused by that subset.

Two examples presented by Mill at the outset of chapter three illustrate this point. The first is that of a speaker who delivers the opinion that "corn dealers are starvers of the poor . . . simply circulated through the press." In example two, the identical message is "delivered orally to an excited mob assembled before the house of a corn dealer." Mill states that the speaker communicating via the press in example one is engaged in "thought and discussion" absolutely protected by virtue of the arguments developed in chapter two. Not so for the speaker in the second example. Mill describes that hypothetical on-the-scene firebrand as engaging in a communication that amounts to "a positive instigation to some mischievous act," a form of speech not included within chapter two's coverage.[21] Here Mill is making a functional characterization of the speaker's activity rather than an empirical assessment of its likely harmful consequences. This comports with the fact that for example one, in which he finds thought and discussion to be involved, he never considers how publication in the press might greatly increase the harm-causing potential of the message by hugely expanding its audience. It is epistemic function rather than potential harm that determines whether a communication amounts to thought and discussion.

Mill's argument in chapter two is perhaps most notable for his claim that the circulation even of invalid opinions serves an epistemic function:

> If there are any persons who contest a received opinion, or who will do so if law or opinion will let them, let us thank them for it, open our minds to listen to them, and rejoice that there is someone to do for us what we otherwise ought, if we have any regard for either the certainty or the vitality of our convictions, to do with much greater labor for ourselves.[22]

This notion of "the vitality of our convictions" is central to Mill's argument in chapter two. He urges his readers to seek a "lively apprehension of the truth which they nominally recognize, so that it may penetrate the feelings and acquire a real

mastery over the conduct." The point of discussion is to form "that living belief which regulates conduct."[23] We must be open to challenge because "complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action."[24]

So which, if any, of the ideas that have accounted for *On Liberty's* impact retain their significance today in the face of the sea change in methods of communication and persuasion that has occurred since Mill wrote? Among those ideas are:

1. Power can rightfully be exercised by society over its members in order to prevent them from harming others, but not to prevent them from harming themselves.
2. A modern society's capacity to adapt and advance depends on its having a public opinion that is "corrigible" in the light of evidence, experience, private reflection, and public discussion.
3. A theory of liberty needs to pay as much attention to private punishments of speakers as it does to legal regulation. Private sanctions, including condemnation, can protect the quality of public opinion by enforcing a "morality of public discussion," but also can damage public opinion by discouraging independent thought, the lifeblood of progress.
4. A speaker's manner of asserting an opinion may justly incur severe censure, though not legal punishment, so long as the censure is not based on which side of a controversy the speaker takes.
5. "Thought and discussion" should be accorded "absolute" protection on the ground that it is a uniquely important activity, different from other forms of communication and more valuable.
6. Speakers should welcome having their ideas challenged by insightful critics who actually believe the criticisms they are putting forth.

Although Mill studied law with the jurisprudential eminence John Austin, in *On Liberty* he presents a moral rather than legal argument; he makes no effort to tailor his principles to pragmatic concerns regarding legal administration.[25] His project is to identify the moral principles that would best enable an advanced society to maximize the well-being of its members in the light of changing conditions and the possibility of progress in harnessing knowledge to serve human needs.

Assessing the contemporary efficacy of these Millian ideas is the task to which we now turn.

One way in which communication and persuasion have changed since Mill's day is that we all, from our demagogues to our sages, operate at a faster pace

of generating, spreading, judging, and moving on from ideas and information. This technology-driven speed-up in the pace of creation and distribution increases the sheer volume of ideas and information audiences must process, which in turn makes the competition among speakers for audience attention more important and more intense. Surely such conditions tempt speakers to resort to exaggeration and simplification to gain and hold audience attention, very likely more than the speakers of Mill's time were so tempted. With technologies such as content algorithms and artificial intelligence now available to serve the cause of capturing and keeping audience attention, Mill's calls for depth of understanding, care of formulation, and unbending sincerity on the part of speakers may seem dated.

The sheer volume of ideas and "information" (including false claims of fact) available to contemporary audiences runs the risk of generating audience despair about processing and understanding it. This is not to suggest that the audiences of Mill's day felt confident about their intake. Audiences always need help in the form of intermediaries. And in fact, digital technology creates the possibility of much greater access to trustworthy help for audience members who desire it than has ever existed before. Nevertheless, many audiences today fail to avail themselves of that form of intermediation and settle instead for partisan, inexpert intermediation from within their online "silos."

By all indications, expert intermediation counts for less in the way most persons come to their beliefs today than was true in the past, certainly in Berlin's day and probably in Mill's as well. The dominant form of intermediation in the digital age is the prioritization practices of the companies that control the key content delivery links of the internet. Because data collected from audience attention can be used or sold to facilitate targeted advertising, click-maximizing digital intermediaries do not select for expertise, accuracy, perspective, coherence, or appreciation of complexity in deciding which content to feature. The dominant intermediaries of earlier eras such as publishers had their own profit-driven priorities, but those were far less in conflict with the function of improving audience understanding.

Intermediation aside, that today's audiences have greater control over their intakes than was true of Mill's audiences may well make persuasion more difficult to achieve. Thanks to digital technology, audiences can more easily engineer confirmation bias to strengthen their preexisting beliefs. They also can more thoroughly shield themselves from the strongest challenges to those beliefs because they have so many choices of what to let in. Mill's audiences no doubt sought confirmation bias in their choice of associates, but they had fewer intake options for acquiring basic information about events and opinions beyond their immediate circle, and thus as a practical matter had to let in accounts that might cut against their prior understandings.

In addition, persuasion is made more difficult when technological capacity facilitates the tactic of "refutation" by flooding: that is, creating overwhelming digital noise to drown out the messages of would-be persuaders. A different distortion of public debate can occur when online harassment of targeted speakers can be organized on a massive scale. The "chilling effect" is a venerable free speech concept, but digital technology introduces new means to harass that must lead many would-be speakers to choose discretion over valor.[26]

In the digital age, it is easier than was true in Mill's time to reach large audiences while speaking anonymously or pseudonymously. Anonymous communication can serve worthy ends, but too often it is the tool of liars, conspiracy theorists, and producers of bots designed to mislead audiences about the state of public opinion. The combination of flooding capacity, ease of anonymity, and the diminished influence of intermediaries bound by professional norms creates fertile ground for disinformation campaigns.

The speed and reach of unmediated digital transmission of ideas enable speakers with the most dangerous opinions and objectives to bring about destructive action without having to convince or rile up more than a tiny percentage of their audience members. Demagogues no longer need to "earn" their malicious influence.

Finally, modern technology enables the storage and retrieval of speech on a scale hitherto unimagined. This has to make speakers more cautious, even as it makes audiences far more capable of holding speakers accountable.

So how might these changes brought about by digital technology problematize the principal ideas in *On Liberty*?

One idea of Mill's that is not in the least rendered obsolete by digital technology is his claim that the regulation of speech by nongovernmental actors and institutions deserves as much attention, even if not necessarily the same governing principles, as regulation by the state. This focus on private regulation follows from his priority of enabling society to realize the full measure of benefits that can be harvested from informed, energized, independent thinking by large numbers of persons with diverse interests and experiences. Much of that potential contribution can be diminished by the private regulation of thought and discussion.[27]

Of course, private regulators of thought and discussion have existed since the dawn of civilization and were prominent in Mill's day. However, digital technology can enhance the reach and leverage of some private regulators to the point where they can influence the development of public opinion as much or more than legal regulation does. Consider the potential impact of the access policies of the dominant social media platforms.

Mill's concern about private regulation was largely about its capacity to enforce the customary understandings of majority opinion, thereby stifling innova-

tion. When he criticizes private regulation in *On Liberty*, he employs such terminology as "society collectively," "the tyranny of the prevailing opinion," and the "interference of collective opinion with individual independence."[28] Private regulation in limited domains such as schools and workplaces when it is designed not to influence public opinion but to facilitate the specialized endeavors of the regulators is not a subject that Mill addresses in *On Liberty*.

Moreover, even when private regulation has the character of enforcing majority norms and is not domain-specific, Mill does not always disapprove. He views such norms as having an indispensable role in enforcing a productive "morality of public discussion." Nevertheless, he makes clear that such a "morality" must not be about the wisdom of a speaker's opinions but only their manner of presentation and distribution.[29]

Mill's favorable view of private regulation in the service of a non-viewpoint-sensitive morality of public discussion would seem to extend to the pursuit of that objective in the digital age. In fact, despite their own shortcomings and frequently perverse incentives, entities such as social media platforms can and often do exercise their private power to help sustain the norm of truth-telling in the face of disinformation tactics enabled by contemporary technology.[30] In principle, such efforts are consistent with *On Liberty*.

Various exercises of high-leverage private power such as that possessed by the owners of social media platforms raise many difficult questions, about which responsible interpreters of Mill can disagree. What is not in dispute is that he was ahead of his time in recognizing the importance of private regulation in determining the quality of a society's thought and discussion – or at least ahead of his time in fully appreciating the significance of his friend Alexis de Tocqueville's observations twenty-four years earlier to that effect.[31]

A second idea of Mill's that we might evaluate for its staying power in the digital age is his claim that thought and discussion makes up a special subset of communication that, due to its unique instrumental value, must be accorded "absolute" protection. With the way that modern technology facilitates the capacity of some speakers to dominate audience attention or to advocate, plan, and implement violent measures, can we still afford to ascribe no legal significance to harms that ensue from the spreading of dangerous opinions simply because the initial messages have more the character of an appeal to thought about a public grievance than a directly and personally manipulative "instigation"?

Mill's extended defense in chapter two of absolute freedom of thought and discussion is all about the singular, society-defining benefits of such freedom. Those benefits are so unique and so fundamental that they dwarf any harms that unregulated thought and discussion might cause, at least when the comparison is conducted at the categorical level. Or so Mill has to maintain if his prescription of absolute protection for thought and discussion is to be justified in utilitarian

terms. From his uncharacteristic failure in chapter two to worry about the harm side of the equation, it is fair to assume that he found the comparison to be lopsided, not really in need of explanation.

Throughout *On Liberty*, Mill treats knowledge of a general sort "on all subjects, practical or speculative, scientific, moral, or theological" to be the quintessential public good. Because he contends that even wrong opinions provide positive epistemic value in the search for such knowledge, increasing the speed and range at which dangerous ideas on general subjects can be spread and acted upon is not likely to change Mill's comparison of benefits and harms given the fundamentality of the benefits in play. To conclude that his argument is obsolete on its own terms, one would almost certainly have to demonstrate that the extraordinary value that he attaches to free thought and discussion about matters of general interest is somehow diminished in our time.

Can we say that the forming and discussing of one's thoughts in the digital age is a different sort of process than formerly, with a lower level of social importance? It might well be true that digital technology has caused the ideas we hold about matters of general interest to be less the product of our distinctive personas, life experiences, and introspection, and more the product of outside forces such as marketing, manipulation, and saturation. Persuading others or being persuaded by them might indeed be more infrequent than before, less in our control, and less the product of independent individual judgment on the merits.

If Mill had argued for according transcendent value to thought and discussion on autonomy rather than consequentialist grounds, concerns about the reduced independence of individual opinions would lend support to the obsolescence thesis. Autonomy by definition is about self-authorship, which entails personal responsibility for distinctive beliefs. And it must be noted that several leading Mill scholars do read him to be relying on autonomy notions in *On Liberty* despite his explicit and emphatic categorization of his argument as utilitarian.[32] Alan Ryan, for example, concludes that

> Mill argues for freedom and individuality as *parts of* happiness rather than merely *means to* happiness. As a result of this, freedom in the sense of individual moral autonomy appears as a good which is valued for its own sake, because it is part of the happiness of the self-consciously progressive man.[33]

Even if Ryan and others are correct in this respect, the most it would imply is that certain claims to personal freedom "for its own sake" can be sustained on Millian grounds. It need not mean that the freedom to express opinions that might harm others is one of those claims.

Mill never employs the term "autonomy" in *On Liberty*. In the passage where he comes closest to making an explicit autonomy argument, he says: "The only freedom which deserves the name, is that of pursuing our own good in our own

way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."[34] This suggests that his notion of autonomy, if he embraces one at all, is limited to assertions of freedom that do not risk impairing the capacity of others to pursue *their* own good. Protecting one's private thoughts, physical being, personal space, and dignity are examples. In contrast, the freedom to express opinions about matters of general interest, even when doing so can cause significant harm to others, does not fall within any conception of autonomy that can plausibly be attributed to Mill.

That is why chapter two of *On Liberty* consists entirely of a detailed *consequentialist* argument about how epistemic enlightenment serves individual and communal well-being. Among the desired consequences that form the heart of Mill's argument in chapter two for the transcendent value of the liberty of thought and discussion are a high level of collective energy, societal adaptability to changing circumstances, and broad investment in the search to find and harness new knowledge. Even though a large element of Mill's notion of collective well-being consists of the aggregation of individual experiences of well-being, consequences relating to larger societal forces and structures play a prominent role in his utilitarian analysis because he thinks that individual flourishing depends not only on personal choice but also the resources provided by one's environment.

This matters in that an argument from consequences, unlike an argument resting wholly on autonomy, can acknowledge a diminution in the independence of individual belief formation due to changes wrought by digital technology, count it as a cost, and yet find such diminution not to be conclusive. The net impact of protecting digitally influenced thought and discussion on individual, aggregative, and public good well-being could still be positive.

For example, genuinely new voices are finding better means of access to substantial audiences in the current environment. Expanded opportunities made possible by technology for seeking, storing, and retrieving information do much to facilitate an increase in the accumulation and accessibility of public knowledge as well as the practical capacity to apply it. The pace of change in the digital world, not only regarding beliefs but in countless other dimensions of social organization, surely problematizes custom worship. These are all Millian gains that cut against the thesis that his prioritization of the liberty of thought and discussion over all other liberties is outdated.

A proponent of the obsolescence thesis could nonetheless claim that digital technology so corrupts public opinion by facilitating disinformation, distraction, flooding, and censorial harassment that nowadays thought and discussion about matters of general interest produces less good in utilitarian terms than Mill supposed from his mid-nineteenth-century vantage point. Disinformation and harassment are probably the worst of these corruptions, but they are also forms of communication that are properly excluded from Mill's absolutely pro-

tected domain of thought and discussion. However, other corruptions cannot be bracketed so readily. Distraction and flooding can be accomplished not only by communications that do not qualify for chapter two's protection but also by Millian thought and discussion transmitted on a technology-enabled massive scale. So audience resistance in the form of not succumbing to the temptation to be swayed or diverted by disproportionate inputs is likely to be the only effective way consistent with Mill's analysis to contain at least some forms of distraction and flooding.

And sure enough, in chapter three of *On Liberty*, entitled "Of Individuality, as One of the Elements of Well-Being," Mill argues that strong individual character is an irreplaceable element of a well-functioning society. There he develops in detail the thesis that adaptation and progress are best served by a social order that fosters "individuality," replete with diverse character types, a wide range of available experiences, and high collective energy. Mill's notion of "individuality" may sound like "autonomy" by another name, but the difference lies in the instrumental, and thus consequentialist, nature of the concept as he employs it. For him, individuality is not about protective self-sovereignty as a universal right so much as the utilitarian benefits that strong characters with diverse talents and experiences can enjoy on that account and the contributions they can make to the well-being of others, including by creating public goods.

Strong individual character cannot be developed and sustained by shielding audiences from dangerous thought and discussion regarding matters of general interest, even when the ideas that must be resisted gain undeserved prominence by means of digital proliferation. Consistent with his emphatic rejection of paternalism in chapter one, his demanding account of belief formation in chapter two, and his exaltation of individuality in chapter three, Mill was not averse to relying on audience character and judgment as the best means to protect society from novel threatening forces in the dynamics of persuasion. In his reading of history, such reliance has always been requisite.

Even so, the corruptions of the digital age might be so unprecedented and formidable as to make obsolete Mill's foundational move of building his argument for the liberty of thought and discussion on the objective of enriching public opinion. After all, there are other possible starting points for such an argument, including those that are driven by distrust of regulators or notions of self-evident entitlement.

True enough, but a well-known observation by a legendary judge explains why a thinker such as Mill, whose primary concern is human flourishing, simply cannot give up on public opinion. In May of 1944, two weeks prior to D-Day, Judge Learned Hand administered the oath of citizenship to one hundred fifty thousand newly naturalized immigrants gathered in New York's Central Park. With over one million of their fellow citizens in attendance, Hand told the new Americans:

> Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it.[35]

Those two sentences would fit perfectly in chapter three of *On Liberty*.

A third idea at the heart of Mill's public opinion–based case for the liberty of thought and discussion is the ideal of the open mind: "In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct."[36] It is not an exaggeration to say that the concept of "corrigibility of belief" is the key to Mill's argument not only in chapter two but in chapter three as well. He emphasizes the value of confronting and truly understanding opposing views, even when such exposure does not lead to an immediate change of mind.[37] What exposure to criticism does entail is an active relationship with one's beliefs, which can strengthen motivation to act on them but also increase the capacity to alter them in the light of new experiences or further reflection. Cognitive dynamism is Mill's prescription for a utility-maximizing public opinion.

Despite the ways that digital technology has broadened and intensified public discussion, we might well wonder whether such energizing is having perverse consequences when it comes to the corrigibility of beliefs. Is Mill's ideal of the open mind sustainable in a world of fast-paced contention between impassioned combatants who enjoy unprecedented technology-enabled ways to control their intakes, confirm their biases, and police their acolytes?

Suppose it is true that corrigibility of belief is harder to maintain amid the cognitive overload and strident rhetoric of our age. Does that tarnish the *ideal* of the open mind? Perhaps Mill's best idea in *On Liberty* is that the open mind never ceases to be the key to societal well-being, and all the more so in periods when it is hardest to achieve.

Probably in every age, people experience angst about how the process of belief formation and persuasion operates compared to the way it used to or should. Mill himself was not without such angst. Consider this lament of his, written in 1836:

> This is a reading age, and precisely because it is so reading an age, any book which is the result of profound meditation is perhaps less likely to be duly and profitably read than at a former period. The world reads too much and too quickly to read well. . . . He, therefore, who should and would write a book, and write it in the proper manner of writing a book, now dashes down his first hasty thoughts, or what he mistakes for his thoughts, in a periodical. And the public is in the predicament of an indolent man, who cannot bring himself to apply his mind vigorously to his own affairs, and over whom, therefore, not he who speaks most wisely, but he who speaks most frequently, obtains the influence.[38]

As we know, when he published *On Liberty* twenty-three years later, those concerns did not prevent Mill from prioritizing thought and discussion and exalting the open mind. His faith in the power of societies to adapt survived the disappointment he felt about opinion formation in his own time. We miss much about Mill if we fail to account for his forward-looking temperament.

Certainly, a utilitarian, especially one whose measuring rod is "the permanent interests of man as a progressive being," needs to be forward-looking in the sense of not assuming that current patterns of belief formation that bear on societal well-being constitute the inevitable future.[39] If the corrigibility of belief is as important as Mill claims it is, and if keeping alive the ideal of the open mind is a way to help revitalize the active holding of unfrozen opinions, or even just preserve what corrigibility of belief remains in the digital age, *On Liberty* has something to say to contemporary readers.

In that regard, despite six subsequent decades of evolution in the processes of opinion formation, Isaiah Berlin's centennial assessment of *On Liberty*'s durability remains apt:

> Mill's defence of his position in the tract on Liberty is not, as has often been pointed out, of the highest intellectual quality. . . . Nevertheless, the inner citadel – the central thesis – has stood the test. It may need elaboration or qualification, but it is still the clearest, most candid, persuasive, and moving exposition of the point of view of those who desire an open and tolerant society. The reason for this is not merely the honesty of Mill's mind, or the moral and intellectual charm of his prose, but the fact that he is saying something true and important about some of the most fundamental characteristics and aspirations of human beings.[40]

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ENDNOTES

[1] Isaiah Berlin, "John Stuart Mill and the Ends of Life," in *Four Essays on Liberty*, ed. Isaiah Berlin (Oxford: Oxford University Press, 1969), 173, 201–205.

[2] Ibid., 201–202, 205.

[3] Two leading Mill scholars have written short, perceptive books focused on the question of his contemporary relevance. See Philip Kitcher, *On John Stuart Mill* (New York: Columbia University Press, 2023); and John Skorupski, *Why Read Mill Today?* (London: Routledge, 2006).

[4] John Stuart Mill, *On Liberty*, ed. David Bromwich and George Kateb (New Haven, Conn.: Yale University Press, 2003 [1859]), 80.

[5] Ibid., 81–82.

[6] Ibid., 82.

[7] Ibid., 102.

[8] Ibid., 90.

[9] Ibid., 76.

[10] Ibid., 82–83.

[11] Ibid., 118.

[12] For detailed demonstrations of the epistemic character of Mill's arguments in "Chapter Two, Of the Liberty of Thought and Discussion," see Christopher Macleod, "Truth, Discussion, and Free Speech in *On Liberty* II," *Utilitas* 33 (2) (2021): 150, 150–155; and Frederick Schauer, "On the Relation Between Chapters One and Two of John Stuart Mill's *On Liberty*," *Capital University Law Review* 571 (2011). For Mill's emphasis on development, see Mill, *On Liberty*, 76, 101, 122, 127, 128, 131, 132, 136, 142, 152, 170, 174. On Mill's "commitment to promoting progress, and the primacy of growth," see Don Habibi, "J. S. Mill's Revisionist Utilitarianism," *British Journal for the History of Philosophy* 6 (1) (1998): 89.

[13] Richard Vernon, "Mill and Pornography: Beyond the Harm Principle," *Ethics* 106 (3) (1996): 621, 622–623.

[14] Piers Norris Turner, "Authority, Progress, and the 'Assumption of Infallibility' in *On Liberty*," *Journal of the History of Philosophy* 51 (1) (2013): 93, 105.

[15] Christopher Macleod, "Mill on the Liberty of Thought and Discussion," in *The Oxford Handbook of Freedom of Speech*, ed. Adrienne Stone and Frederick Schauer (Oxford: Oxford University Press, 2021), 3, 14. Professor Macleod was selected to write the entry on Mill for the Stanford Encyclopedia of Philosophy.

[16] He declares legal sanctions to be unsuited to the task, presumably because he considered them to be too slow-moving, formalistic, cumbersome, and necessarily defendant-protective for such moral standard-setting work. Mill, *On Liberty*, 119.

[17] Ibid.

[18] Ibid., 119–120.

[19] Ibid., 81.

[20] On Mill's rule utilitarianism, see Rex Martin, "Mill's Rule Utilitarianism in Context," in *John Stuart Mill and the Art of Life*, ed. Ben Eggleston, Dale E. Miller, and David Weinstein

(Oxford: Oxford University Press, 2011), 21; J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill," *The Philosophical Quarterly* 3 (10) (1953): 33; and Henry R. West, *Mill's Utilitarianism* (London: Continuum Books, 2007), 66–67.

[21] Mill, *On Liberty*, 121.

[22] Ibid., 112.

[23] Ibid., 107–108.

[24] Ibid., 89.

[25] See Nicholas Capaldi, *John Stuart Mill: A Biography* (Cambridge: Cambridge University Press, 2004), 35–36.

[26] On flooding and harassment, see Tim Wu, "Is the First Amendment Obsolete?" *Michigan Law Review* 117 (3) (2018): 547.

[27] See, generally, "Symposium: Non-Governmental Restrictions on Free Speech," *Journal of Free Speech Law* 2 (1) (2022).

[28] Mill, *On Liberty*, 76.

[29] Ibid., 119–120.

[30] See Dawn Carla Nunziato, "Misinformation Mayhem: Social Media Platforms' Efforts to Combat Medical and Political Misinformation," *First Amendment Law Review* 19 (1) (2020): 32; and Nathaniel Persily, "Platform Power, Online Speech, and the Search for New Constitutional Categories," in *Social Media, Freedom of Speech and the Future of Our Democracy*, ed. Lee C. Bollinger and Geoffrey R. Stone (Oxford: Oxford University Press, 2022), 193, 193–211.

[31] See Alexis de Tocqueville, *Democracy in America, Volume 1* (New York: Vintage Books, 1990 [1835]), 233–238.

[32] See, for example, Capaldi, *John Stuart Mill*, 249–257; John Gray, *Mill on Liberty: A Defence*, 2nd ed. (London: Routledge, 1996), 73–86; Christopher Macleod, "Mill on Autonomy," in *The Routledge Handbook of Autonomy*, ed. Ben Colburn (London: Taylor & Francis, 2022); and John Skorupski, *John Stuart Mill* (London: Routledge, 1989), 354–359.

[33] Alan Ryan, *J. S. Mill* (London: Routledge & Kegan Paul, 1974), 133.

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Empowering Speech by Moderating It

Danielle Keats Citron & Jonathon Penney

Content moderation is typically viewed as an affront to free expression. When companies remove online abuse, they face accusations of censorship. Lost in the discussion is the fact that victims of intimate privacy violations and cyberstalking typically – and regrettably – withdraw from on- and offline activities. Online assaults chase targeted individuals offline; they silence victims. Content moderation can secure opportunities for people to speak. Legal and corporate prohibitions against intimate privacy violations and cyberstalking can help provide the reassurance that victims need to stay online. They can endow individuals with a sense of trust so they continue to use networked technologies to express themselves. Those prohibitions are consonant with First Amendment doctrine and free speech values. Combating online abuse isn't a zero-sum game with free speech as the loser. Rather, it can free us to speak by changing the culture that rewards abuse and encourages self-censorship.

A myth of epic proportion has gained traction: that any effort to moderate online speech is a zero-sum game, with free expression as the loser. When social media companies remove destructive posts that violate terms of service, people cry, "Censorship!" Alex Jones, founder of the far-right conspiracy news site Infowars, accused YouTube of "killing the First Amendment" after the company blocked videos that revealed maps of the homes of Sandy Hook families.[1] This isn't just an extremist view: the Pew Research Center has found that a majority of people believe that companies are engaged in "political censorship" when they moderate content.[2] Some legislators have made this view a cornerstone of their political philosophy. At a House Oversight and Accountability Committee hearing in February 2023, Representative Lauren Boebert denounced Twitter as a "speech overlord." To the company's former head of Trust and Safety, Yoel Roth, she angrily admonished, "How dare you" shadow-ban my posts (even though no evidence supported the claim and former Twitter executives denied it). Representative Marjorie Taylor Greene stated that Big Tech was silencing Americans.[3] The censorship narrative has gained traction in state legislatures as well. Underlying this view is the assumption that content moderation has no upside for free expression.

The outcry is similarly strident at the suggestion that law should curtail online abuse. Online assaults that include doxing, intimate privacy violations, and

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threats are dismissed as weak attempts to "blow off steam." Any effort to address them is viewed as a threat to free speech. The ACLU, for instance, has adamantly opposed the passage of laws penalizing the nonconsensual disclosure of intimate images. These laws risk chilling legitimate expression, the ACLU has argued, even though the laws made clear that they would not cover matters of legitimate public interest. Under law's blighting stare, free expression is impossible.[4]

For more than a decade, we have been interrogating these claims. Rather than vanquishing free expression, combating online abuse frees people to speak. In the face of online assaults that amount to cyberstalking or intimate privacy violations, targeted individuals stop expressing themselves. They close their social media accounts, lest perpetrators exploit those accounts to attack them. They withdraw from family and friends. If their loved ones try to "talk back" to abusers, they face terrifying online assaults themselves. Victims and their loved ones are silenced and terrorized. Research makes clear that online abuse exacts significant costs to free expression.

As our research suggests, legal and industry interventions against such abuse make space for more expression rather than less. Such interventions enable victims to speak their truths. Rather than silencing speech that deserves normative protection, law and corporate policies enable victims to trust companies enabling communications so they can reveal themselves and share their truths.

Legislators aren't just talking about the "censorship" of social media companies – they are doing something about it. Florida has prohibited big tech companies from removing, filtering, or downgrading journalists' speech, while Texas has barred them from moderating any user-generated content based on viewpoint, with some narrow exceptions. Under the Texas law, a "social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on: (1) the viewpoint of the user or another person; (2) the viewpoint represented in the user's expression or another person's expression; or (3) a user's geographic location in this state or any part of this state."[5]

The Fifth Circuit upheld the Texas law, finding that social media companies are public utilities and must take all comers. The court vacated a preliminary injunction of the bill, enabling it to go into effect, on the grounds that the law does not chill speech but rather chills censorship. The court underscored that social media companies failed to "mount any challenge under the original public meaning of the First Amendment."[6]

The Fifth Circuit baldly and incorrectly asserted that content platforms "exercise no editorial control or judgment." Having worked with social media companies for more than a decade, reviewing their internal speech rules, we have learned that these companies actively moderate online content, banning, filtering, high-

lighting, and prioritizing all sorts of speech, including proscribable speech like cyberstalking, terroristic threats, and nonconsensual intimate images, as well as protected expression like hate speech, misinformation, and disinformation. Social media companies are unlike telephone companies and telephone providers, which perform no role in deciding who may use their services. Social media companies are more analogous to newspapers, bookstores, or entertainment companies that enjoy First Amendment protections as speakers in their own right.

The Florida law met a decidedly different fate: the Eleventh Circuit upheld the preliminary injunction, finding that the Florida law was not likely to survive First Amendment review.[7] The court held that the Florida law's restrictions on a social media company's ability to moderate content triggered First Amendment scrutiny. The court highlighted decisions protecting the editorial discretion of publishers and media companies, noting that when social media companies remove or de-prioritize user-generated posts, they are making a judgment about the value of such content. The court found that the statute was unlikely to survive "intermediate – let alone strict – scrutiny" because a state has no legitimate interest in counteracting private speech decisions "by tilting the public debate in a preferred direction."[8]

In *Moody v. Netchoice*, the Supreme Court endorsed the notion that a social media company's content-moderation decisions constitute speech that implicates the First Amendment. While vacating the Fifth and Eleventh Circuit decisions on grounds unrelated to the First Amendment merits, the Court provided guidance on the First Amendment question. The Court explained that deciding whether third-party speech will be included or excluded, pursuant to a social media company's terms of service, amounts to editorial choices protected by the First Amendment and that "[h]owever imperfect the private marketplace of ideas," it is far worse to have the government decide when speech is imbalanced and "coerc[e] speakers to provide more of some views or less that others."[9]

That strikes us as right. A private party's ability to block or filter someone else's constitutionally protected speech is part of the First Amendment tradition. Under that tradition, unlike the government, whose laws should not favor certain ideas or speakers over others, private parties are permitted, even expected, to shape norms around speech activity.[10] Generally speaking, the "government can't tell a private party or entity what to say or how to say it."[11] The government should not be in the business of telling social media companies what kinds of speech it must affiliate with (or not affiliate with).

Beyond the doctrinal point, the larger normative point remains: social media sites should be allowed to make choices about online content. They should be free to moderate their users' activities to match their priorities. They should be permitted to ban cyberstalking, threats, doxing, and nonconsensual pornography. The good of free expression, in fact, depends on their doing so.

Every day, people – more often, marginalized people – face online abuse that makes it impossible for them to speak.[12] Online abuse may involve cyberstalking: repeated targeting of specific individuals with defamatory lies, threats, and privacy violations. Lies accuse victims of being prostitutes or having sexually transmitted infections; threats invoke sexual violence; privacy invasions include doxing. When victims appear to be people of color or LGBTQIA+, the abuse is suffused with racist, homophobic, and transphobic invective. Online abuse also includes intimate privacy violations, such as the nonconsensual recording and sharing of someone's intimate images.[13]

Consider the cyberstalking campaign faced by Nina Jankowicz, a researcher specializing in state-sponsored disinformation. In April 2021, the Biden administration tapped Jankowicz to lead a new group in the Department of Homeland Security (DHS) called the Disinformation Governance Board. The board would coordinate DHS efforts to highlight trustworthy information about high-stakes issues like COVID-19 response measures and cybersecurity events. Within twenty-four hours of the board's announcement, prominent far-right media outlets and influencers attacked Jankowicz as a threat to democracy whose work would inevitably distort the truth and censor free speech.

Jankowicz faced ferocious, threatening, and destructive online abuse. Posters accused her of spreading disinformation, rather than combating it (which she had done throughout her career and would have continued to do at DHS). Videos were doctored to make it seem that she thought certain people should be able to edit others' tweets, which she had never said. Detractors began circulating her contact information online. Jankowicz received frightening emails, texts, voicemails, and letters that threatened rape and death. At the time, Jankowicz was nine months pregnant with her first child.

The Biden administration shut the board down, and Jankowicz resigned. Security consultants advised Jankowicz and her husband to relocate, an unrealistic suggestion given that Jankowicz was due to give birth. Fox News television guests remarked with glee that their "side" had emerged victorious and "got her bounced." Jankowicz retreated into silence for months. She stopped using social media. She shut down her Twitter account. She felt unsafe to leave her home.[14]

High-profile individuals like Jankowicz aren't the only ones facing online assaults that chase them offline. "Joan," a recent law school graduate, stayed in a hotel while traveling for work. When she returned home, she received an email from a stranger. The email included a video of her showering and urinating in the hotel bathroom, a video that she never knew existed, let alone gave anyone permission to take. The emailer, presumably a hotel employee, threatened to post the video on adult sites and to send it to Joan's LinkedIn contacts unless she sent additional nude photos and videos of herself. After Joan refused, the emailer made good on the threats. The emailer sent the video to Joan's graduate school classmates and

her work colleagues (who the emailer presumably found via her LinkedIn profile). The emailer posted the video (with her name in the title of the video) on adult sites, including PornHub. The video appeared on dating sites next to the suggestion that Joan was available for sex.

Joan did everything that she could to get the videos and posts taken down, but she was met with a brick wall of silence. Most adult sites ignored her requests to remove the video. PornHub, the most popular adult site in the world, initially took down the videos in response to Joan's complaints. Unfortunately, the privacy invader kept reposting the video. After a while, PornHub stopped responding to Joan's requests for help. Despite Joan's best efforts, the video appeared on adult sites and many of the postings had thousands of views.

For Joan, as for so many people facing such abuse, privacy violations are never-ending. No matter what Joan did, the video remained online. For months and months, Joan searched for new postings every day and found more and more sites where the video had been posted. Joan felt scared and alone. No space seemed safe – not a public restroom, gym locker, or fitting room. If a hotel employee could hide a camera in her room, so could those with access to other places in her life where she expected and deserved privacy.

Joan shuttered her social media accounts. Retreating from online engagement seemed necessary, but it wasn't what she wanted. The privacy invader seemingly identified her friends and coworkers from her social media accounts, so Joan closed her Facebook account, even though it was how she kept in touch with friends from college and high school. She took down her LinkedIn profile, even though she knew that she needed to be on the site if she ever wanted to change jobs.

Telling her boss about what had happened was a nightmare. Although her boss conveyed support, Joan could not help but think that her employer and coworkers now saw her as a nude body on the toilet and in the shower. She was humiliated. Joan suffered severe anxiety and depression. She lost a significant amount of weight; it was a way for her to regain control over her body and make it difficult for people to recognize her from the video. She worked out every day in the hope that gaining strength would enable her to fend off attackers. Joan worried that someone might respond to the fake ads and accost her offline.

The experience fundamentally changed the arc of Joan's life. Joan was engaged at the time of the initial privacy violation. Her fiancé was kind and supportive in ways large and small. He helped Joan contact adult sites and request the removal of the videos. When it became unbearable for Joan to check the sites, he monitored Google for new postings of the video. Joan and her fiancé delayed their wedding. As Joan explained to Danielle Keats Citron, how could she get married when she felt afraid to leave her house? (They eloped two years later.)

Long after the initial emails and posts, Joan felt watched and unsafe. Any time her laptop or phone seemed to slow down or have issues, she immediately thought

that her tormentor had hacked her devices. Joan's sense of ease – her preternatural optimism – was gone, thanks to the violation of her intimate privacy.

Young women, sexual and gender minorities, and people of color suffer a disproportionate amount of cyberstalking and intimate privacy violations. The self-censorship that Joan and Jankowicz experienced is typical. Researchers have found that cyber gender harassment results in victims' withdrawal from online discourse, friendships, family, and romantic relationships.

As Jonathon Penney has found, women are statistically more chilled in their speech and engagement when targeted with online abuse.[15] A report issued in 2016 explained that "younger women are most likely to self-censor to avoid potential online harassment: 41% of women ages 15 to 29 self-censor, compared with 33% of men of the same age group and 24% of internet users ages 30 and older (men and women)."[16]

Studies show that online abuse imperils female politicians' expression. A NATO study released in 2020 found that female Finnish cabinet ministers received a disproportionate number of abusive tweets containing sexually explicit and racist abuse and demeaning gendered expletives like "slut" and "whore."[17] A 2019 study found that 28 percent of Finnish female municipal officials targeted with misogynistic hate speech reported being less willing than they would have been otherwise to make decisions that might unleash online abuse.[18] Iiris Suomela, a member of Finland's ruling coalition, has explained that her fear of misogynistic online abuse has changed the way that she talks about and addresses issues. The country's first Black woman member of Parliament, Bella Forsgrén, echoed her colleague's sentiments in saying that she must think twice about the discussions that she participates in and how she talks about the issues, lest she face online backlash.

Intimate privacy violations have a similar silencing effect. In the face of the nonconsensual taking, use, and sharing of intimate images, women are inclined to self-censor and to connect with fewer individuals.[19] They are more likely to withdraw from online activities, including shutting down their accounts.[20]

Victims of intimate privacy violations often isolate themselves. They disconnect from loved ones and from online connections. As sociolegal scholar Nicola Henry and her coauthors explain, such isolation is "due to a profound breach of trust, not only in relation to the abuser, but from family, friends, and the world around them."[21] Victims feel like they can no longer "trust anyone" or "anything."[22] Developing or sustaining close relationships can be difficult in the aftermath of intimate privacy violations. Victims feel alienated from loved ones who find it difficult to understand what happened.[23]

In writing her book *The Fight for Privacy*, Citron interviewed more than sixty people whose intimate privacy had been violated. They hailed from the United States, the United Kingdom, India, and Iceland. Most of those individuals were

women, sexual and gender minorities, and people of color, who often had intersecting marginalized identities. Nearly every single person experienced a blow to their willingness to express themselves. They shut down their social media accounts. They stopped emailing and texting friends. They stopped dating. They deleted their online dating apps. They feared new relationships, including friendships. They lost trust in the world around them and in their ability to safely express themselves online and off.

Law and industry practices can provide meaningful protection for intimate privacy.[24] We can and should bring law to bear to combat intimate privacy violations. Rules governing the nonconsensual filming, recording, or otherwise collecting of intimate images or information raise few, if any, First Amendment concerns because they separate the public sphere from the private. Trespass laws, the intrusion-on-seclusion tort, and video voyeurism laws have withstood constitutional challenge. Computer hackers and peeping toms cannot avoid criminal penalties by insisting that they were only trying to discover information that the public would benefit from knowing.[25]

What about the argument that the disclosure of intimate images involves the discloser's speech so it cannot be the basis of civil remedies or criminal penalties? When the government regulates speech based on the content of that speech, it usually must satisfy what is called "strict scrutiny" review. Strict scrutiny is a difficult standard to satisfy because government should not be in the business of favoring some ideas and disfavoring others. But laws can satisfy that tough standard if those laws serve a compelling interest that cannot be promoted through less restrictive means. Criminal laws banning nonconsensual pornography, crafted with the help of the Cyber Civil Rights Initiative, have faced constitutional challenge and survived the crucible of strict scrutiny review.[26] The supreme courts of Illinois, Indiana, Minnesota, and Vermont have upheld their states' nonconsensual intimate imagery statutes on the grounds that their statutes were justified by the compelling governmental interest in preventing the "permanent and severe" harms posed by nonconsensual intimate images and because the statutes were narrowly tailored to serve that interest.[27] The First Amendment would preclude specific legal actions if the public would have a legitimate interest in seeing nonconsensual intimate images. The fact that the public is interested in someone's intimate images does not, however, turn those images into matters of public interest. This is the case both for private people whose lives are not under public inspection and for celebrities whose intimate lives are public obsessions.

Law and industry also can and should curtail cyberstalking. Although cyberstalking often involves communications, it targets specific individuals with harassing speech that can be regulated. Courts have upheld cyberstalking convictions because the harassing speech either fell within recognized First Amendment

exceptions or involved speech that has enjoyed less rigorous protection, such as true threats, defamation of private individuals, and the nonconsensual disclosure of private communications on purely private matters.[28] The Supreme Court recently ruled in *Counterman v. Colorado* that the First Amendment requires proof that a defendant was reckless about the terrorizing nature of a threat to criminally punish a "true threat." The law can regulate true threats, but there must be proof that the defendant consciously disregarded the risk that their speech activity would be viewed as threatening in order to prevent the chilling of protected speech.[29]

As we wait for law to protect intimate privacy as vigorously and comprehensively as it should, content platforms should protect people from intimate privacy violations. If and when law and market measures move in that direction, the expressive impact will be profound. Not only would law and corporate speech policies deter and reduce online abuse, mitigating its chilling impacts, but law and corporate speech policies also would say to intimate privacy victims that they matter, that they can express themselves knowing that companies and the law can help them if their intimate privacy is violated.

This is known as the expressive function of law: how law shapes behavioral norms by changing the social meaning of behavior.[30] When a law is passed, it provides a powerful symbolic or "informational" signal as to wider popular attitudes about social behavior – about what behaviors warrant legal penalty.[31] This is especially so in democracies, where laws tend to reflect the broader electorate's norms and values. When a law is passed to protect intimate privacy, it signals popular support for the protection of victims and recognizes the value of their autonomy and dignity, including their expressive engagement. Protective measures adopted by social media companies also have an expressive function: they say that victims' speech and ongoing presence and engagement are corporate priorities, that they are important to the social media community itself and worthy of protection.

In addition to enunciating attitudes and values, law provides signals about the risks associated with certain behavior: namely, that perpetrators of online abuse will be prosecuted, securing space for victims to speak and engage openly free from fear.[32] Through this informational and signaling function, the law has expressive impact that affects behavior – both in the near term as people respond to the law's messages – like victims speaking out more – and over time, as people internalize the attitudes and norms expressed by the law.[33]

A growing body of behavioral research explores how laws that restrict and curtail forms of online abuse have these expressive impacts. In 2019, we wrote about the expressive impact of cyber harassment laws.[34] We drew on Penney's empirical evidence that cyber harassment laws have a salutary impact on people's online speech and engagement, particularly for women.[35] Penney administered an original online survey to 1,296 adults based in the United States, which described

to participants a series of hypotheticals.[36] One scenario concerned participants being made aware that the government had enacted a new law with tough civil and criminal penalties for cyber harassment. Responses offered a range of insights. They suggested that a cyber harassment law would have few chilling effects on regular speech.[37] Of the participants, 87 percent indicated that a cyber harassment law would have no impact or would make it more likely for them to speak and write online.[38]

Most states have cyberstalking laws on the books, but that is regrettably where they remain. Police rarely enforce those laws because they are misdemeanors (and thus are not worth their time and resources) and because law enforcement often dismisses the attacks as just "boys being boys."[39] We need state lawmakers to reform those laws, treating them as felonies, and to spend resources training law enforcement to investigate reports, rather than turn victims away.

Doing so would have great value. Penney's empirical research has shown that cyber harassment laws actually encourage online expression, particularly for women, rather than suppress online expression, as it is widely assumed (or at least assumed by advocacy groups like the ACLU).[40] Penney's analysis reveals a gender effect in response to the law: female participants in the survey were statistically more likely to engage online in response to the cyber harassment law in a variety of ways.[41] Female survey participants reported being more likely to share content online and more likely to engage on social network sites in response to the government enacting cyber harassment laws. We have argued elsewhere that cyber harassment laws would have that salutary impact given law's expressive value.[42] Those laws would tell victims that their safety and online engagement are valued, that they will be protected, and that they matter.[43]

In 2021, we teamed up again, along with media studies scholar Alexis Shore, to conduct empirical research on the potential impact of both legal and industry efforts to protect intimate privacy (with a special focus on the responsibilities of online platforms).[44] Our findings suggest that both legal protections and industry measures would engender trust in companies and the legal system such that individuals would be more inclined to engage in self-expression online.

In one experimental study, participants were exposed to different protective sexual privacy interventions. We found that participants who had previously experienced forms of online abuse – including intimate privacy violations – were more inclined to disclose and express intimate information after becoming aware of measures enacted to protect intimate privacy. That finding held across all conditions – for interventions involving both legal and platform-based measures – though participants presented with *platform*-based measures were even more likely to be willing to engage in intimate expression.

In another experimental study with a pre/post-longitudinal design, our results found that both legal and platform-based intimate privacy measures had a positive

impact on trust among participants, especially for participants from marginalized populations. After participants were made aware of both legal and platform-based intimate privacy measures, trust became a stronger predictor of intimate expression online and offline, and that predictive relationship was even stronger among women, especially those who had previously experienced online abuse. We also found that both legal and platform measures increased trust in partners, such that they would be inclined to share and disclose intimate information to them, among participants from various marginalized groups – Latinos, African Americans, Asian Americans, Pacific Islanders – who are most often the targets of online abuse and intimate privacy violations.

These findings suggest that legal and platform-based intimate privacy measures can promote trust, leading to greater intimate expression and sharing over the long term. Both studies suggest that individuals will feel more inclined to engage in intimate expression with partners if they know that platforms have legal incentives to protect them from illegality online and that they are engaging efforts pursuant to those requirements.

This is a crucial point: our ongoing research with Shore suggests that legal measures that incentivize social media companies to address intimate privacy violations can result in even more speech, not less. For instance, as Citron has proposed elsewhere, the law that currently shields social media companies from liability even if their platforms encourage or solicit intimate privacy violations should be reformed.[45] Congress surely never meant to provide a free pass to sites whose purpose is intimate privacy violations and online assaults. Sites that deliberately or purposefully solicit, encourage, or leave up material that they know (or have reason to know) constitutes stalking, harassment, or intimate privacy violations should not enjoy immunity from liability. This would not mean that content platforms would be strictly liable for intimate images or cyberstalking posted by users. Individuals whose intimate images appear on the sites without consent would have to bring legally cognizable claims against those sites. They should have a chance to do so.[46] And reform to that federal law would have salutary effects on all of us. People might be more likely to engage in intimate expression online and offline if they know that their intimate privacy enjoys protection – this is especially true for women. We might hear more women's voices, a win for civil rights and civil liberties.

We are at a tipping point. Our intimate privacy is being violated when we most need it. We need to protect intimate privacy for the good of free expression. In short, our findings suggest that protecting intimate privacy can help provide the reassurance that victims need to express themselves, rather than retreating into silence. Law and self-governance aimed to protect intimate privacy can indeed free us to speak.

ABOUT THE AUTHORS

Danielle Keats Citron, a Member of the American Academy since 2023, is the Jefferson Scholars Foundation Schenck Distinguished Professor in Law at the University of Virginia. She has been a member of Facebook's Non-Consensual Intimate Imagery Task Force since 2011, served as a member of Twitter's Trust and Safety Task Force from 2016 to 2021, and has been a member of Spotify's Trust and Safety Council since its inception in 2021. Citron serves as the Vice President of the Cyber Civil Rights Initiative, an organization devoted to fighting for civil rights and liberties in the digital age. She is the author of *The Fight for Privacy: Protecting Dignity, Identity and Love in the Digital Age* (2022) and *Hate Crimes in Cyberspace* (2014). She was named a MacArthur Fellow in 2019.

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[24] We leave the details for readers of Citron's *The Fight for Privacy*.

[25] Ibid., 144.

[26] Both of us have positions within the Cyber Civil Rights Initiative. Citron serves as the Vice President and Penney as an adviser.

[27] *State of Indiana v. Conner Katz*, 2022 WL 152487 (Sup. Ct. Indiana Jan. 18, 2022); *State of Minnesota v. Michael Anthony Casillas*, A19-0576 (Sup. Ct. Minn. Dec. 20, 2020); *People of the State of New York v. Kevin Austin*, 155 N.E.3d 439 (Sup. Ct. Ill. 2020), cert denied, 141 S. Ct. 233 (2020); and *United States of America v. Nathan Van Buren*, 214 A.3d 791 (Sup. Ct. Vt. 2019).

[28] Citron, *Hate Crimes in Cyberspace*, 199–217.

[29] *Counterman v. Colorado*, 600 U.S. ___ (2023); and Danielle Keats Citron, "From Bad to Worse: Stalking, Threats, and Chilling Effects," *The Supreme Court Review* 2023 (2023): 175–212. Mary Anne Franks authored an amicus brief in the *Counterman* case; Citron signed that brief along with Erwin Chemerinsky, Michael Dorf, Eric Segall, and Cristina Tilley. The brief argued that the First Amendment does not require a specific-intent requirement for stalking and threats.

[30] Alex C. Geisinger and Michael Ashley Stein, "Expressive Law and the Americans with Disabilities Act," *Michigan Law Review* 114 (2016): 1061, 1061–1062; and Richard H. McAdams, *The Expressive Powers of Law: Theories and Limits* (Cambridge, Mass.: Harvard University Press, 2015).

[31] Geisinger and Stein, "Expressive Law and the Americans with Disabilities Act," 1062; and McAdams, *The Expressive Powers of Law*, 139–141.

[32] McAdams, *The Expressive Powers of Law*, 152–155, 162–165.

[33] Ibid., 140–141.

[34] Danielle Keats Citron and Jonathon W. Penney, "When Law Frees Us to Speak," *Fordham Law Review* 87 (2019): 2317.

[35] Penney, "Internet Surveillance, Regulation, and Chilling Effects Online."

[36] Citron and Penney, "When Law Frees Us to Speak," 2330.

[37] Ibid.

[38] Ibid., 2331–2332.

[39] Citron, *Hate Crimes in Cyberspace*, 83–88.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Jonathon Penney, "Online Abuse, Chilling Effects, and Human Rights," in *Citizenship in a Connected Canada: A Research and Policy Agenda*, ed. Elizabeth Dubois and Florian Martin-Bariteau (Ottawa: University of Ottawa Press, 2020), 207.

[44] The Knight Foundation supported our empirical research project with a $75,000 grant and we are grateful for their support.

[45] Danielle Keats Citron, "How to Fix Section 230," *Boston University Law Review* 103 (2023): 713–761.

[46] Of course, those lawsuits would have to press claims that can be squared with the First Amendment. One can imagine sites like Hidden Camera or MrDeepFakes, which traffic in intimate privacy violations, could face tort claims for enabling crime.

Hostile State Disinformation in the Internet Age

Richard A. Clarke

Foreign actors, particularly Russia and China, are using disinformation as a tool to sow doubts and counterfactuals within the U.S. population. This tactic is not new. From Nazi influence campaigns in the United States to the Soviets spreading lies about the origins of HIV, disinformation has been a powerful tool throughout history. The modern "information age" and the reach of the internet has only exacerbated the impact of these sophisticated campaigns. What then can be done to limit the future effectiveness of the dissemination of foreign states' disinformation? Who has the responsibility and where does the First Amendment draw the boundaries of jurisdiction?

State-sponsored disinformation (SSD) aimed at other nations' populations is a tactic that has been used for millennia. But SSD powered by internet social media is a far more powerful tool than the U.S. government had, until recently, assumed. Such disinformation can erode trust in government, set societal groups – sometimes violently – against each other, prevent national unity, amplify deep political and social divisions, and lead people to take disruptive action in the real world.

In part because of a realization of the power of SSD, legislators, government officials, corporate officials, media figures, and academics have begun debating what measures might be appropriate to reduce the destructive effects of internet disinformation. Most of the proposed solutions have technical or practical difficulties, but more important, they may erode the First Amendment's guarantee of free speech and expression. Foreign powers, however, do not have First Amendment rights. Therefore, in keeping with the Constitution, the U.S. government can act to counter SSD if it can establish clearly that the information is being disseminated by a state actor. If the government can act constitutionally against SSD, can it do so effectively? Or are new legal authorities required?

The federal government already has numerous legal tools to restrict activity in the United States by hostile nations. Some of those tools have recently been used to address hostile powers' malign "influence operations," including internet-powered disinformation. Nonetheless, SSD from several nations continues. Rus-

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sia in particular runs a sophisticated campaign aimed at America's fissures that has the potential to greatly amplify divisions in this country, negatively affect public policy, and perhaps stimulate violence.[1]

Russia has created or amplified disinformation targeting U.S. audiences on such issues as the character of U.S. presidential candidates, the efficacy of vaccines, Martin Luther King Jr., the legitimacy of international peace accords, and many other topics that vary from believable to the outlandish.[2] While the topics and the social media messages may seem absurd to many Americans, they do gain traction with some – perhaps enough to make a difference. There is every reason to believe that Russian SSD had a significant influence on, for example, the United Kingdom's referendum on Brexit and the 2016 U.S. presidential election. But acting to block such SSD does risk spilling over into actions limiting citizens' constitutional rights.

The effectiveness of internet-powered, hostile foreign government disinformation, used as part of "influence operations" or "hybrid war," stems in part from the facts that the foreign role is usually well hidden, the damage done by foreign operations may be slow and subtle, and the visible actors are usually Americans who believe they are fully self-motivated. Historically, allegations of "foreign ties" have been used to justify suppression of Americans dissenting from wars and other government international activities. Thus, government sanctions against SSD, such as regulation of the content of social media, should be carefully monitored for abuse and should be directed at the state sponsor, not the witting or unwitting citizen.

Government regulation of social media is problematic due to the difficulty of establishing the criteria for banning expression and because interpretation is inevitably required during implementation. The government could use its resources to publicly identify the foreign origins and actors behind malicious SSD. It could share that data with social media organizations and request they block or label it. A voluntary organization sponsored by social media platforms could speedily review such government requests and make recommendations. Giving the government the regulatory capability to block social media postings – other than those clearly promoting criminal activity such as child pornography, illegal drug trafficking, or human smuggling – could lead to future abuses by politically motivated regulators.

Over time, we have moved from the Cold War to the hybrid war. Russia and China are today engaged in a hybrid war with the United States. Aspects of this kind of competition include hacking into computer networks, publicly revealing (and sometimes altering) the data they hack, running active espionage programs, creating and disseminating disinformation, inventing American identities online, and stoking internal dissent on emotionally contentious issues.[3]

Both Russia and China have similar goals: to turn America's attention inward to limit its foreign presence and involvement, to weaken U.S. national unity, to sow dissension, and to undermine worldwide confidence in the U.S. government

and its system of democracy and liberties. Both openly state their goal is to subvert what they see as a hyperpower's global hegemony.[4] Unstated is the goal of reducing interest within their own countries in American-style democracy and human rights guarantees ("See what calamity and dysfunction it brings in America").

Russia (then the Soviet Union) and China had similar goals during the Cold War (1945–1989), but that competition did not morph into a conventional or nuclear war (although there were many proxy wars and Chinese forces did directly combat U.S. forces in the Korean War). Nor did the tools of hybrid war succeed then in causing significant domestic security problems for the United States.

There are, however, reasons to think that hybrid war may be more damaging and more successful now than in its earlier incarnations. About the same time that the Cold War ended, the Information Age began. With the global rise of the internet came the morphing of news media, the creation and rapid mass adoption of social media, and now the introduction of generative artificial intelligence (GenAI), complete with fake news and synthetic personas.

Many believe it is necessary to restrict First Amendment protections for those who disseminate "fake news," for those among them who are foreign actors, or at the very least for synthetic personas. Advocates of further limitations point to the first known successful attempt by a hostile foreign power to affect the outcome of a U.S. presidential election (2016) as the prime example of the harm that unrestricted, foreign-generated or -amplified expression can cause.[5] They see a hidden, or sometimes not-too-covert, Russian hand in the gun control debate, anti-vaccination lobbying, and both sides of the Black Lives Matter movement, and they wonder what role Moscow might have played (if any) in the January 6th sedition. Convincing fake videos, such as one of former president Barack Obama seeming to say things that he never uttered, give rise to concerns about what damage unrestricted GenAI could soon bring.[6]

These concerns can (and should) cause us to review what restrictions we have and what further restrictions we might need on the First Amendment's protections for hostile foreign powers and their agents, witting and unwitting. But let us first turn to some important definitions.

Big lie: A term first used by the Nazis, meant to suggest that something that should be on its face preposterous might be believed if properly asserted by credible sources. It is first attributed to Adolph Hitler and his contention that "in the big lie there is always a certain force of credibility; because the broad masses of a nation are always more easily corrupted in the deeper strata of their emotional nature than consciously or voluntarily; and thus [are more likely to] fall victims to the big lie than the small lie."[7]

Cyber war: Computer operations designed to create damage, disruption, or destruction of computer networks and/or devices controlled by software.

Deepfakes: Images and videos made with the use of GenAI that appear to show people doing and/or saying things that they never did or said. The software realistically mimics voices and styles of speaking, as well as moves the lips in the image in synchronization with the audio track.

Disinformation: A term first used by the Soviet Union to characterize state-sponsored strategic deception spread through a variety of means, both at home and abroad. It became a central activity of Soviet intelligence as early as the 1920s and continued as a major program component through the Cold War. Russian intelligence in the twenty-first century has resumed the use of disinformation as a significant tool.[8]

Fake news: Information in traditional or newer media, including social media, which is (or is claimed to be) intentionally erroneous; also, a characterization of news sources that regularly carry intentionally erroneous material.

Fake personas: Actors on social media platforms and elsewhere whose identity is intentionally inaccurate, assumed, or fabricated. Russian and Chinese agents have created thousands of social media accounts with American names and hometowns to convince American readers that the views that are being espoused are those of their neighbors or people like them.[9]

Hybrid war: The use of a panoply of techniques employed in the absence of, before, or during a conventional military conflict, such as unauthorized entry into computer networks, public dissemination of the hacked material in its original or altered state, cyber warfare, the spread of disinformation, activities designed to create dissent and disruption in the enemy state, sabotage, espionage, covert action, subversion and, in some uses, special forces operations behind enemy lines.

Information warfare: State use of true and/or false accounts and themes to persuade an enemy or potential enemy audience to act in a way that is beneficial to that state actor; the role of the state actor as the originator of the information may or may not be overt.

Influence operations: A campaign by a state actor to cause a foreign audience to support the policies of the state actor or to oppose the policies of an opposing state; the campaign may include bribery of foreign officials or media personnel, the spread of disinformation, propagation of truthful stories that support the image of the state actor or damage the image of another nation, foreign development assistance, disaster relief aid, direct foreign investment, military and security assistance, training, scholarships, and cultural exchanges.

Psychological operations: A term used by the U.S. military until the 1990s to describe its activities that are now known as information warfare and/or influence operations.

Sleepers: Foreign intelligence personnel who create or use a false identity of a citizen of a target country and then live in that country, usually for an extended period, usually with jobs and families to add to the credibility of their cover story;

a Soviet and now Russian intelligence technique that entered American public consciousness with the exposure of a network of such intelligence personnel in the United States in 2010, later popularized in the television series *The Americans*.

Synthetic personas: Similar to fake personas, but also employing facial and other images, still or video, created by GenAI programs. Additionally, video images of real people altered by GenAI programs to portray them doing or saying things that they did not do or say.

Let us turn now to a brief history of foreign interference in the United States. Disinformation operations have been recorded since before the Greek's wartime gift of a horse statue to the city-state of Troy. American history is also replete with hostile foreign attempts, real and imagined, to influence domestic events, usually during wars. Often these concerns lead to federal government overreaction. The canonical decision of *ex partite Mulligan* stems from President Lincoln's use of Article 1, Section 9 of the Constitution to arrest and deny *habeas corpus* rights to those engaged in antiwar subversion in support of the rebellious states.[10] In World War I, agitation, strikes, and bombings in support of anarchism and Communism led to widespread law-enforcement suppression activities. This included the infamous Palmer Raids, designed in part to identify, arrest, and deport alleged foreign agents. The Espionage Act of 1917 and the Sedition Act of 1918 (repealed in 1921) were written, passed, and enforced to deal with foreign and domestic antiwar and antidraft activities.[11]

The Espionage Act and the Sedition Act, which expanded the government's authority to limit criticism of the war, were challenged many times for their constitutionality. But *Schenck v. United States* (1919) solidified the Espionage Act's legality. The unanimous decision of the Supreme Court held that the First Amendment's Free Speech Clause did not protect activities that were deemed unlawful under the Act's restrictions, which were further justified under Congress's wartime authority.[12] Prior to its repeal in 1921, the Sedition Act was similarly upheld by the Supreme Court in *Debs v. United States* (1919), *Frohwerk v. United States* (1919), and *Abrams v. United States* (1919).[13]

In World War II, unfounded fear of foreign interference led to the unconstitutional internment of over one hundred thousand American citizens of Japanese ethnicity.[14] While those Japanese Americans posed little or no risk, there was an overt attempt by the German Nazi government to sponsor a Nazi party and movement in the United States beginning in 1933 with the Friends of New Germany organization. Some members of the successor organization, the German American Bund, were prosecuted under the Espionage Act. Others were prosecuted under the Selective Service Act of 1940, which authorized military conscription (some had their convictions overturned in 1945). One Bund leader, a German immigrant, had his U.S. citizenship rescinded.[15]

During the Vietnam War, fears of alleged foreign involvement in the antiwar movement led to unconstitutional surveillance of Americans – as an active teenage participant in the anti–Vietnam War movement, I can assure readers that its vehemence and popularity owed nothing to any foreign hand. In the 1970s and 1980s, there were allegations of a foreign hand in the "Ban the Bomb" and then the "Nuclear Freeze" campaigns led by Americans supportive of international arms control.[16]

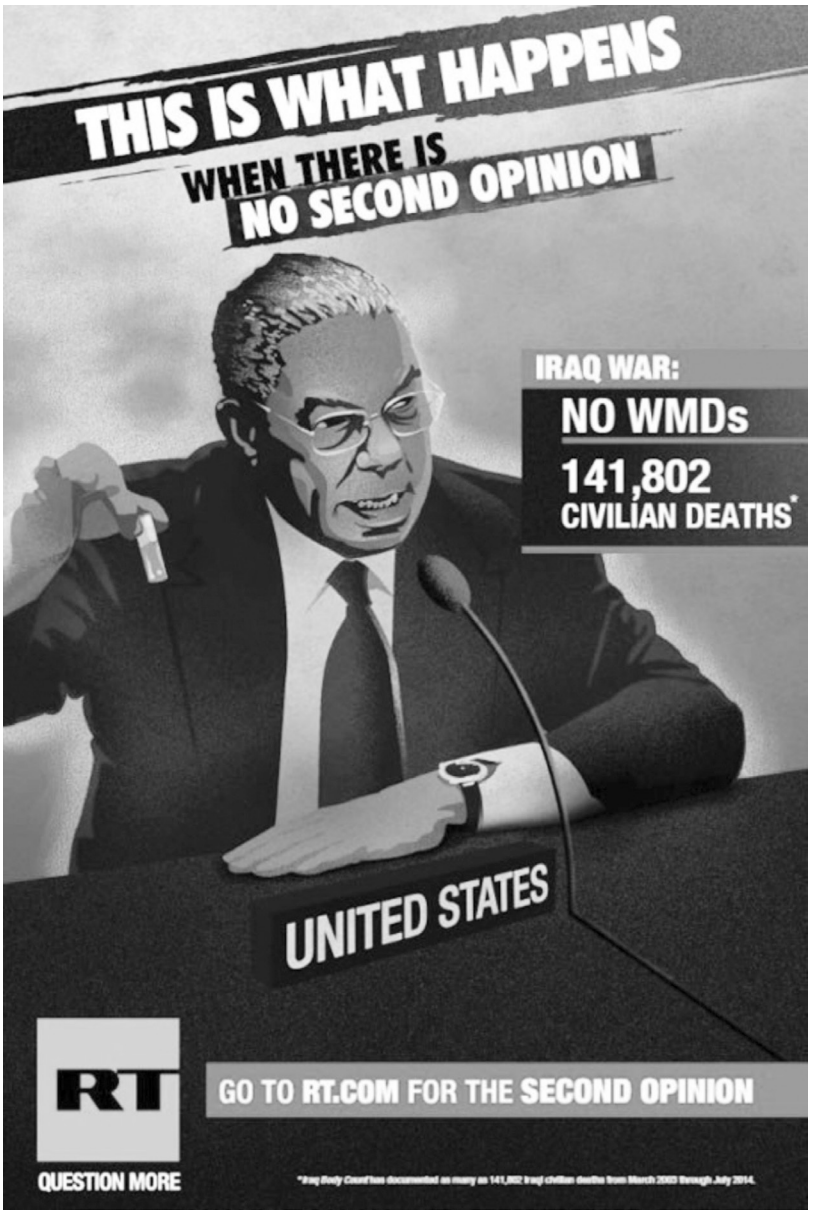
My first encounter with foreign propaganda was as a teenager using a shortwave radio in the 1960s. Listening to Radio Moscow through the atmospheric electronic static left me with the distinct impression that America had nothing to fear from that source of Communist propaganda. The U.S. government implicitly agreed with that conclusion and did nothing to jam the signal. But twenty years later, as deputy secretary of state for intelligence, I was surprised to learn how effective Soviet propaganda had been in Africa. My colleague in the Intelligence Bureau, Kathleen Bailey, was among those who revealed that the Soviets had, among many other disinformation efforts worldwide, convinced much of Africa that the United States had invented HIV/AIDS, at Fort Dietrich in Maryland and at the Wistar Institute on the University of Pennsylvania campus, as a biological weapon to kill Black people.

The 1980s HIV disinformation campaign, apparently known in the KGB as Operation Denver, involved bribing newspaper editors to run erroneous stories, sponsoring conferences, and distributing articles from "scientific journals." One allegation in the campaign was that the United States was distributing condoms in Africa that were laced with HIV. While it all seemed ridiculous to most U.S. government officials, it is an example of a successful use of the big lie technique.[17]

By 2010, the Russian government broadcasted a polished English cable television news channel, Russia Today (later rebranded as simply RT), in the United States and Europe. In 2014, I was startled to see Russian government–funded advertisements emblazoned on the sides of Metro buses in Washington, D.C., complete with an artist's rendering of former Secretary of State Colin Powell holding a vial and discussing alleged Iraqi biological weapons at the UN Security Council. The ad (Figure 1) read, "This is what happens when there is no second opinion. Iraq War: No WMDs, 141,802 civilian deaths. Go to RT.com for the Second Opinion."[18] That propaganda operation was a long way from the scratchy broadcasts from Moscow I had listened to as a kid. It was convincing.

In 2015, Adrian Chen wrote a prescient article for *The New York Times Magazine* in which he exposed an organization in St. Petersburg, Russia, known as the Internet Research Agency, as a propaganda and influence operation. The supposedly private organization had created a number of convincing posts online pretending to be U.S. television news reports, social media responses from average Americans, and local government announcements, all concerning a large explosion at a

Figure 1
Poster from 2014 RT (Russia Today) Ad Campaign on Plurality in Media



Source: John O'Sullivan, "Russia Today Is Putin's Weapon of Mass Deception. Will It Work in Britain?" *Spectator Australia*, December 6, 2014.

chemical plant in Louisiana. There had, however, been no such explosion. It was an experiment in advanced disinformation using sophisticated deception on the internet.[19] Despite Chen's warning, when Russia engaged in a massive disinformation operation a year later, U.S. intelligence and law enforcement did not detect it in real time. Nor did its target, the presidential campaign of Hillary Clinton.

As documented by congressional and Justice Department investigations, Russian intelligence services interfered in the 2016 U.S. presidential election by, among other things, creating thousands of fake accounts on numerous social media apps, pretending to be U.S. citizens, and then spreading both a partisan message and what was indisputably disinformation. But the Russian internet activity went beyond simple messaging. Russian intelligence had a role in the hacking and public release of files from the Democratic National Committee, timed to sow discord at the Democratic Party's convention. Russian intelligence agents on the ground in the United States interviewed Americans to help hone their message.[20]

Russian disinformation focused on swing states and on particular voting groups and neighborhoods within those states. One goal was to suppress Black Americans' votes, which Russia assumed would be overwhelmingly for the Democratic candidate. Fake personas on social media spread lies about the Democratic candidate and urged Black voters to boycott the election. In those targeted locales, ballots from Black Americans declined.[21] Similarly, synthetic internet personalities targeted voters who prioritized climate concerns, urging votes for the Green Party candidate, Jill Stein. Stein was feted in Moscow, sitting at President Putin's table. In several swing states, Hillary Clinton lost by fewer votes than Stein received.[22]

Such is the power of social media that the synthetic Russian personas were able not just to influence the thinking of some American voters, but to cause them to act in real life. One trick messaging effort successfully encouraged partisans to dress up as a Hillary Clinton lookalike in orange prison garb, locked up in a pretend cage that was then put on display at political rallies. On other occasions, the St. Petersburg "Americans" created political counter-demonstrations and rallies in the United States at specific times and places.[23] Russian disinformation, hacking, and fraudulent internet activity were sufficient to make the difference in the outcome of the 2016 U.S. presidential election.

What was the most dangerous path of Russian disinformation? Following the 2016 election, the fake personas continued to spread disinformation in the United States, focusing on the COVID-19 pandemic, circulating "antivax" themes. Russian personas have also supported gun rights, been on both sides of the Black Lives Matter movement, and called for the secession of various states from the Union (a Russian disinformation campaign had similarly supported Brexit covertly prior to the UK referendum).[24]

Following the Russian invasion of Ukraine in 2022, Moscow's disinformation campaign targeted nations in the Global South to support the "special military activity." Among the disinformation they spread were accounts of a joint U.S.-Ukrainian program to develop biological weapons in Kyiv, a big lie that would have little traction in America. More recently, campaigns like Doppelganger are creating deepfake videos and fake media sites to spoof legitimate news and undermine Western support of Ukraine. Although slow to gain traction in the United States, these instances are part of a highly successful influence operation that has led to scores of nations abstaining or voting with Russia on UN resolutions condemning the Russian war.

The objectives of China's influence operations are traditionally defensive, but have recently shifted toward an offensive approach. One of their defensive themes, recalling the 1980s Soviet effort on AIDS, is that the United States invented COVID-19, which their army brought to Wuhan during the World Military Games athletic competition that took place there in 2020.[25] In addition, Chinese disinformation claimed the United States lied about the conditions of the Uighur ethnic group in Xinjiang.[26] China's messaging also uses U.S. activity to justify Beijing's creation of new islands with military bases on them in the South China Sea.

On offense, China mimics Russian efforts, amplifying existing division to encourage mistrust of the U.S. government, and has become more aggressive in attempts to undermine credibility of the United States through disinformation. One long-running disinformation campaign, dubbed Spamouflage or Dragonbridge, has shifted from defensive, pro-CCP (Chinese Communist Party) content to direct disinformation against the United States.[27] This network was first identified in 2019, but the American-oriented accounts were identified in 2022. As part of the campaign, accounts claimed that the Chinese-sponsored hacking group APT41 is backed by the U.S. government. APT41 is known for intellectual property theft, espionage and intelligence-collection operations, and supply-chain compromises.[28] They also claim that the United States bombed the Nord Stream pipelines as part of their goal to replace Russia as Europe's dominant energy supplier.[29]

China's influence operations have evolved from the bots, trolls, and click farms of 2019. Accounts connected to Chinese influence operations use a complex strategy of GenAI, impersonation, profile-hijacking, and coordinated posting. They impersonate real cybersecurity and media accounts to support their narratives using the same name and profile picture and similar usernames as the authentic accounts. These accounts use tactics such as plagiarism, alteration, and mischaracterized news reports, including content that is AI-generated or AI-enhanced.

The strategies are becoming increasingly sophisticated in their narrative production and ability to avoid detection, but there is little evidence of success in attracting the attention of the American public or swaying public opinion.[30] Although those Chinese themes' credibility may be lacking in the United States and in some

other target countries, videos of supposed television news broadcasts being distributed as part of Chinese disinformation are quite convincing. Some of the videos appear to show American reporters and news anchors, but they are deepfakes and synthetic personas produced by AI programs. Microsoft reported an uptick in the use of GenAI to produce audio, video, and other visual content by Dragonbridge. Two instances relate to conspiracies that the U.S. government was behind the wildfires in Maui in August 2023 and the Kentucky train derailments in November 2023.[31]

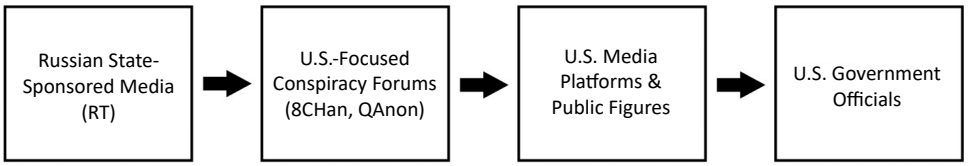
Assuming that the U.S. government was sufficiently concerned by the potential of Russian or Chinese disinformation campaigns in the United States to influence elections or provoke violence, what can it legally do today? What tools does the U.S. government now have to counter SSD?

The State Department's Global Engagement Center, supported by separate programs in the CIA and Department of Defense's (DoD) Special Operations Command, address the problems of Russian and Chinese disinformation abroad. The three agencies uncover the disinformation, attempt to label it in some way as fake news, and engage in counter-messaging to reveal the U.S. version of the truth to the same audience. The State Department also works to generate similar and supportive actions by friendly governments. In the United States, however, it is a different cast of departments and agencies that can use a myriad of existing legal authorities to deal with aspects of foreign disinformation and malign influence operations.

One tool the U.S. government can and should use to counter disinformation is "naming and shaming." As shown in Figure 2, the progress of disinformation, from its introduction through Russian state-sponsored media to wider reach via U.S. government officials, is completely revealable. Members of the U.S. government should regularly call out colleagues who spread Russian or Chinese disinformation, knowingly or unknowingly. The White House should hold weekly briefings from the podium to label Chinese and Russian disinformation in the news and identify which U.S. officials, especially in Congress, are parroting this information. The United States has employed this technique before. In 2017, as the extent of Russian malign activity in the 2016 election became more apparent, the United States moved against RT television, which is funded by the Russian government. Using the Foreign Agent Registration Act (FARA) of 1938, the Justice Department required RT to file as a Russian government entity.[32] Many cable outlets dropped the service and, following the Russian invasion of Ukraine in 2022, the satellite operator DirectTV did as well. RT then shut down its U.S.-based operation and programming.[33] FARA is not a ban; it simply requires the entity in question to admit its foreign sponsorship and file with the Justice Department.

If a non-U.S. citizen was found to be promoting disinformation or malign influence operations while they were present in the country, the Department of

Figure 2
The Life Cycle of Russian Disinformation



Source : Author's illustration.

Homeland Security could deport them on the grounds that their activity violated the terms of their entry visa, which could be revoked under the Immigration and Nationality Act of 1965.[34] If financial activity of any kind takes place in support of a foreign malign influence operation, the use of the sanctions authority is an available tool. By declaring a threat to U.S. national security, the U.S. economy, or U.S. foreign policy, the Treasury Department can ban financial transactions with specific sanctioned entities or individuals the Secretary of the Treasury designates under the International Emergency Powers Act (IEPPA) of 1977.[35] Hundreds of Russian organizations and individuals have been so sanctioned following the invasion of Ukraine. Were any American individual or organization to knowingly receive financial support from a sanctioned entity, they could be charged with a felony, the transaction blocked, and assets seized.

If certain other statutes are violated as part of the foreign malign influence operation, the Justice Department can charge criminal violations. If a computer network was hacked as part of a hybrid war campaign, as was done to the Democratic National Committee's system in 2016, the hacker could be charged under the Computer Fraud and Abuse Act of 1986.[36] Indeed, five named Russians have been so charged. Charges can be brought against an actor who was outside of the United States, provided that the targeted computer was in the United States. Other Russians who engaged in the 2016 campaign to influence the U.S. election have also been criminally charged with attempting to defraud the U.S. government, engaging in wire fraud, bank fraud, and aggravated identity theft.[37]

Certain actions in support of a foreign malign influence operation may violate the Espionage Act of 1917. In 2019, journalist and Wikileaks founder Julian Assange was indicted under that law for receiving and publishing classified information that had been hacked from a U.S. government network.[38] If a malign influence operation is planning, has engaged in, or is conspiring to encourage vio-

lence directed at the government, sedition may also be charged. Although some sedition laws have been repealed and others have been found unconstitutional, there remains the seditious conspiracy violation, which criminalizes behavior involving conspiracy "to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof."[39]

Although seditious conspiracy was seldom charged in the last fifty years (prior to the January 6 insurrection), it was used in 1993 against an Egyptian, Abdul Rahman, residing in New York City for his involvement in planned terrorist attacks. Following the 1993 arrest of Rahman, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996, which makes it a felony to "provide material support" to organizations and individuals designated by the secretary of state as terrorists.[40] Some U.S. citizens who participated in the January 6 insurrection have been charged with seditious conspiracy and some have been convicted. As of June 12, 2023, the Department of Justice charged sixty individuals with conspiracy to obstruct the certification of the election. Within these charges, eighteen individuals have been charged with seditious conspiracy.[41] And as of this writing, appeals, as well as more prosecutions, are underway.[42]

One expansion of U.S. government authority to deal with SSD could be to criminalize knowingly providing material support (by U.S. citizens or foreign nationals) to operations by foreign hostile powers engaging in disinformation and malign influence operations that caused or threatened to cause (drawing on the example of the International Emergency Economic Powers Act) significant harm to the national security, foreign policy, or economy of the United States. If that were to be considered, however, great care would be needed to prevent abuse or infringement upon First Amendment guarantees. Any such new law should be very specific about what activities would be considered material support to a hostile foreign power and what standards should be used.

How should the United States respond to these challenges? The president already has executive authorities to counter hostile foreign powers engaging in hybrid war activities against the United States. If the president finds that a covert "action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States," and so notifies the designated members of Congress, the president may direct intelligence agencies to carry out appropriate activities without public acknowledgment.[43]

Under such a "finding," intelligence agencies could hack back against a nation involved in hostile operations against the United States, disrupting computer-

related operations, revealing foreign government secrets, or any number of other activities, including lethal action. Thus, the U.S. government could attack those involved in directing hostile operations against it or could launch its own disclosure and influence campaigns (disinformation operations conducted abroad by the U.S. government raise sensitive issues concerning "blowback," the possibility that U.S. citizens or U.S. media operations would see, believe, and disseminate the disinformation in the United States).

The president may also order the Department of Defense to conduct cyber operations to counter hostile foreign influence operations, or other hybrid war activities, under the DoD and White House interpretation of existing legal authorities. As the DoD's General Counsel explained,

> National Security Presidential Memorandum-13 [NSPM-13] of 2018, United States Cyber Operations Policy . . . allows . . . the Secretary of Defense to conduct time-sensitive military operations in cyberspace. Congress also has clarified that the President has authority to direct military operations in cyberspace to counter adversary cyber operations against our national interests . . . whether they amount to the conduct of hostilities or not, and . . . are to be considered traditional military activities.[44]

Using that interpretation, the secretary of defense ordered U.S. Cyber Command to carry out certain activities to protect U.S. elections, including actions directed against the St. Petersburg–based Internet Research Agency.[45] The NSPM and DoD directives and policy reportedly establish First Amendment–related tests and are apparently limited to countering U.S. election-related hostile actions.

But this federal authority in cyberspace need not stop at countering U.S. election-related hostile actions. Led by the White House, the federal government should make a concerted effort to interpret and establish the existing authority it has through the previously mentioned laws and policies. Through cyberspace and social media platforms, hostile foreign actors are no longer limited by location or numbers. The U.S. federal government should coordinate and calibrate its available resources and legal authority to limit these hostilities.

None of the existing legal or direct response authorities, however, prevent social media platforms from being used to spread disinformation that could provoke damaging activity in the United States. To do that, new legislative and regulatory authorities would be required.

How, then, can or should we regulate social media? Social media's impact on modern culture and sentiment is indisputable. This goes hand-in-hand with foreign and/or nefarious actors' attempts to establish influence across these platforms. The current public policy debate revolves around regulating the content on social media platforms (X, Facebook, and YouTube) and regulating the existence of the platforms themselves (TikTok).

TikTok is a wholly owned subsidiary of ByteDance Ltd., a Chinese company registered in the Cayman Islands but headquartered in Beijing. Herein lies the problem. Chinese companies, under new data access laws, can be required to release their data to the Chinese government upon request. With more than one hundred seventy million U.S. TikTok users, the U.S. government has become increasingly concerned with China's possible access to Americans' data.[46]

TikTok U.S., which has a headquarters in Culver City, California, had previously been banned from government devices in multiple states, and ByteDance Ltd. received orders to relinquish its ownership of the company under authority of the Committee on Foreign Investment in the United States.[47] This committee, chaired by the Treasury Department, can mandate a foreign divestment in a U.S. business or block a transaction from occurring, if the result is determined to be a national security risk.[48] This process, which requires a thorough review, could be expanded to further limit foreign influence on social media companies with U.S. users.

Following the Office of the Director of National Intelligence's direct reference to TikTok as a possible threat to national security, Congress passed a measure to outlaw the platform in the United States. The measure passed on April 24, 2024, and gave Byte Dance nine months to sell or initiate a sale of the company, and six months to divest from its U.S. subsidiary. If it fails to comply, the app will no longer be available for U.S. users to download or update. The ban has faced significant backlash from many of its American users and content-creators. Many argue that access to information does not equate evidence of harm, and therefore the ban is not proven to be necessary to protect U.S. citizens. In this case, a ban on the platform will restrict First Amendment rights and internet freedom. Others argue that the threat to national security is substantial enough, and that the ban is necessary to prevent the Chinese government from weaponizing information collected from ByteDance and directing personalized influence operations at Americans.[49]

Social media platforms vary widely in what they will permit to be posted by their users, but what goes up and what is banned is almost entirely up to the companies that own and operate the services. The few legal exceptions to what can be written or said on social media involve child pornography (the posting of which is already a federal crime) or, conceivably, incitement to violence or seditious conspiracy.

Some social media companies employ thousands of staff and spend millions of dollars attempting to identify accounts created by fake personas and posts involved in disinformation campaigns. Other social media companies are less attentive to those considerations, perhaps because controversial content drives usage, and that, in turn, affects advertising rates and income. Or perhaps they do not self-regulate or moderate content out of a deep abiding commitment to the values of free expression. While various research agencies often publish reports that identify influence efforts and fake accounts, they do not have the authority to regulate content or suspend accounts.

Some social media platform executives, notably Meta/Facebook CEO Mark Zuckerberg, have called for regulation, but they have not offered any detailed proposals. Perhaps this is because it is difficult to specify the types of content that should be banned or, alternatively, labeled as disinformation. While Russian disinformation efforts have raised concerns about vaccinations and have opposed gun control legislation, so have American citizens without prompting from Moscow.

In addition to the reaction to a possible TikTok ban, the Utah Social Media Regulation Act and the public's reaction to its passing exemplifies how difficult and controversial it is to regulate social media platforms. This law mandates that social media companies provide parents and guardians of minors and Utah's government with unilateral control over minors' accounts and prevents social media companies from collecting any data or content connected to minors' accounts.[50] This legislation has generated strong criticism from free speech groups on the ground that this erodes civil liberties and safety online.[51] Judicial review seems certain, but even if this was held to be constitutional, it is likely to be easily circumvented by minors.

Identity-management systems and programs to control malign foreign entity creation of fake personas are probably technically feasible. There have been proposals that using such systems means that all social media users be verified as real people, not fake personas. Requiring that by law, however, raises constitutional questions. Moreover, there are numerous situations in which someone might for good reasons want to post information anonymously to avoid reprisals.

The federal government (and some of the larger IT companies) could, however, identify fake personas in use or those attempting to be created. By monitoring known hostile foreign powers' internet activity outside of the United States, the government could look for indications that someone was not who they claimed to be. It could notify social media companies about such possible fake personas. The companies could then temporarily block such accounts from appearing in the United States until their owners proved to the company (not to the government) that they were legitimate users, according to some specified standards or criteria. Some such cooperation is likely ongoing today, but not systematically. A more formal system might not prevent all foreign fake personas, but it might significantly reduce their number.

A law could, conceivably, require internet providers and/or social media companies to abide by a doctrine of "due care" to identify fake personas, to label obvious disinformation, and to give special treatment to postings that would be likely to inflame civil unrest or promote possible violence against protected populations. Flagrant disregard for due care could be prosecuted and fines imposed. The constitutionality of such a law under the First Amendment could be hotly contested, however. Recent attempts by state governments to regulate content-moderation practices in Florida and Texas were deemed unconstitutional in a unanimous decision by the Supreme Court. This decision upheld the First Amend-

ment right of social media companies to remove or publish content at their discretion, without government directive.[52]

In support of such a law, or possibly instead of it, voluntary standards of conduct could be created by a council of social media companies and/or major advertisers, in collaboration with civil society and nongovernmental groups concerned with preventing incitement to violence or hatred against people based upon protected classes like their race, ethnicity, religion, and gender preference. This council could be modeled after the existing Global Internet Forum to Counter Terrorism (GIFCT), which brings together representatives and information from technology experts, government, civil society, and academia to counter terrorist and violent extremist activity online.[53]

If a council modeled after the GIFCT – which was originally founded by Facebook, Microsoft, Twitter, and YouTube in 2017 – created standards of due care, and if some platforms consistently and flagrantly violated those standards, the council could call upon advertisers to place them on a do-not-support list. These standards of due care, with guidance from the previously mentioned council, could be further expanded to encourage social media companies to actively combat disinformation through a system of labeling, rating, and exposure. This practice would encourage a more responsible social media environment, as companies would be encouraged to label content, rate the validity of content, and expose users and sites in which disinformation is regularly posted or referenced while providing references to fact-checked sources.

Establishing a system of collective responsibility through adherence to established standards, whether legal requirements or industry standards, is one potential way to combat disinformation and foreign influence online. Responsible social media sites could effectively (possibly through incorporation of AI) label these accounts and posts as inaccurate, rather than deleting them.

Consideration might also be given to having internet service providers (ISPs, such as Verizon and Comcast) granted safe harbor to block servers, social media, or other websites that are found by such a council to be propagating disinformation that could lead to violence or that foster hate groups. Under the FCC's existing stance on net neutrality, ISPs may already have such authority. Many ISPs block particularly offensive pornography websites. ISPs that fail to block such disinformation could come under pressure from civil society groups and leading advertisers.

So what is to be done? The problem of state-sponsored disinformation is real, significant, and likely to become more damaging with the wider use of AI. The U.S. government has a legitimate interest in minimizing the effectiveness of foreign nations' attempts to amplify our internal divisions and their campaigns to spawn violence.

The government has a panoply of existing legal authorities to counter SSD, from criminal prosecutions of foreign agents at home to covert action and cyber operations abroad. Although the Justice Department must retain the sole authority to determine when and whom to prosecute, a White House coordinator should actively orchestrate the multitude of U.S. government entities that can track, expose, prosecute, and otherwise counter state-sponsored disinformation.

Such a White House coordinator should also work with private sector social media companies, internet service providers, and advertisers to establish voluntary standards for acting against state-sponsored disinformation. Such actions could include naming and shaming U.S. officials who spread disinformation, and labeling, systematically exposing, or possibly blocking malign activity originating with hostile intelligence services and propaganda agencies. All of that should be tried in earnest before any thought is given to further regulating free expression by real people.

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The Future of Speech Online: International Cooperation for a Free & Open Internet

Nick Clegg

This essay explores the impact that the resurgence of sovereignty has had on freedom of online speech. I argue that, in the past few decades, the internet has undergone a radical transformation from a universal tool of free communication to one that is increasingly fragmented into national and regional siloes. While acknowledging that recent internet regulation by democratic governments has been both necessary and inevitable, I argue that the authoritarian internet model – with citizens segregated from the rest of the global internet and subject to extensive surveillance and censorship – is on the rise, presenting a real risk to the internet as we know it. In the face of this threat, the world's techno-democracies need to work together to protect the freedoms that the internet has so far made possible.

The internet is the latest in a long line of communications technologies to have enabled greater freedom of speech. From the printing press to the radio to the television and the cell phone, technological advances have made it possible for more people to express themselves, share news, and spread ideas. At every stage, speech has been further democratized, empowering people who could not previously make themselves heard and challenging the influence of the traditional gatekeepers of public information – including the state, the church, politicians, and the media. These advances have often been met first with excitement and enthusiasm, followed by a public backlash fueled by a mix of legitimate concerns about the impact of technology on society and moral panic stoked by the vested interests whose power has been challenged. In time, these pendulum swings have come to a resting point through a combination of the normalization of the technologies in society, the development of commonly understood norms and standards, and the imposition of guardrails through regulation.

The internet has enabled the most radical democratization of speech yet, making it possible for anyone with an internet connection and a phone or computer to express themselves, connect with people regardless of geographical barriers, organize around shared interests, and share their experiences across the world in

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an instant. Over the last two decades, social media and instant messaging apps have turbocharged internet-enabled direct communication – and have exploded in popularity. More than one-third of the world's population uses Facebook every day. More than one hundred forty billion messages are sent every day on Meta's messaging apps, including Messenger, WhatsApp, and Instagram.

These technologies have made it possible for grassroots movements to grow rapidly and challenge established authority and orthodoxy, and in doing so, change the world – from the Arab Spring to the Black Lives Matter movement and #MeToo. A decade ago, sociologist Larry Diamond called social media a "liberation technology."[1] Without the ability of ordinary people to share text, images, and video in close-to-real time, and to have it amplified via networks of people connected through social media apps like Facebook, Instagram, and Twitter, the groundswell of public support for these causes and others would never have been possible. Social media also made it possible for millions of spontaneous grassroots community-based initiatives to start and flourish during the emergency stages of the COVID-19 pandemic to help the vulnerable or celebrate frontline workers, and for millions of small businesses to stay afloat and reach customers during lockdowns.

It would be naive to assume that connection inevitably leads to progress or harmony. The free and open internet is not a panacea. With hindsight, the techno-utopianism of the Arab Spring phase of social media was never going to last. But the pendulum has now swung far the other way, as it has done in the aftermath of previous technological advances, to a phase of techno-pessimism, with many critics decrying social media as the source of many of today's societal ills. This backlash has led us to a pivotal moment for the internet. Politicians around the world are now responding to the clamor with a new wave of laws and regulations that will shape the internet for generations to come.

The radical liberalization of speech enabled by the internet brings its own set of issues and dilemmas: from what to do about the spread of misinformation, hate speech, and other forms of "bad" speech, to a range of novel issues around privacy, security, well-being, and more. These challenges are worthy of lengthy analysis and discussion in their own right – and they are the focus of other essays in this volume.

It is right that policymakers the world over are grappling with the many challenges the internet presents and beginning to establish a new generation of guardrails intended to mitigate the potential harms. But if we accept as our starting point that, for all the downsides, empowering people to express themselves directly is on the whole a positive thing for societies, and that this has been enabled by the open, borderless, and largely free-to-access internet, then we must not take it for granted.

In its early days, many thought that the internet's distributed architecture and multi-stakeholder governance model would be enough to keep it open and free. It

was thought that the web was by design a technology that evades control by any single state or organization – an idea perhaps best captured in poet and political activist John Perry Barlow's end-of-the-millennium manifesto, "A Declaration of the Independence of Cyberspace."[2] As he rather grandly put it: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather." Alas, this idealism has proved to be misplaced. Events in recent years have demonstrated that the internet's design is not enough to guarantee protection from government control.

The clash between borderless open communication and authoritarian top-down control is one of the greatest tensions in the modern internet age. Authoritarian and semi-authoritarian regimes have demonstrated over and over that when they want to quash dissent, one of the tools they use is the internet. They often try to do two things: 1) censor what their citizens can say, and 2) cut their citizens off from the rest of the global internet. And, as we have seen firsthand at Meta, to do these things they target the use of social media and messaging apps by their citizens.

The global open internet was built on democratic values – largely by American companies with American expectations of free expression, free enterprise, and freedom from government control. The collaborative, multi-stakeholder approach to the development of interoperable protocols and standards helped ensure that a piece of information could reliably be sent from one digital address to another using a single language known as the "Internet Protocol," all without a government unilaterally deciding what those technical standards should be. That, in turn, laid the foundation for a boom in technological innovation, expression, and commerce that flowed over those networks in real time. For those of us living in Western democracies, this is likely the only model of the internet that we have ever experienced. But the global internet, in its truest sense, no longer exists. And what remains of it is being challenged by an alternative model.

The authoritarian internet model – with citizens segregated from the rest of the global internet and subject to extensive surveillance and censorship – is on the rise, presenting a real risk to the open, accessible internet as we know it. This is how China's internet works today, and other countries have made similar moves to build digital walls – or entirely new networks – at their national boundaries. Russia, for example, was already moving this way before the internet clampdown that accompanied its invasion of Ukraine.

Artificial intelligence is the next frontier for freedom of speech online. AI is currently being developed by private companies, academic institutions, and governments – including authoritarian ones. Unlike the historical era in which the internet was developed – the 1990s and early 2000s – in which the liberal para-

digm of the internet was taken for granted, today we have competing visions that aim to shape the standards and norms of the next generation of transformative technologies.

The fracturing of the global internet into local and regional siloes is likely to intensify – by both accident and design – in the years ahead. As it does, it poses an ever-greater threat to free speech both online and offline. Writing new rules for the internet has increasingly become an opportunity for governments to pursue their economic and social agendas, as well as the stuff of manifestos, sloganeering, and geopolitical horse-trading. As tech issues have risen in political salience, populist nationalism has found expression in the debate about the internet.

This new digital nationalism is not solely the preserve of authoritarian states. As is the case with the wider rise of populist nationalism globally, elements of digital nationalism are also creeping into the debate in open democratic societies. For example, talk of "digital sovereignty" and "data localization" – asserting a nation's right to stop or limit the free flow of data across borders – is now commonplace. These ideas increasingly underpin new laws. As they do, they chip away at the foundations of the open internet, which relies on cross-border data flows, and play into the hands of authoritarian regimes who see these terms being used in places like the EU and use it as political cover for their own more onerous restrictions.

Of course, it's right that governments should seek to express national sovereignty over matters of national importance to them. Barlow's declaration of independence from government control came when the internet was still nascent with a fraction of the billions of people who are online today. Ultimately, the phase of global internet regulation happening right now is necessary given the internet's level of maturity and its scale of impact on society, and many new internet regulations are designed to actively protect freedom of speech online. But the broader rise of digital nationalism poses an existential threat to the open internet, and in particular, the profoundly liberating effect it has had on people's ability to express themselves freely.

In a number of regions around the world, we have seen attempts by governments to silence citizens, control the flow of information, and manipulate public debate. This is increasingly the case during times of war and social unrest, when apps like Facebook, Instagram, Twitter/X, TikTok, YouTube, WhatsApp, and Messenger are used by ordinary people to connect within and across borders to make their voices heard, to share news and information, and to organize and rally support. Nowhere has this been more apparent in recent years than in Russia's invasion of Ukraine and during recent mass protests in Iran.[3]

Within days of Vladimir Putin's full-scale invasion of Ukraine, Russia attempted to block or restrict access to Facebook and Instagram as part of a wider attempt to cut Russian citizens off from the open internet, silence people and independent media, and manipulate public opinion. State-controlled media outlets and Russia-

based covert influence campaigns also kicked into gear to spread propaganda and misinformation and to subvert media narratives beyond its borders. In recent years, Meta and others have become increasingly savvy about how to identify and take down these campaigns, not just on their own platforms but across the internet through cross-industry cooperation. Since 2017, Meta has disrupted more than two hundred so-called "coordinated inauthentic behavior" networks globally.[4]

The widespread protests in Iran that began in the wake of the awful killing of Jîna Emînî, a Kurdish woman better known as Mahsa Amini, led to the Iranian government clamping down aggressively on speech and freedom of assembly, as well as limiting the use of the internet and apps like Instagram.[5] It's little wonder why: Instagram has been widely used by Iranians to shed light on the protests and the brutal response of the regime. Since Emînî's death, hashtags related to the protests in Iran have been used on Instagram more than one hundred sixty million times. #MahsaAmini was the fifth top hashtag globally during the first three months of protests, demonstrating the power of social media to help create awareness in these critical moments. Protestors also shared Instagram footage of the protests with international media outlets, many of whom couldn't report directly from Iran.

Clampdowns by authoritarian regimes on the use of social media and the wider internet are not limited to times of acute crisis. Increasingly, they are also using content and data laws to suppress free speech.

Laws that seek to come to grips with the proliferation of content online do not inherently have to impinge on the right of citizens to express themselves freely. Perhaps the best example of internet legislation that actively protected free speech comes from a generation ago. The last time the United States enacted significant internet regulation was 1996, when Section 230 of the Communications Act was created to address liability for online content.[6] The statute protects free speech by making online services immune from civil liability for the actions of their users while providing protections for platforms to moderate content. This combination of simple tools – a shield from liability for hosting speech generated by others, and the latitude to moderate that content – has often been hailed as an integral enabler of speech in the digital era that also unlocked innovation and commerce. But it is hard to imagine such a law being passed in today's climate. And Section 230 itself has not been preserved in aspic since the 1990s. For example, in 2018, the Fight Online Sex Trafficking Act / Stop Enabling Sex Traffickers Act was passed to clarify that Section 230's liability protections did not mean exemption from enforcement of federal or state sex trafficking laws.[7]

Of course, technological capabilities have also evolved exponentially in the last quarter-century, which is why updating Section 230 has been fiercely debated in

Washington and elsewhere in recent years. Done well, Section 230 reform can continue to promote free speech while equipping companies with the tools to combat harmful content such as child exploitation, pornography, incitement of violence, and bullying and harassment. Meta has spoken out in support of updating Section 230 to require platforms to be more transparent about their standards, processes, and actions; establish regular reporting requirements; and maintain a safe harbor approach, in which larger platforms are required to demonstrate that they have robust practices for identifying illegal content and quickly removing it. Any such requirements, Meta has argued, should not adversely affect the playing field for nascent or smaller companies that have less capacity to comply with a complex regulatory regime, with exemptions or modifications for those entities as needed.

Of course, cultural attitudes and historical sensitivities vary widely around the world, and nation-states have a sovereign right to determine what is legal and illegal speech in their territories. Doing so by no means represents a mortal threat to free expression. Few would argue, for example, that Germany's ban on Holocaust denial is unreasonable.

The threat to free speech comes from laws designed to quash dissent, restrict political speech, or otherwise infringe international human rights norms. China's restrictive "Great Firewall of China" content laws are well-known: there are vast swathes of websites that Chinese users are blocked from accessing, while news, satire, and other content are frequently censored.[8] And these restrictions can have knock-on effects beyond China's borders. Chinese-owned TikTok is one of the fastest growing social media apps in the world, but has been accused of restricting political content globally, including videos of prodemocracy protests in Hong Kong.[9]

Individual companies will decide for themselves when to stand firm and when to acquiesce in the face of laws or government requests they disagree with, but not without consequences. Companies like Meta receive countless requests from authorities in countries democratic, authoritarian, and in-between to remove political content, often accompanied by threats of fines if they fail to comply, and often shrouded in vague justifications of maintaining national security or public order. In some cases, refusal to remove content can lead to access to these platforms being throttled (a means of intentionally slowing internet traffic to a halt). And laws have been proposed in some countries requiring internet companies to designate local employees who can be held responsible by local law enforcement, adding an unsettlingly personal element to any refusal to cooperate with government requests.

Of course, if resisting attempts by authorities to censor content on a company's platform comes at too high a price, the alternative is to withdraw services from that market altogether. In either case, free speech is restricted. Either citizens use a platform that limits their ability to express themselves, or they lose the ability to use the platform to express themselves at all. But while censorship poses a direct threat to free speech online, another characteristic of digital nationalism – the

desire to limit the flow of data across national borders – poses an indirect but no less significant one.

For all intents and purposes, China's internet is separate from the rest of the global internet. Not only does China's internet model impose restrictions on content, it also requires restrictions on the flow of data in and out of the country, essentially creating a digital wall at its national border. As digital nationalism takes hold in other countries, support for data localization has grown.

For some policymakers, the motivation behind data localization policies is economic – albeit based on a deeply flawed misconception that "data is the new oil" – a scarce resource to be hoarded, enriching those who own the most. As I have argued elsewhere, notwithstanding the fact that it is a valuable resource for those who know how to obtain relevant insights from it, data is a nonrivalrous good rather than a finite commodity to be owned and traded, pumped from the ground and burned in cars and factories.[10] As such, the value of data does not lie in hoarding it, but in the network effects produced by global flows of data. It is this freedom of information flows that makes the internet, and its underlying structure of data, valuable not just for companies like Meta, but for billions of individual users, small businesses, civil society organizations, and researchers across the world. Fixating on where data is stored and processed is a red herring; its value can be derived regardless of where it is stored globally.

Nonetheless, this idea has influenced policymakers in a number of countries, and not just where authoritarian regimes are in power. While "hard" data localization policies result in an almost complete enclosure of a country's data economy within national boundaries, the desire to impose greater national sovereignty over data has increased support for "soft" data localization policies in many open democracies. This milder form of localization requires data to be mirrored in local servers, so that copies are held domestically, which has the effect of slowing internet services and limiting access to them. Indeed, support for data localization in liberal democracies unwittingly gives legitimacy to the actions of authoritarian governments who want to impose harsher control over the internet.

Following this trend, governments around the world are growing more aggressive in their demands for private platforms to comply with rules to produce data, block content, and break the end-to-end encryption that keeps messaging services private and secure. What's more, as the Center for Strategic and International Studies put it:

> National security justifications for these mandates are often thinly veiled attempts at asserting greater control of the domestic digital domain; meanwhile, data localization has had negative impacts on human rights, privacy, and economic interests.[11]

These developments create the conditions for the splintering of the open internet, with all the negative impact that this will have for freedom of speech around the world. This splintering not only risks changing the character of the existing internet, but also threatens to shape the next generation of transformative technologies powered by artificial intelligence – from "generative AI" tools that use machine learning systems to create new text and visual content, to "metaverse" technologies like virtual reality, augmented reality, and mixed reality that could reshape the way we work, learn, and play.

Without global cooperation on the development of the standards underpinning these powerful new technologies, they could be fragmented from the start. Instead of universal standards, we will have an arms race between different models, underpinned by different values, leading to a more technologically, socially, and culturally divided world than ever before.

We need a counterweight to the spread of the authoritarian internet. The world's techno-democracies must recognize and actively promote and defend the idea of the open internet. The announcement of an agreement to protect open data flows between the United States and the European Union is a necessary step, as are the principles enshrined in the "Declaration for the Future of the Internet" announced by the Biden administration and signed by dozens of governments in 2021.[12] We need concrete actions to follow.

To protect against the spread of the authoritarian internet, the democratic world needs a shared sense of ambition and urgency. In 1944, with the end of World War II in sight, the Allies gathered in Bretton Woods, New Hampshire. After a month of intense negotiations, an agreement was struck that became the foundation of global stability in the postwar era. Bretton Woods led to a new global governance philosophy based on the idea that if nations large and small ceded a degree of their own sovereignty to abide by the same global rules, it would prevent a return to the protectionism and economic catastrophes of the 1920s and 1930s. Global institutions like the International Monetary Fund (IMF) and the World Bank were created to promote economic growth and political stability for all. We need that same scale of ambition to unite the democratic world today. The internet has been one of the great collective achievements of humanity. It is time for its Bretton Woods moment. A shared sense of purpose based on universal values like free expression, transparency, and accountability could be the foundation for an international consensus that governments, industry, and civil society can organize around.

If we want to create a system with the teeth necessary to rigorously defend the open internet, we need an international body with the ability to hear complaints and adjudicate them when conflicts of law arise. This mechanism could apply to conflicts related to laws that impede data flows or undermine the protocols on which network interoperability relies, but also to resolving jurisdiction questions

related to other conflicts of law. States that signed up to such a body would be bound by its decisions, and expected to uphold shared values and refrain from regulating the internet in ways that put other countries at a disadvantage.

However, given the growing geopolitical chasm between the United States and the European Union on one side and China and Russia on the other, it may be wishful thinking to imagine the creation of meaningful new multilateral global institutions – the Bretton Woods moment and postwar institutions were made possible by the destruction of the Axis powers, and no such total victory over authoritarian control of the internet is possible. Therefore, an incremental approach is more realistic. Policy scholars Tanya Filer and Antonio Weiss have argued that the future of international cooperation lies in "digital minilaterals," which they describe as "a small, trust-based network with a shared set of values oriented around innovation and the creation and sharing of knowledge."[13]

Starting small is key to redeveloping the kernels of trust that have been lost in this climate of rising nationalism. Alongside the IMF and World Bank, an "International Trade Organization" was originally envisaged as part of the postwar Bretton Woods system as a necessary bulwark against the protectionist policies that contributed to the outbreak of war. Instead, the international community chose to enact a series of rules under the General Agreement on Tariffs and Trade (GATT), before finally setting up the World Trade Organization (WTO) to oversee those rules in 1995. A similar trajectory could be necessary for the sort of international cooperation required today to eventually blossom.

Indeed, the WTO could provide a forum for democracies to come together around a GATT-style arrangement on international data flows and other digital issues. It could include just a few key players at first, with the intention of expanding over time. Such an approach goes with the grain of recent attempts to get multinational agreement on digital issues. For example, leading WTO countries have taken steps toward a new global trade agreement on cross-border e-commerce. The 2019 plurilateral joint statement on e-commerce has now been signed by scores of WTO countries.[14] The statement includes the United States and China, but not India. Persuading India and others to join the e-commerce negotiations should be an integral part of the future of this process. The United States, European Union, and their allies could pursue a coordinated effort that would tie joining the e-commerce agreement with economic and political incentives. This could take the form of economic assistance, direct investment, and political support in international fora where appropriate.

The WTO could also bring democracies to the table around other pressing challenges, like regulatory coordination and expanding the CLOUD Act – which enables data to be shared for investigations of serious crime – to include more countries beyond the United States, the United Kingdom, and Australia. As the U.S. Department of Justice proudly proclaimed, the CLOUD Act "represents a

new paradigm: an efficient, privacy and civil liberties-protective approach to ensure effective access to electronic data."[15] This new paradigm should reach more democracies.

This approach – using the WTO to bring key democracies together around agreements that then expand to include more countries – could be a great starting point for global alignment on AI regulation, too. The Biden administration has already signaled its intention to legislate to safeguard privacy and civil rights in the use of AI technologies.[16] Using its global clout to bring nations together to establish common standards around AI would help to ensure democratic values are baked in as these technologies are developed across the democratic world.

Whatever the forum, democracies need to do more to provide support and guidance to private platforms in protecting free speech and defending human rights when they operate in authoritarian and semi-authoritarian countries. Starting small to get agreement between key players may be necessary, but the ambition should be global. Multi-stakeholder institutions in particular – in which government, industry, civil society, academia, and technical experts come together on equal footing – can support the development of a framework of actions that private platforms can take to do this across the globe and provide guidelines for the kinds of speech that need to be protected.

We are living through an extraordinary period. In three decades, the internet has radically democratized speech and transformed the global economy. And a new generation of technologies – from hugely powerful AI systems to metaverse technologies like virtual and augmented reality – promise to deepen the integration of data-driven technologies in every corner of our societies. Necessary new waves of laws to govern digital technologies are being written in capitals around the world, and governments are becoming increasingly savvy and sophisticated in how they harness technological progress to their domestic and global advantage.

The result is that the internet is changing – but not necessarily for the better. After a period of extraordinary openness, the internet is increasingly being carved up into national and regional silos. With each new national restriction, the internet becomes a little less free, and the digital economy becomes a bit more constrained. Slowly, the authoritarian internet replaces the open internet, and authoritarian values replace democratic ones online, not the least of which is the belief in free expression.

In the face of this threat, democracies have a responsibility and a choice: actively support the open internet or stand by silently as digital nationalism reshapes it piece by piece. Defending the open internet is still possible, but it will require serious political will and leadership, particularly from the world's leading techno-democracies such as the United States, European Union, India, and other significant leaders in this field like Japan, Australia, and South Korea. They not only need to reject digital nationalist policies domestically, but to cooperate to

guard against them internationally. We cannot afford any more benign neglect. The internet requires not a more intense version of digital nationalism, but rather a renewed belief in international and regional collaboration that aims to protect the freedoms that the internet has so far made possible to all.

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The Future of Free Speech: Curiosity Culture

Olivia Eve Gross

On college campuses today, students contemplate whether sharing their opinion is worth the consequences. In this essay, I delineate the current state of speech on college campuses and explore the role of no-platforming, social coercion, and social media's impact on this environment. Additionally, I describe how students are stifling the university experience by using a variety of methods to either silence speech or ensure that certain speech receives social punishment. The practice of elevating one's own view by silencing others' speech is not a new tactic, but is one that persists on college campuses in a variety of forms. To combat the current speech climate on campus, we need to foster a culture that is more curious and inquisitive by providing tools to students at a young age that support their ability to agreeably disagree and thrive in environments of open discourse.

Before entering college in 2020, I thought cancel culture existed solely in the domain of celebrities, newsmakers, social media, consumer brands, and large corporations. I first became aware of the phenomenon in its original context: a TV show was canceled in response to a backlash after its star committed an abhorrent act. In another case, a product-endorsement contract was canceled ahead of public outcry over the spokesperson's reported behavior. As these scenarios grew more common, I assumed cancellations only took place in the realm of the famous.

At the start of my first year at the University of Chicago, I learned that cancel culture had infiltrated campus life. Students were being shunned for voicing an unpopular view in class, excoriated on social media over a pun, or shamed for asking a question because they were of the "wrong" identity for the subject matter. My campus wasn't unique – if anything, Chicago does more than almost any other university to advocate and defend principles of free speech.

This revelation was as bewildering as it was upsetting. The fundamental mission of a liberal-arts education is to promote diverse perspectives, thoughtful debate, intellectual growth, and, hopefully, classmate camaraderie in the shared experience of it all. And my university does a lot to support this objective. But students themselves are now stifling the university experience by using a variety of

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methods to either silence speech or ensure that certain speech receives social punishment. Such trends have detrimental consequences for the campus community at-large, eroding the university's formative environment of speech. In polling conducted by the Foundation for Individual Rights and Expression, more than half of students (56 percent) expressed worry about damaging their reputation because of someone misunderstanding what they have said or done.[1]

For certain students on campus, the goal is not to rebut arguments but simply to stifle them. Speakers with whom these students disagree are to be "no-platformed." In a university context, no-platforming is the practice of blocking individuals or organizations from speaking on campus because their expressed views and agenda are deemed too offensive to the campus community or violative of its standards. All members of the university community are capable of no-platforming, whether that be students and faculty obstructing the entrance to a venue or administrators forbidding a speaker from presenting their views. No-platforming is distinct from protesting: protesting serves to communicate – literally, in many cases, to demonstrate – disagreement, whereas no-platforming seeks to deny the voice and presence of a given speaker altogether because "the targeted person is morally or politically beyond the pale, and . . . should thus be denied a view on campus."[2] While no-platforming has implications for various campus constituents and the prospective speakers, I will focus on its effects on the intended audience, the students. Further, I will describe how no-platforming greatly impacts the nature of discourse and social norms across the entire university community.

The term "no-platforming" can be traced back to 1974, when the UK National Union of Students (NUS) adopted a policy bearing that title that prohibited student unions from giving representatives of the fascist National Front Party – or other openly fascist or racist organizations or societies – access to speaking engagements at British universities. Soon after, this prohibition was applied to a wider range of speakers who espoused "harmful" views beyond fascism and racism, such as anti-Semitism, misogyny, Islamophobia, homophobia, and transphobia.[3] One's own view on the character of no-platforming will substantially depend on an individual's perspective regarding the role and mission of a university, including the university's relationship to the world beyond campus.

In discussing no-platforming in a university context, a distinction should be made between the general principles of free speech and the principles of academic freedom. Free speech principles are somewhat generic and based on the belief that "speech is entitled to special protection from regulation or suppression."[4] While the nature and extent of this "special protection" are subject to much debate, the core tenet holds that speech should not be restricted for being either bad, wrong, offensive, or false.[5] Principles of academic freedom, on the other hand, prescribe

liberties that are necessary to support the scholarly functioning and overall intellectual environment of the university. Such principles may resemble those of general free speech in seeking special protection for expression, but the premise is more specific and purposeful: "In order that everyone should have access to the information necessary for informed judgements about issues of public concern, societies need specialized institutions – including an independent university sector devoted to the creation and dissemination of expert knowledge."[6]

This points to a key concept espoused by many: the "special protection" for speech in furtherance of academic freedom requires, or presupposes, that the university is "independent" from the world outside it due to the particular nature and needs of the research and educational activity undertaken within its ivy-covered walls. This highlights a major dilemma for the principles of academic freedom as they pertain to speech and, by extension, no-platforming policies. Namely, if one of the aims of a university education is the development of students' intellectual autonomy in preparation for continued learning, personal growth, career success, and societal contribution post-graduation, then campus cloistering and censorship are fundamentally counterproductive. Exposure to and discussion on a wide range of intellectual perspectives, including those that may be extreme, disturbing, or even abhorrent, is an essential component of a student's educational journey in the development of their autonomy. Justifying the censorship of speakers and speech to preserve principles of academic freedom is contradictory to the goals of the environment. However, it is important to note that upholding free expression on campus does not equate to allowing anyone to say anything, anywhere, at any time. Universities appropriately restrict expression in myriad ways: such as forbidding students from yelling or sharing irrelevant speech in the classroom, prohibiting students from playing music too loudly in the dormitories, and punishing student protesters who violate university guidelines and disrupt campus life, as some universities did in response to students' encampments this spring. While these are not the core issues I am discussing, there are potential consequences to such restriction of speech that should also be considered.

Free speech scholars often argue that a foundational aspect of intellectual and personal autonomy is the ability to express oneself freely. The autonomy argument for free speech emphasizes the principle that limiting opportunities both to speak and, as important, to hear others speak violates a person's right to self-governance. This principle extends to various contexts, including within the paradigm of higher education and young adulthood, the process of self-actualization that enables self-governance. One's ability not only to speak freely but also to freely receive, analyze, interact with, and selectively internalize others' speech is essential to *becoming* autonomous. Philosopher Thomas Scanlon argues that such components are necessary in order to be respected as an autonomous agent: "an autonomous person cannot accept without independent consideration the judg-

ment of others as to what he should believe or what he should do" and that "persons who see themselves as autonomous see themselves as having a right to make up their own minds. . . . A right of this kind would certainly support a healthy doctrine of freedom of expression."[7] Given the formative role free speech has in the development of one's autonomy, the university campus is a domain in which protecting it becomes particularly important. The flow of information, exchange of ideas, and debating of opinions are integral to the university milieu and experience. Furthermore, free speech must be protected on campus because university students are at the age when they are undergoing their most intense and impactful intellectual, social, and personal development.[8]

An essential element and exercise of personal autonomy and, thus, an important outcome of a university education is the ability to distinguish fact from fiction, to discern the merits and demerits of an issue or position. Ultimately, this capacity enables individuals to make informed decisions about what information and opinions to assimilate or reject, asserting their independence and autonomy in shaping their own perspectives. As such, no-platforming deprives students of opportunities to develop and practice such analytical, discernment, and decision-making skills. This is consistent with philosopher John Stuart Mill's claim that an individual's views become properly defined and fully internalized only after they have withstood rebuttal and have exercised the best arguments in their opposition. According to Mill, without such a comparative, clarifying, and confirmational process, one's opinions are merely "dead dogma, not a living truth."[9] Therefore, free speech must be as open as possible to ensure exposure to and engagement with ideas and opinions that will undermine one's assumptions and challenge one's beliefs. Given the formative function and period of the university experience, Mill's imperative would seem especially applicable to students and is a further argument against no-platforming on campus.

Others, however, point to the same formative aspect of the university experience and environment to assert instead that speech should be limited and to justify no-platforming on university campuses. There is a risk that unrestrained free speech could unfairly and unnecessarily deceive students and thereby undermine their education and self-actualization. According to philosopher Neil Levy, "In refusing to offer bad views a platform, we therefore withhold misleading evidence, and to that extent, we treat the audience with the respect due to autonomous agents."[10] Here, Levy is asserting that no-platforming certain individuals is justified out of a respect for students and is rooted in an assumption that the proposed speech requires a worthiness to receive such a platform. Furthermore, because academic work entails research, development, and setting of facts and standards – that is, "creation and dissemination of expert knowledge" – for others, open access to speech on campus potentially can contaminate academic output with misinformation or disinformation.[11] While these arguments for speech

restriction and no-platforming in the name of academic freedom may seem plausible, they prevent students from exercising and enhancing critical acumen. Additionally, they embody a patronizing mistrust of students' ability to speak and judge for themselves, counter to the university's supposed mission of promoting the intellectual capacity and personal autonomy of its students.

When considering the potential consequences for speech restriction and no-platforming in the name of academic freedom, one can locate speakers or views in the past to be determined unworthy of a platform that would presently be viewed as being silenced unjustly. In the spring of 1968 at Bucks County Community College (BCCC), Dick Leitsch, president of the New York chapter of the Mattachine Society, an early national gay rights organization, was invited to give a speech. The President of BCCC, Charles E. Rollins, said that hearing from a gay rights activist "would not be in the best interest of the student body or the community" and canceled the speech. The fact that Leitsch's sexual orientation and lecture topic were reasons the administration found him to be unworthy of a platform challenges the notion that universities are capable of justly determining what is deemed to be "responsible discourse" and who is "credible" to speak. While the no-platforming of a gay rights activist would be far from the present norms on college campuses in the United States, such evolutions in who a university would deem "credible" further asserts that no-platforming provides more harm than good. The students at BCCC protested the college president's decision in what became one of the largest demonstrations in support of gay rights before the 1969 Stonewall rebellion in New York City and one of the only known pre-Stonewall gay protests on a college campus. The critical role of a university in accommodating student speech, even when it opposes both society's and the university's policies, is made evident by the protests that occurred at BCCC and on other campuses throughout history. Such expressions of speech on university campuses have allowed topics such as gay rights to be discussed long before they were considered acceptable areas for discussion in academia or society in general. As seen by what occurred at BCCC, student protest can clearly contribute to learning and progress both in the academy itself and in American society generally.

This commitment to free and open discourse is embodied in the Chicago Principles, which underscore the University of Chicago's dedication to fostering an environment of robust and uninhibited debate. Drafted in 2012 by legal scholar Geoffrey R. Stone as a response to attempts to suppress free speech, the Chicago Principles affirm the University's unwavering support for academic freedom and have been adopted or adapted by over seventy institutions across the United States. As Stone has noted, protecting free speech on campus is essential to intellectual development and autonomy: "It's about protecting the opportunity to debate ideas. Period."[12] No-platforming is therefore more adverse than ben-

eficial to the educational experience, even in cases of exposure to disturbing or offensive views. As Neil Levy asserts, students "need to learn to reason not only when we are calm but also when we feel attacked."[13] Again, as Mill argues, freedom of speech, while at times offensive, enables people to arrive at a clear understanding of truth, while censorship prevents them from distinguishing fact from fiction: "If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error."[14] Mill highlights a quintessential part of education, which is the opportunity for students to exercise their autonomy by undertaking their own truth-seeking process.

There are instances in which free speech on campus should be restrained to prevent, for example, the incitement of actual violence. While the boundaries between a person feeling attacked and being in danger of violence can in certain instances be profoundly hard to outline, speech can and should, in rare cases, be very mindfully and carefully limited. However, for the aims of a university to be achieved, the expression of ideas and opinions on university campuses must be free from coercive institutional restriction. For these goals to be pursued and reached, there are exceptions to this standard outlined by Mill: "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[15] Mill's position is known as the harm principle, which asserts that the speech of individuals should only be limited in order to prevent harm to others. While the importance of such a standard is clear for the benefit of a university environment, drawing boundaries for when speech violates such a principle presents a difficult challenge. If such a principle is not present, members of the university are not safe from the potential incitement of violence, but if exercised to an extreme, the goals of the university space can be threatened.

No-platforming often exemplifies the overly broad application of the harm principle, causing acceptable speech to be narrowed. When no-platforming was first used as a term, it was tethered to a substantive opposition to "openly racist or fascist organizations or societies."[16] Now, no-platforming is being used as a force of increasing intolerance that targets an ever-broadening array of speakers and viewpoints deemed objectionable by a particular sect of students. This dynamic poses threats to the goals of a university education as speakers are now refused a platform on the grounds that their claims constitute harmful hate speech.[17] For example, although cases involving the Israeli-Palestinian conflict inflict emotional reactions, it is not appropriate for them to be met with no-platforming, unless those instances disrupt the university's ability to function or there is a serious threat of violence on campus. However, as stated above, determining how one defines such a threat is a challenge. The simultaneous balance between the need for

the harm principle and difficulty deciding when speech is being overly censored is a serious challenge facing universities across the world.

While it is not clear how one can and should determine the boundaries of the enforcement of the harm principle, there exists a present need for widening what is generally considered to fall within the bounds of acceptable speech. The threats that over-restriction brings to the goals of educational spaces must be handled seriously. Currently, no-platforming is being exercised in cases that do not meet the threshold of the harm principle and is disrupting learning environments. Historically, one can easily identify that speech silencing has never come from just one political ideology. The tactic of elevating one's own view by silencing speech one does not agree with has come in a variety of forms using a wide range of strategies.

Similar to the aim of no-platforming, which seeks to deny the voice and presence of a given speaker altogether, the book banning taking place in K–12 schools across the United States aims to eliminate the existence of entire subjects. Rather than welcoming speech that challenges and thus edifies one's views, books are currently being banned at an alarmingly fast rate. According to a recent report from PEN America, there are at least fifty groups across the country focused on removing books they object to from libraries across the nation, and of the three hundred local chapters that PEN tracked, 73 percent were formed after 2020. The goal is to prohibit books containing such content as violence, graphic scenes, profanity, and images of, or references to, the LGBTQIA+ community. This has included banning work such as Toni Morrisons's *The Bluest Eye*, Margaret Atwood's *The Handmaid's Tale*, and several young adult novels with LGBTQIA+ characters.[18] The Keller Independent School District, just outside of Dallas, passed a rule in November 2022 banning books from its libraries that include the concept of gender fluidity.[19] Such book banning does not allow students to discern the merits and demerits of an issue or position, and ultimately to decide for themselves what information and opinions to embrace or reject. Book banning directly threatens the formation of critical thinking skills and contaminates the educational experience.

While no-platforming on college campuses challenges the fundamental mission of a liberal-arts education – to promote diverse perspectives, thoughtful debate, and intellectual growth – other dynamics cause similar damage. Students are stifling the university experience through a form of on-campus cancel culture that ensures certain speech receives social punishment. While it is clear that no-platforming can have intellectually crippling consequences for the campus community at large, social punishment from peers can seriously erode the university's environment of free and open speech as well.

Take for example Niko Malhotra, a student at Williams College who wrote an op-ed in his school newspaper to describe how COVID-19 restrictions set by Williams had impacted both the campus community and many students' mental

health. Malhotra wrote this piece when vaccination was mandated, and routine antigen testing was taking place on Williams' campus. According to Malhotra, some of Williams' guidelines contradicted the recommendations the Centers for Disease Control and Prevention had issued at the time, and Malhotra wrote in his op-ed, "Well, I don't follow the rules, and neither should you."[20] Malhotra published his piece with an awareness of the potential consequences, writing:

> I was ready for many people to be upset with my opinions but what I didn't expect was how much of people's reactions were targeted at me as a person rather that the content of my ideas, especially in a way that extended to my basic social interactions with my classmates on a small campus. That's what hurt – people thought of me as irredeemable in character solely because of my differences in opinion.

Following the publication of the op-ed, students he considered friends treated him as a stranger, and peers ignored him. Malhotra felt that because of his article, those who knew him and those he considered himself to be close to feared being associated with his views, and felt like they had to make a choice between remaining his friend or receiving social consequences for doing so.

Whether or not one agrees with Malhotra's views, we should aim to have campus environments that not only tolerate but encourage students of all viewpoints to freely share their opinions and write about them in their school newspaper. The thought of publishing or even speaking aloud should not be accompanied by the fear of receiving serious social punishment from peers for doing so. However, on today's college campuses, these fears are present among student bodies, eroding the environment of free and open speech. Malhotra's article intended to invite discussion, debate, and dialogue in a similar manner to the protests of the students at Bucks County Community College. According to one recent study by the Heterodox Academy, a nonprofit devoted to promoting viewpoint diversity, about 90 percent of students agree that "colleges should encourage students and professors to be open to learning from people whose beliefs differ from their own."[21] However, the treatment that Malhotra received because of his op-ed speaks to a culture on campus that socially penalizes students for sharing views that might be perceived as diverging from standards set by a student's own particular community.

Students on college campuses who desire to socially punish those who have different opinions than them are closing themselves off to new thoughts that might emerge from engaging with people or viewpoints they disagree with. Students should work to understand their peers, especially those they do not agree with, as such a process can both give them insight about what persuaded people to hold such opinions and simultaneously further develop their own intellect. While students should treat each other with respect, I am not saying that every person a student disagrees with must be their friend. Rather, I believe that we should aim

to have a culture on campuses in which people are curious to understand where those that they do not agree with are coming from. As opposed to being inclined to socially harm those we disagree with because of their views, we must invest in a culture on campus filled with curiosity.

From cases like Malhotra's, one can begin to see why, according to another study by the Heterodox Academy, nearly two-thirds of students surveyed agree that "the climate on their campus prevents some people from saying things they believe because others might find them offensive."[22] The "climate" referenced in this study is one where severe social punishment can be a result of particular speech, silencing students in fear of receiving such harm. Malhotra's friends would tell him that people would approach them asking why they would be friends with someone who held such views. When other students on Williams' campus witness the social punishment Malhotra received, they do not feel encouraged, but increasingly feel discouraged, to speak up about a variety of topics, and this is precisely what needs to change.

Malhotra's story is hardly uncommon on campus. Students can be targeted for something they said in a classroom or a social setting, censured online, and suddenly ostracized – or even accosted in person. Such behavior is usually committed in a "run-and-gun" fashion. A shamer quickly launches the attack via a mobile app or website and moves on. Others see it, internalize the accusation, and harbor and spread scorn for the target. If such a culture seems scary in professional settings, imagine what it's like on campus: the targeted person can be a roommate, a friend, an acquaintance, or a classmate. Even if it's a total stranger, the victims of campus cancellations are more visible, accessible, and therefore vulnerable to mistreatment than cancel culture beyond the campus.

Adults who are the targets of such efforts at their workplaces at least have homes to serve as distanced and separate environments; most students only have dorms. As Malhotra expressed, "Living in a dorm compounded the social consequences of voicing an unpopular or contentious opinion on COVID-19 restrictions. People who I interacted with on a daily basis in my building . . . would avoid eye contact with me out of fear of association. The consequences of speaking out in a way that did not conform to the dominant narrative were distinctly apparent." While the in-person treatment Malhotra received was hurtful, the attacks he received online took on a far more aggressive form.

Social punishment for speech that occurs online encompasses various elements that contribute to a potentially more detrimental experience for the individual being targeted. Because the shamer's social-media posting can be anonymous or disappear automatically, the target usually has no chance to respond directly with an explanation, a defense, or a correction. Even when such responses are posted, those who are already biased against the student are rarely interested in considering the other side of the story. Furthermore, Malhotra described that the negative speech

he received on social media had a combative tone that none of the harassment he received in-person possessed. Students feel far more empowered and invincible to share speech attacking someone's personhood when behind a screen, or as in some instances online, when anonymously posting.

Additionally, some accusations remain online forever and are ready to resurface with a simple internet search. We now live in a grim era in which students face potential life sentences – whose penalties include social ostracism or academic and professional rejection – based on allegations that might be distorted or baseless. Even when they are true, they are usually in response to statements that were immature, ill-considered, or easy to misconstrue – these are students after all. Rather than serving as a learning opportunity, these mistakes follow students.

Furthermore, social media amplifies the harm of cancellation beyond the initial ambush, as everybody piles on online. The group chat for all those who lived in Malhotra's dorm was utilized to call out and shame people who supported his article. And while devastating to the individual, such a social culture additionally damages the academic environment. Fear of receiving such punishment for one's beliefs has a chilling effect on students in the classroom, extracurricular pursuits, social events, and everyday interactions on campus. Students have become hesitant to offer an opinion, pose a question, or take the other side of an argument – whether in earnest or just to explore an issue – lest they say something "wrong."

The more that students are fearful about venturing beyond their comfort zones and cliques, the more the educational experience is degraded, and status quo becomes in vogue. Opinions aren't appropriately challenged in classrooms or common spaces. Trust to foster genuine open dialogue between students erodes. The great banquet of ideas that a world-class academic experience is meant to provide degrades into a diet of flavorless clichés and low-calorie conversations, exchanges for acceptance of what is most popular rather than critical analysis. This isn't what college is supposed to be and it certainly won't prepare future changemakers for the critical thinking skills required to participate in a well-functioning democracy full of respectful debate. A dedication to free speech and academic freedom is essential for rigorous and open scholarly inquiry. Students having a tendency to conform, accepting popular opinions without critical thought, can lead to dangerous consequences.

This situation is particularly disconcerting to me as a great-granddaughter of Holocaust survivors. I was raised to recognize and speak out against propaganda, silencing, groupthink, and public shaming. As an adolescent studying Talmud, Jewish religious law, I came to appreciate the questioning form of its text, its embodiment of the principles that opposing views are entitled to receive full consideration and that people can agreeably disagree. These are the roots of my passion for constitutional law, especially its core tenets of free expression, due process, and equal rights.

So how can this strain of cancel culture be counter-cultured? Outspoken contrarian voices by people in leadership positions – including, quite admirably, the late University of Chicago president Robert Zimmer – are commendable, inspiring, helpful, and necessary. However, they alone are insufficient to remedy the kind of deep-seated problem that such a pervasive campus culture of social punishment presents. They are, frankly, too few and too remote. Frightened students silently cheering them on won't change anything. Students who want a more robust intellectual experience need to stop whispering among themselves. They need to speak out and come to each other's aid when anyone, especially those whom they disagree with, is attacked for speech that is within the protections of the First Amendment.

When students on campuses witness social punishment like that which Niko Malhotra faced, they must speak up. The response to this campus culture will have to come from the ground up – from the students themselves. Sharing opinions, debating ideas, and challenging prevailing norms must not only be allowable, but expected, respected, and rewarded. And that, in turn, will require cultivating the skills of listening closely and giving others the benefit of the doubt, of practicing agreeable disagreement and fostering constructive dissent. In short, we need to replace cancel culture with *curiosity culture*.

While some universities are putting forth programming to cultivate environments of free speech, many of these efforts have come only as a response to incidents that have threatened cultures for open discourse on campus. For example, in March 2023, a group of students at Stanford Law School attempted to no-platform Fifth Circuit Court of Appeals judge Stuart Kyle Duncan by shouting so loudly that he could not deliver his remarks in full. Two days following his talk, Stanford Law School dean Jenny Martinez and university president Marc Tessier-Lavigne released a statement apologizing to Judge Duncan for the university's failure to uphold its own policies, which decree against such disruptions. In an additional statement, Dean Martinez described how a cooperative relationship between free expression and diversity needs to exist. She also announced that to create a stronger culture for open discourse, all students would be required to take a mandatory free speech training course, beginning in the spring of 2023.

Stances like Dean Martinez's are admirable and necessary, inspiring others to speak up, but such steps on isolated campuses are insufficient to remedy the kind of speech culture that now permeates on many campuses. While such efforts, regardless of their causality, are well-meaning, such work will take a far more significant amount of energy and must come far sooner in a student's academic journey. Free speech is integral not just to self-governance, but to self-actualization. If we demand the existence of academic environments in which open discourse exists, we simultaneously have the responsibility to ensure that students have the tools to get the most out of being present in such spaces. Beginning at a young age, stu-

dents need to be provided with environments of free and open discourse and be given the experience to discern information and articulate their own views.

I have been obsessed with the U.S. Supreme Court since a young age. In my adulthood, I have especially come to appreciate the Court's embodiment of the idea that opposing views can receive equal consideration and that people can agreeably disagree. During high school, I found it difficult to find spaces that achieved such a dynamic. I was intrigued by the structure of the Court and looked for extracurricular activities that similarly practiced the values of agreeable disagreement; to my surprise, I struggled to find them. I sought to interact with others in conversation, especially those I disagreed with, but wanted a space to do so that was grounded in primary documents.

This initial fascination with the Court led me to create the first High School Law Review when I was sixteen, which generated a space for students to learn about how the judicial branch functions, debate law, publish their opinions, and understand the role of dissent in the Court. We met every Tuesday morning, arrived early to discuss Court decisions, and planned our print debut. We took turns presenting and debating cases – giving equal time to differing viewpoints – and hosted guest speakers from top law school journals. Members were energized as they began to wrestle with and appreciate the interpretive challenges of the Constitution. In the law review setting, students increasingly recognized the importance of separating a person from their opinions. Additionally, within this space that we created, the fragility and ever-evolving nature of ideas was not only understood, but respected. Students were applying the notion of agreeable disagreement that they had learned while debating constitutional law to their everyday conversations. After creating this space at my high school, I began to receive notes from students around the country asking how they too could participate.

In response to this demand, I founded The High School Law Review, a curricular program and national competition centered on the value of agreeable disagreement through the study of constitutional law. Through this program, students anywhere can create a law review chapter of their own in order to practice agreeable disagreement, recognize the value in ideological difference, and promote free speech. I established The High School Law Review to facilitate a culture of curiosity, where students both desire to interact, and recognize the value in interacting, with those who think differently from them.

The path to widespread acceptance of free speech principles will be a long one, but we must start by providing students with the tools they need to confidently engage in agreeable disagreement to foster the leadership necessary for democratic participation. Getting students to begin to speak up and share their views on college campuses won't be easy. And it can certainly seem like the rewards might not be worth the risk. But this work is one of values – we need to support the thought-

ful cultivation of a college culture of curiosity, not social coercion. This work cannot be imposed but rather must be invested in at a young age through programs like The High School Law Review.

ABOUT THE AUTHOR

Olivia Eve Gross is the Founder and CEO of The High School Law Review, which offers curriculum and programs promoting the study of constitutional law and the value of dissent to students worldwide. Olivia recently graduated from the University of Chicago, where she studied Fundamentals: Issues and Texts, a multidisciplinary major that examines a central question through classical texts. Olivia focused on Plato's Gorgias to explore the question, "How do we agreeably disagree?" She also earned a Master's in International Relations, focusing on the commodification of social norms.

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Free Speech on the Internet: The Crisis of Epistemic Authority

Brian Leiter

Much of our knowledge of the world comes not from direct sensory experience, but from reliance on epistemic authorities: individuals or institutions that tell us what we ought to believe. For example, what most of us believe about natural selection, climate change, or the Holocaust comes from our reliance on epistemic authorities (scientists, historians). Sustaining epistemic authority depends, crucially, on social institutions that inculcate reliable second-order norms about whom to believe about what. The traditional media were crucial, in the age of mass democracy, with promulgating and sustaining such norms. The internet has obliterated the intermediaries who made that possible, and, in the process, undermined the epistemic standing of actual experts. This essay considers some possible changes to existing free speech doctrine to remedy the epistemological crisis brought about by the internet.

Every society has mechanisms for inculcating in its citizens beliefs about the world, about what is supposedly true and known. These epistemological mechanisms include, most prominently, the mass media, the educational system, and the courts. Sometimes these social mechanisms inculcate true beliefs, sometimes false ones, and most often a mix. What the vast majority *believe* to be true about the world (sometimes even when it is not) is crucial for social peace and political stability, whether the society is democratic or not. In developed capitalist countries that are relatively free from political repression, like the United States, these social mechanisms have, until recently, operated in predictable ways. They insured that most people accepted the legitimacy of their socioeconomic system, that they acquiesced to the economic hierarchy in which they found themselves, that they accepted the official results of elections, and that they also acquired a range of true beliefs about the causal structure of the natural world, the regularities discovered by physics, chemistry, the medical sciences, and so on.

Although ruling elites throughout history have always aimed to inculcate moral and political beliefs in their subject populations conducive to their own continued rule, it has also been true, especially in the world after the scientific revolution, that the interests of ruling elites often depended on a correct understanding of the causal order of nature. One cannot extract wealth from nature, let alone

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take precautions against physical or biological catastrophe, unless one understands how the natural world actually works : what earthquakes do, how disease spreads, where fossil fuels are and how to extract them. This is, no doubt, why both authoritarian regimes (like the one in China) and neoliberal democratic regimes (like the one in the United States) invest so heavily in the physical and biological sciences.

In the half-century before the dominance of the internet in America (roughly from World War II until around 2000), the most prominent epistemological mechanisms in society generally helped ensure that a world of causal truths was the common currency of at least some parts of public policy and discourse in the relatively democratic societies. There were, of course, exceptions : the panic over fluoridation of water in the 1950s is the most obvious example, but it was also anomalous. Even false claims about race and gender (that were widespread in the traditional media until the 1960s and 1970s) were met with more resistance from the pre-internet media, especially from the 1960s onwards. The basic pattern, however, was clear : social mechanisms inculcated many true beliefs about how the *natural* world works, while performing much more unevenly where powerful social and economic interests were at stake.

The internet has upended this state of affairs : it is the epistemological catastrophe of our time, locking into place mechanisms that ensure that millions of people (perhaps hundreds of millions) will have false beliefs about the causal order of nature – about climate change, the effects of vaccines, the role of natural selection in the evolution of species, the biological facts about race – even when there is no controversy among experts. Indeed, a distinguishing and dangerous achievement of the internet era has been to discredit the idea of "expertise," the idea that *if experts believe something to be the case, that is a reason for anyone else to believe it*. Experts, in this parallel cyber world, are disguised partisans, conspirators, and pretenders to epistemic privilege, while the actual partisans and conspirators are supposed to be the purveyors of knowledge.

Legal philosopher Joseph Raz's analysis of the concept of "authority" is helpful in thinking about what we mean when appealing to the idea of "authority" in epistemic contexts : that is, contexts in which we want to know *whom* we should believe when we seek the truth.[1] An epistemic authority, on this account, is someone who by instructing people about what they ought to believe makes it much more likely that those people will believe what is true (that is, they will believe what they ought to believe, *ceteris paribus*) than if they were left to their own devices to figure out for themselves what they are justified in believing.

Suppose, for example, I want to understand the "Hubble constant," which captures the rate of expansion of the universe. I could try reading various technical articles in scientific journals to figure out what I ought to believe about it. It is unlikely I could make good sense of this material, given my lack of background in the rel-

evant mathematics and astrophysics. Alternatively, I could consult my University of Chicago colleague, astronomer Wendy Freedman, an eminent scientist who has done seminal work on the Hubble constant. I am confident Freedman is an epistemic authority about the Hubble constant and cosmology generally, vis-à-vis me; I am more likely to hold correct views about these matters by attending her lectures (for undergraduates no doubt) than if I tried to figure these matters out for myself.

Why am I confident that she is an epistemic authority? It is obviously *not* because I have undertaken an evaluation of her research and published results, something I am not competent to do (if I were, I would not need to consult an epistemic authority on this topic). I rely, rather, on the opinions of others we might call *meta-epistemic authorities*: that is, those who can provide reliable guidance as to who has epistemic authority on a subject. So, for example, in the case of Freedman, I am relying on the facts of her appointment as a university professor at a leading research university and her election to the National Academy of Sciences,[2] as well as guidance from a philosopher of science with whom I have worked, and in whom I have particular confidence with regard to his meta-epistemic authority based on past experience.

Epistemic authority is always relative. Professor Freedman is an epistemic authority on the expansion of the universe vis-à-vis me, but would not have been vis-à-vis the Nobel laureate and cosmology expert Steven Weinberg, for example. Similarly, I am an epistemic authority on Raz's view of authority vis-à-vis my students and my colleagues, but not vis-à-vis Leslie Green, Raz's student who recently retired from Raz's chair at Oxford. Epistemic authority is relative both to what the purported authority knows and what the subjects of the authority would be able to know on their own. Epistemic authorities, in short, help their subjects believe what is true (or more likely to be true), and without that help, those subjects would be more likely to end up believing falsehoods or partial truths.

Here is the crucial epistemological point: *almost everything we claim to know about the world generally – the world beyond our immediate perceptual experience – requires our reliance on epistemic authorities*. This includes our beliefs about Newtonian mechanics (true with respect to midsize physical objects, false at the quantum level), evolution by natural selection (the central fact in modern biology, even though it may not be the most important evolutionary mechanism), climate change (humans are causing it), resurrection from the dead (it does not happen), or the Holocaust (it happened). Most education in the natural sciences, apart from some simple lab experiments students actually perform, is a matter of accepting what epistemic authorities report is the case about the nomic and causal structure of the world. The same is also true of most education about history and the empirical social sciences.

The most successful epistemic norm of modernity, the one that drove the scientific revolution – empiricism – demands that knowledge be grounded, at some (inferential) point, in sensory experience, but almost no one who believes in evo-

lution by natural selection or the reality of the Holocaust has any sensory evidence in support of those beliefs. Hardly anyone has seen the perceptual evidence supporting the evolution of species through selection mechanisms, or the perceptual evidence of the gas chambers. Instead, most of us, including most experts, also rely on epistemic authorities: biologists and historians, for example. (The latter, of course, rely in part on testimony from witnesses to the events they describe.) The dependence on epistemic authority is not confined to ordinary persons: most trained engineers, for example, rely on epistemic authorities for their beliefs about the age of the universe, just as most lawyers rely on epistemic authorities for their beliefs about who wrote the U.S. Constitution and why.

But epistemic authority cannot be sustained by empiricist criteria alone. Salient anecdotal empirical evidence, the favorite tool of propagandists, appeals to ordinary faith in the senses, but is easily exploited given that most people understand neither the perils of induction nor the finer points of sampling and Bayesian inference. *Sustaining epistemic authority depends, crucially, on social institutions that inculcate reliable second-order norms about whom to believe; that is, it depends on the existence of recognized meta-epistemic authorities*. Pre-collegiate education and especially the media of mass communication have been essential, in the modern age of popular democracy, to promulgating and sustaining such norms.

Consider one of the most important newspapers in the United States, *The New York Times*, which, despite certain obvious ideological biases (in favor of America, in favor of capitalism), has served as a fairly good mediator of epistemic authority with respect to many topics. It has provided a bulwark against those who deny the reality of climate change or the human contribution to it; it has debunked those who think vaccinations cause autism; it gives no comfort to creationists and other religious zealots who would deny evolution; and it treats genuine epistemic authorities about the natural world – for example, members of the National Academy of Sciences – as epistemic authorities. Recognition of genuine epistemic authority cannot exist in a population absent epistemic mediators like *The New York Times*.

The assault on knowledge – and especially on who counts as an epistemic authority – has been dramatically exacerbated by the rise of the internet. The internet, after all, is the great eliminator of intermediaries, including, of course, those who determine who has epistemic authority and thus deserves to be heard and thus perhaps believed. This was always its great attraction for those previously excluded from public discourse. As cyberspace, however, with its lack of mediators and filters, has become a primary source of information, its ability to undermine both epistemic authority and, as a result, knowledge has become alarmingly evident: it magnifies ignorance and stupidity and is now leading millions of people to act on the basis of fake epistemic authorities and the fantasy worlds they construct. Consider just a few examples.

Tens of millions of people in the United States continue to believe that Hillary Clinton and other Democrats were running a child abuse sex ring out of a pizza parlor in Washington, D.C.; one deluded individual even showed up with a gun at the parlor.[3] A recent survey found that 17 percent of Americans still believe that "a group of Satan-worshiping elites who run a child sex ring are trying to control our politics."[4] A man who murdered dozens of Muslims at two mosques in New Zealand was "steeped in the culture of the extreme-right internet," with "his choice of language [in his online manifesto], and the specific memes he referred to, suggest[ing] a deep connection to the far-right online community."[5] His manifesto explained that he had done research and developed his racist worldview on "the internet, of course.... You will not find the truth anywhere else."[6] The latter assertion involves, alas, a rather serious mistake about epistemic authority.

In the United States, millions may have forgone a vaccine for COVID-19 because of misinformation shared widely on the internet, including by an osteopath in Florida:

> An internet-savvy entrepreneur who employs dozens, Dr. Mercola has published over 600 articles on Facebook that cast doubt on Covid-19 vaccines since the pandemic began, reaching a far larger audience than other vaccine skeptics, an analysis by The New York Times found. His claims have been widely echoed on Twitter, Instagram and YouTube.[7]

Unlike those online inspiring mass murder, the possible causal connection between vaccine misinformation and harm to human beings is more uncertain, but one can see how it might proceed. Ignorant, gullible, or disturbed people come to believe that the vaccine is dangerous, rather than helpful; these people then forgo vaccination, and some fall ill and some die, infecting others along the way. Although epistemic authorities are united in rejecting this misinformation, the internet makes it available to millions while undermining the credibility of the actual epistemic authorities.

Speech that leads to bad conduct has been a long-standing problem for the law. The law could adopt a blanket prohibition on advocacy of unlawful conduct, but democratic countries with strong commitments to civil liberties have avoided such an approach, proposing instead to limit such prohibitions to advocacy that poses an "imminent" or "immediate" threat of unlawful conduct. John Stuart Mill's famous example of the speaker inciting an angry mob in front of the corn dealer's house by declaring that corn dealers starve the poor is the paradigm for this liberal approach: the speaker addressing the mob could be prohibited from the incitement in that context, but he should not be prohibited from publishing that opinion in the newspaper.[8]

The choices for speech in Mill's day were more stark than now: the soapbox agitator inciting the mob in person, at one extreme; or writing an essay in the

Times of London, at the other, an essay that would hardly be read – except perhaps by corn dealers and other capitalist elites! (Of course, there were also pamphlets and broadsheets in circulation; as media of communication, they are perhaps a bit like the current internet, but less omnipresent.) Inciting mobs in real time to lawless action is an easy case, even for those otherwise committed to very strong free speech protection; it is perhaps too easy, since it rarely gets prohibited, given that it happens in real time. However, the media for speech are more complex today. There remain, to be sure, speakers inciting mobs in real time in front of proverbial corn dealer's houses, but there are also pundits and talking heads on radio and television speaking to thousands or millions whom they can't see, but some of whom might be mobs menacing corn dealers. And then there are those uploading YouTube videos and podcasts, potentially reaching thousands or millions of the alienated, the disturbed, the marginalized, the "highly incitable." Mill's distinction has less direct applicability in our internet world.

This point was memorably made by a journalist writing in the wake of the bombings in Sri Lanka by Islamic terrorists in 2018. The government responded by shutting down social media for fear that it would incite anti-Muslim violence. Here is how journalist Kara Swisher described it:

> When the Sri Lankan government temporarily shut down access to American social media services like Facebook and Google's YouTube after the bombings there on Easter morning, my first thought was "good."
>
> Good, because it could save lives. Good, because the companies that run these platforms seem incapable of controlling the powerful global tools they have built. Good, because the toxic digital waste of misinformation that floods these platforms has overwhelmed what was once so very good about them. And indeed, by Sunday morning so many false reports about the carnage were already circulating online that the Sri Lankan government worried more violence would follow.…
>
> "The extraordinary step reflects growing global concern, particularly among governments, about the capacity of American-owned networks to spin up violence," The Times reported on Sunday.
>
> Spin up violence indeed. Just a month ago in New Zealand, a murderous shooter apparently radicalized by social media broadcast his heinous acts on those same platforms. Let's be clear, the hateful killer is to blame, but it is hard to deny that his crime was facilitated by tech.…
>
> Social media has blown the lids off controls that have kept society in check. These platforms give voice to everyone, but some of those voices are false or, worse, malevolent, and the companies continue to struggle with how to deal with them.

> In the early days of the internet, there was a lot of talk of how this was a good thing, getting rid of those gatekeepers. Well, they are gone now, and that means we need to have a global discussion involving all parties on how to handle the resulting disaster, well beyond adding more moderators or better algorithms.[9]

This journalist's concerns are articulated within the traditional "speech causing harmful behavior" framework familiar to the law of incitement inspired by Mill's example. She also aptly identifies the two crucial challenges the internet presents to this paradigm:

1. Without gatekeepers, the internet can easily become awash in the "toxic waste of misinformation." The internet "give[s] voice to everyone, but some of those voices are false or, worse, malevolent."
2. This "toxic waste of misinformation" can then "spin up violence" in crimes "facilitated by tech."

The first challenge is an epistemological one. The absence of gatekeepers means everyone can get through the internet gate (as long as they have access, which is less and less of an obstacle), and there is no check on their honesty, their accuracy, or their sanity. The result is that the internet is often an unreliable mechanism for generating true beliefs about the world. The second concerns the consequences of this epistemological failure, although "spin up" and "facilitated" are obviously rather vague for legal purposes. The idea, however, is that "misinformation" on the internet can incite violence thanks to the ubiquity of the message.

Now incitement has two parts: there are the (potentially) inciting words spoken in a particular context, and then there is the reception of those words by hearers (those "incited"). The law of incitement tends to focus on the former, simply assuming a generic hearer. While some words are *very inciting* to normal hearers, *under the right conditions* (Mill's case of the mob in front of the corn dealer's house, which was presumably the rationale of the Sri Lankan government), it is surely also important that some hearers are *especially incitable*, perhaps regardless of the context.

One can be more or less polite about this last point. As Swisher put it: "Social media has blown the lids off controls that have kept society in check." Why does society need "controls" to "keep" it "in check"? In the modern era, Freud articulated this concern most memorably in *Civilization and Its Discontents* in 1930, right before the Nazi catastrophe engulfed the world. In Freud's view, human beings are by nature driven by both aggressive instincts that pull them (and society) apart, and "erotic" instincts that draw them together; Freud's concern was that this instinctual "brew" was ready to blow up at any time, especially given the excess repression of "erotic" drives characteristic of his time. Even Marxists, who reject

Freud's view of human nature, can agree that society is always on the verge of "blowing up" precisely because of the exploitation of the labor of many for the benefit of the few. Whatever the explanation, it is clear that there are many infuriated and agitated people in all modern societies, a large proportion of whom are "highly incitable" (some of them with good reason). Part of the problem, even from the Freudian or Marxist perspective, is that those who have good reason to be angry and agitated are typically angry and agitated for the completely wrong reasons: they want to kill people of a different religion, for example, not their actual oppressors. Blowing society apart without rhyme or reason is not a "progressive" goal. That is why "keeping the lid on" is something free speech doctrine cannot ignore.

In the pre-internet era, the major media of communication helped to keep the lid on society. In the internet era, however, the law needs to consider the fact that there are people who are "ready to blow": that is, highly incitable, and thus susceptible to the omnipresent internet. Internet speech is not like Mill's firebrand agitating the mob in front of the corn dealer's house; content on the internet is everywhere, always available to those ready to "blow," wherever they are. It would be as if the agitator against the corn dealer could deliver his message not just to the mob in front of him, but to anyone, anywhere, in front of any corn dealer's house. In the internet era, and with the collapse of epistemic authority, we need to think about the effects of internet speech on these people.

Unlike in Mill's time, we can take a meaningful precaution against provoking the "highly incitable" while still allowing free expression: we could, as the Sri Lankan government did, shut down the internet, shut down the "toxic digital waste of misinformation" that might incite normal hearers and will almost certainly trigger the highly incitable; yet speakers can still stand on street corners and submit opinion pieces to the newspapers. Of course, shutting down the whole internet in an emergency is ripe for abuse, and one that would be hard to regulate against in advance. That certainly does not mean the Sri Lankan government was wrong in the case described above, but regulations authorizing generic "emergency internet shutdowns" are plainly risky given the background incentives governments have to shut down communication.

The internet, however, is huge and has many locations. One possibility would be to authorize regulators to close *particular sites* during emergencies, such as Google, YouTube, Instagram, and Facebook. The list would change over time, depending on what the most common sources of incitement are. Since Google searches are an instrument of mischief, shutting them down is in all likelihood particularly important.[10] Internet users will still be able to find all their regular websites without the benefit of Google (or other search engines), and they should still be able to access the news sites featuring content filtered through gatekeepers (like *The*

New York Times or the BBC). (As an alternative, perhaps government could block certain search terms on Google for a short period of time, depending on the emergency.) Like the Roman Republic's provision for dictatorial powers, such emergency shutdowns should be temporally limited: in the case of internet sites, say, one week, subject to judicial review of a requested extension. One thing we know is that time cools passions.

A better approach to filtering would reduce the number of places on the internet that offer incitement in the first place. This would require a significant change to First Amendment jurisprudence in the United States, which is particularly permissive. My proposal here would apply only to what I call "pure" internet sites. It would involve, in the first instance, creating analogs of existing "fighting words" and "incitement to imminent illegal action" doctrines under American constitutional law. By "pure internet sites," I mean websites that do not have analogs in the *traditional* (or "legacy") media – print (like *The New York Times*), radio (National Public Radio), television (CNN, ABC, Fox) – and that do not involve serious gatekeepers, who review content for defamation, accuracy, vulgarity, and so on. For these pure internet sites (such as blogs, webzines [some of which pretend to have editors], X, Instagram, and Facebook), I suggest that we apply the familiar categories of "low value" speech, *but without their temporal conditions*.

Fighting words, as the Supreme Court famously said, are words that "by their very utterance, inflict injury or tend to incite an immediate breach of the peace."[11] In the case of pure internet sites, this would mean *words that would, in real life and real time, inflict injury or tend to incite an immediate breach of the peace* are forbidden. So, too, for incitement to unlawful action, the test would be: whether these words, *if said "in front of the corn dealer's house" (that is, a temporal context ripe for incitement) would lead to illegal action*, in which case they would be forbidden. Stripping out the real-world temporal requirement is justified by the wide reach of the internet, and its potential to trigger not only the normally incitable, but the *highly incitable* as well. The internet constitutes a "virtual reality," as is often said, so it deserves "virtual" fighting words and "virtual" incitement doctrines. This would no doubt shut down a lot of internet ranting, but the loss to well-being (even accounting for the unhappiness of ranters) would be minimal. It seems plausible that those who want to spout "fighting words" would be less likely to do so in actual reality than in the virtual one. It is hard to see how this is an overall loss to society's well-being.

Yet none of the preceding, even if it would help with the risk of incitement and ensuing violence, would touch the problem of false information – about vaccines or false COVID-19 cures – that are peddled continuously on the internet (though not only there). Here is where the United States would require a fundamental rethinking of First Amendment doctrine and how it treats harms caused through the mental or intellectual mediation of a hearer/reader.[12]

The problem with current law is illustrated by the fate of the early 1980s proposal by writer and activist Andrea Dworkin and legal scholar Catharine MacKinnon to create a cause of action for harms suffered due to pornography. One law embodying that proposal was struck down as unconstitutional by the U.S. Court of Appeals for the Seventh Circuit in *American Booksellers Association v. Hudnut*.[13] The Court rejected the ordinance's definition of "pornography" as involving an unconstitutional content-based restriction on speech. The Court actually agreed with "the premises of this legislation. Depictions of subordination tend to perpetuate subordination."[14] But that did not mean the law passed constitutional muster; rather, the effectiveness of pornography in subordinating women

> simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a Manifesto by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government.[15]

The phrase "mental intermediation" does a lot of theoretical work in this part of the opinion. Much of that intermediation is "unconscious" (as the opinion even acknowledges), such that the individual presumably exercises no control. Even conscious intermediation is affected by forces beyond the individual's control.[16] The real question should be about the causal chain from "speech" to harm (subject, perhaps, to foreseeability or "reasonableness" requirements). Someone in the Weimar Republic in 1930 who thought Hitler and the Nazis should be shut down because their speech was very dangerous would in fact have been correct: Hitler and the Nazis made clear the harm they intended to do, in a way wholly unlike Marx and Engels (assuming someone actually read them). The real issue should be "the likelihood" (to quote the Seventh Circuit) of the harm, and the severity of that harm, not whether there is "mental intermediation."

The latter consideration was the real hurdle for the general Dworkin-MacKinnon idea, not the fact of "mental intermediation," whose role they would not have denied: the causal connection between the "speech" and the harm was not very clear and is even less clear now as pornography has become widely available. Countries with open internet access are now awash in pornography ("one click away"), to an extent Catharine MacKinnon would never have dreamed of at the time. The massive rise in exposure to pornography has not coincided with restrictions on the rights of women or an increase in sex crimes (although there are so many confounding variables, it is still hard to know the actual effect of pornography).

The contrast with false speech about COVID-19 and vaccines is instructive. The causal connection between those who hear false information and those who forgo life-saving vaccines and public health measures seems clearer. National Public Radio listeners and cosmopolitan professionals in major urban areas who read *The New York Times* are not generally forgoing vaccines and masking; Fox News viewers and "conservative" talk radio listeners are at higher rates. Of course, not *all* of the latter make bad choices, but some do, and do so because of the speech to which they have been exposed. What we need for pure internet sites (perhaps not only them) is tortious liability for harm that a *reasonable person would see as a foreseeable consequence of speech they knew or should have known was false*. We must be mindful that the concept of "harm" has been inflated in recent years, to encompass psychological states that would have previously been deemed "offensive" or "hurtful." "Harm" for purposes here should be limited to "injury to physical well-being." The knowledge requirement on the part of the speaker should be similar to "actual malice" in the defamation context: knowledge of the falsity of the speech or reckless indifference to its truth or falsity. Foreseeability judgments, as we learned from the American legal realists, are famously sensitive to situational factors and policy considerations, and that should be welcome: if you peddle nonsense about cures or vaccines during a pandemic, and people end up sick or dead, you should suffer the legal consequences if those people (or their estates) can prove the causal role of your speech in the outcome. How to think about causation is more complicated. Obviously, if a website is the exclusive source of the false information that leads to the physical harm, that is an easy case; the more likely scenario is one in which there are multiple sources of misinformation leading to harm, sources both on the internet and in the traditional media. Something like the "market share" liability theory from tort law should apply: purveyors of misinformation pay for damages in proportion to how much of the market they reach.

Whatever the doctrinal regime that is adopted, prevailing in tort will often be challenging (as it should be), but one may hope that the specter of liability will deter some of the worst offenders, even if it becomes a game of whack-a-mole. Sometimes, however, whacking (in court) the biggest moles is enough. The crucial point is that "mental intermediation" should be irrelevant, just as it is when the rabble-rouser incites the mob in front of the corn dealer's house, since "being incited" to unlawful action also depends on "mental intermediation." The fact that the "mental intermediation" lasts longer should be legally irrelevant.

There is a final obstacle in the United States to legal remedies in tort for mischief on the internet: namely, Section 230 of the Communications Decency Act. Section 230 shields internet service providers (ISPs), search engines, and websites from liability in tort for content that others provide. It does not exempt them, however, from liability for copyright violations or from violations of federal criminal statutes. The exemption for ISPs makes sense: they are more like the phone

company than *The New York Times*. But the idea that website owners get a free pass on hosting tortious wrongdoing, but not on hosting copyright violations, is *prima facie* bizarre. Section 230 is hardly the only approach democratic countries can take toward liability on the internet,[17] and it should clearly be repealed with respect to websites, but that is an issue I have addressed elsewhere.[18] What is important here is that if there is to be tortious liability for false speech on the internet that is foreseeably harmful (like lies about vaccines), we would need to change Section 230. Notice and takedown requirements, together with penalties for reckless or baseless notices, is probably the best approach (along with a prohibition on websites permitting waivers).

Counting against any efforts to regulate the internet is the strongest argument against government regulation of speech, in real or virtual life: distrust of regulators.[19] I have bracketed that consideration here, although it is the regulatory paradox that looms over all such discussions. If regulators are not themselves meta-epistemic authorities (or meta-meta-epistemic authorities), then asking them to regulate speech on the internet with an eye to maximizing epistemic values is a fool's errand. Perhaps we have passed the point of no return in the United States, in which the potential regulators are themselves epistemically incompetent. I am somewhat more optimistic, but time will tell.

AUTHOR'S NOTE

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ENDNOTES

[1] Joseph Raz, "Authority, Law and Morality," *The Monist* 68 (3) (1985): 295. Raz's main concern is practical authority, which aims to tell people what they ought to do, but that is not what is most important for my purposes. Raz's account has been disputed as an analysis of the kind of authority law claims. For one kind of doubt (but not the only one), see Brian Leiter, "Legal Positivism as a Realist Theory of Law," in *The Cambridge Companion to Legal Positivism*, ed. Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021).

[2] The National Academy of Sciences, like the American Academy of Arts and Sciences, has to some extent compromised its epistemic authority in recent years by giving weight to demographic diversity, rather than purely scientific and scholarly achievement, in its election of new members.

[3] Matthew Haag and Maya Salam, "Gunman in 'Pizzagate' Shooting Is Sentenced to 4 Years in Prison," *The New York Times*, June 22, 2017, https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html.

[4] Mallory Newall, "More than 1 in 3 Americans Believe a 'Deep State' is Working to Undermine Trump," *Ipsos*, December 30, 2020, https://www.ipsos.com/en-us/news-polls/npr-misinformation-123020. See also Kevin Roose, "QAnon Followers Are Hijacking the #SaveTheChildren Movement," *The New York Times*, August 12, 2020, https://www.nytimes.com/2020/08/12/technology/qanon-save-the-children-trafficking.html. More recently, see Giovanni Russonello, "QAnon Now as Popular in U.S. as Some Major Religions, Poll Suggests," *The New York Times*, May 27, 2021, https://www.nytimes.com/2021/05/27/us/politics/qanon-republicans-trump.html.

[5] Daniel Victor, "In Christchurch, Signs Point to a Gunman Steeped in Internet Trolling," *The New York Times*, March 15, 2019, https://perma.cc/W6BJ-XZ8U.

[6] Ibid.

[7] See Sheera Frenkel, "The Most Influential Spreader of Coronavirus Misinformation Online," *The New York Times*, August 27, 2021, https://perma.cc/V4L9-WVNY.

[8] John Stuart Mill, *On Liberty* (Boston: Ticknor and Fields, 1863), 107–108.

[9] Kara Swisher, "Sri Lanka Shut Down Social Media. My First Thought Was 'Good,'" *The New York Times*, April 22, 2019, https://www.nytimes.com/2019/04/22/opinion/sri-lanka-facebook-bombings.html.

[10] See Brian Leiter, "Cleaning Cyber-Cesspools: Google and Free Speech" in *The Offensive Internet: Speech, Privacy, and Reputation*, ed. Saul Levmore and Martha C. Nussbaum (Cambridge, Mass.: Harvard University Press, 2010), 161–162.

[11] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[12] This is not the only issue. The plurality opinion by Justice Kennedy in *U.S. v. Alvarez*, 567 U.S. 709 (2012) rejected the view that false statements of fact were simply "low value" speech, subject to little constitutional protection, and thus held that the Stolen Valor Act of 2005 (which imposed criminal penalties for lying about receipt of military medals and honors) was a content-based regulation subject to strict scrutiny. Concurring in the result, two Justices (Breyer and Kagan) held that false statements of fact deserved only intermediate scrutiny, but still the Act failed to pass constitutional muster even under this less demanding test. The dissent by Justice Alito (joined by Scalia and Thomas) argued that prior cases already stood for the proposition that "the right to

free speech does not protect false factual statements that inflict real harm and serve no legitimate interest." Ibid., 739. The dissent's view would ultimately have to prevail were regulations like those discussed in the text to be constitutionally viable, in addition to the issues discussed in the text.

[13] 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

[14] Ibid., 329.

[15] Ibid.

[16] On the general philosophical problem, and the relevant psychological evidence, see Brian Leiter, *Moral Psychology with Nietzsche* (Oxford: Oxford University Press, 2019), chap. 5, 7.

[17] Ashley Johnson and Daniel Castro, *How Other Countries Have Dealt With Intermediary Liability* (Washington, D.C.: Information Technology and Innovation Foundation, 2021), https://perma.cc/BA8R-ZCP6. Australia, for example, is proposing legislation that would require social media companies to have takedown provisions for defamatory content. See also, for example, "Australia to Introduce New Laws to Force Media Platforms to Unmask Online Trolls," Reuters, November 28, 2021, https://www.reuters.com/world/asia-pacific/australia-introduce-new-laws-force-media-platforms-unmask-online-trolls-2021-11-28.

[18] Leiter, "Cleaning Cyber-Cesspools," 156.

[19] See Brian Leiter, "The Case Against Free Speech," *Sydney Law Review* 38 (4) (2016): 407, 433–439.

Thinking the Unthinkable about the First Amendment

Nicholas Lemann

The First Amendment's press clause has long played second fiddle to the speech clause. With the professional press in steep economic decline, it may be time to consider freedom of speech and freedom of the press separately, in order to shore up journalism's distinctive, and imperiled, role in a healthy democracy.

On my bookshelf is a treasured relic of a bygone age, a full print edition of *The Oxford English Dictionary* (OED): twelve volumes plus five supplements, the last of them published in 1986. The OED puts the first use of *journalism*, "the occupation or profession of a journalist; journalistic writing; the public journals collectively," at 1833. *Journalistic*, "of or pertaining to journalists or journalism; connected or associated with journalism," arrived a few years earlier, in 1829. *Reporter*, "one who reports, debates, speeches, meetings, etc., especially for a newspaper; a person specially employed for this purpose," originated earlier still, in 1813. And *interview*, "to have an interview with a person; specifically on the part of a representative of the press," didn't appear until decades later, in 1869.[1]

I served as dean of Columbia University's Graduate School of Journalism for ten years, from 2003 to 2013. During that time, I was privileged to attend dozens, or maybe even hundreds, of official journalism events: banquets, prize ceremonies, and so on. Almost invariably, the speakers would extol the First Amendment as a sacred constitutional enshrinement of our profession. Often one of them would observe that we are the only field of endeavor specifically mentioned in the Constitution, or assert that it was the framers' special intent to put the amendment that mentioned us first because it was so important to them.

But as we see from the OED, such sentiments are self-celebratory historical fantasies, because there were no journalists in 1791, when the First Amendment was ratified. At the Constitutional Convention, in 1787, the framers specifically declined to include a press freedom clause in the original document, which is why the First Amendment, along with the rest of the Bill of Rights, was added a few years later by Congress. In the original version of the Bill of Rights, the current First Amendment was actually the Third Amendment, in line behind two others that were dropped because they couldn't attract majority support.

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If there were no journalists to celebrate, then what was the intention of the First Amendment's press clause? The most enduring contrarian view is still probably that of historian Leonard W. Levy (first published back in 1962), who believed that the words to pay attention to in the First Amendment are "Congress shall make no law" – meaning that the First Amendment was supposed to clear the way for *the states* to restrict freedom of the press if they wanted to.[2] Levy also argued that even for the federal government, the First Amendment was meant only to forbid prior restraint, which is why the short-lived Sedition Act of 1798, which was practically enforceable only after publication, didn't contradict the First Amendment.

First Amendment scholar David A. Anderson, refuting Levy, argued that the First Amendment made national a principle that several states had already established.[3] The original source of the language of the First Amendment, according to Anderson, was the Pennsylvania state constitution of 1776, which asserted that "the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore, the freedom of the press ought not to be restrained."[4] Anderson next follows the First Amendment trail to the Virginia constitutional ratifying convention of 1788, which adopted language that he sees as having been taken from Pennsylvania's constitution: "That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated."[5]

If one is searching for legal endorsement of the after-dinner speech version of the origin of the First Amendment, a good place to look would be a 1975 lecture by Justice Potter Stewart, called "Or of the Press," on the amendment's press clause. Stewart argued that the press clause should be understood as being aimed at the "organized" press, and is therefore conceptually distinct from both the speech clause and the rest of the Bill of Rights:

> Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[6]

Stewart – who, for what it's worth, was chairman of the *Yale Daily News* as an undergraduate – understood this institutional protection the First Amendment afforded the press as a distinct and limited one. It was meant not to enable people who happened to be publishing their work through news organizations to say whatever they wanted, but to enable the public to have more access to public information, in cases where the presence of a journalist was required to maximize the flow of facts to a broad audience. He described the role of the journalist this way in a short concurrence to a 1980 decision in the case of *Houchins v. KQED*: "He

is there to gather information to be passed on to others, and his mission is protected by the Constitution for very specific reasons."[7]

Unlike Leonard Levy or David Anderson, Stewart made no claim to have gone through the contemporary historical materials underlying the drafting of the First Amendment, so what he said can't function as proof that the framers shared his institutional and informational understanding of the press clause. My own conjecture would be that, whatever it should mean now, back then the First Amendment probably envisioned "the press" as a method for printing and disseminating speech, not as an organized endeavor dedicated to gathering and publishing verified information about public affairs, because the latter activity didn't really exist yet. That is, originally the speech clause and the press clause would have referred to essentially the same thing, not to two distinct and separate activities, one citizen-empowering, the other profession-honoring.

Still, in the era of social media, it has become especially obvious that speech and press are not in fact the same thing. As Justice Stewart said, they should be conceived separately and legally treated separately. Considering this requires setting aside the fears many people, including my fellow journalists, have about the risks inherent in letting the law into journalism.

It was well into the twentieth century before the Supreme Court heard any cases about either the speech clause or the press clause of the First Amendment. Even then, as attorney and legal scholar Sonja R. West has argued, the Court "has steadfastly refused to recognize explicitly any right or protection as emanating solely from the Press Clause," which has "left us with a Press Clause that is a constitutional redundancy." West elaborated:

> Because the freedoms to publish and disseminate speech are also protected by the Speech Clause, the Press Clause has been left with nothing to do. Members of the press thus enjoy the same freedoms of expression as any individual person but nothing more. The rights to publish or broadcast are the same as the right to speak, and what narrow protections for newsgathering the Court has recognized, such as limited rights of access to judicial proceedings, have been housed in a muddy combination of the freedoms of speech, assembly and press and awarded to everyone, not just the press.[8]

In *The Liberal Tradition in America*, political scientist and historian Louis Hartz calls Supreme Court jurisprudence Talmudic. By that standard, one could argue that the existence of the press clause must indicate that a more profound meaning must inhere in it than the Court has chosen to find thus far – by definition, nothing in the Constitution can be accidental or meaningless, so the press clause can't be the constitutional equivalent of a vermiform appendix. Pursuing this is difficult if one wants to operate strictly within the confines of original intent, because of the absence of professional journalists when the press clause was draft-

ed and ratified. David Anderson gave it the old college try, writing: "The Framers perceived, however dimly, naively, or incompletely, that freedom of the press was inextricably related to the new republican form of government and would have to be protected if their vision of government by the people was to succeed."[9] But one could also be less strict and say that, like universal voting and public education, professional journalism was a happy accident that arrived in the nineteenth century, without specific constitutional sanction, but has shown itself to be democratically essential and so deserves constitutional protection.

In Potter Stewart's 1975 lecture, he listed a number of ways the Supreme Court had endorsed his view of the meaning of the press clause. These had come during what journalists of my generation think of as the golden age of press law, and they entail giving journalists and news organizations special privileges beyond what ordinary citizens have, in support of their special function. The glorious twin pillars of this jurisprudence, from a journalistic point of view, were the *New York Times v. Sullivan* case (1964) and the Pentagon Papers case (1971), which protected the press from libel suits filed by public officials and from efforts to restrain publication of government secrets. There was a near miss in the *Branzburg v. Hayes* case (1972), when the Supreme Court by a five-to-four vote declined to exempt reporters from testifying before grand juries.

My purpose here is not to review press clause litigation in detail; suffice it to say that those long-ago victories don't now look like the beginning of a string of significant Supreme Court decisions based on the press clause, and that the most obvious problem in many press clause cases has been the difficulty of determining whom would be granted journalistic privileges. We are an unlicensed profession, and there is a free speech risk inherent in dividing all self-declared journalists into two categories, one for the legally privileged elite and another for upstarts and outsiders. But, as West pointed out, states have enacted laws granting privileges to journalists, government entities don't grant press credentials to all applicants, and the Federal Communications Commission gets to choose, partly on journalistic grounds, which applications for broadcast licenses it will approve. It isn't an insuperably difficult or inescapably controversial task.

During the heyday of the journalistic establishment, the Court's nearly exclusive focus on the speech clause was not entirely disadvantageous for those working in the press. The customary interpretation of the First Amendment brought together reporters and publishers, two groups who often tussle, in common purpose: both got special constitutional exaltation, and the publishers also got an implicit freedom from regulation on free speech grounds, a privilege that other recognized professions don't have. One doesn't hear the owners of television stations, who prosper from political advertising, loudly objecting to the Court's 2010 *Citizens United v. Federal Election Commission* decision, which protected campaign spending as a form of free speech.

News organizations have continued to pursue the cause of legal privileges for journalists, but without a sense of existential urgency – partly, perhaps, because of a collective sense that it's a lost cause. But there may now be another and more pressing reason for trying to give greater legal meaning to the First Amendment's press clause: it might function as one of a number of tools for combating the economic calamity that has befallen the organized, reportorial press in the twenty-first century, mainly as a result of the rise of the internet.

I assume I am writing for a mainly academic audience here. If your primary daily news source is *The New York Times*, and if you feel yourself to be generally awash in media content of all kinds, and if you're used to thinking of universities as perpetually beleaguered, you may not be fully aware of how much more beleaguered journalism is. According to Pew Research Center, newsroom employment in the newspaper industry fell by 57 percent just in the twelve years between 2008 and 2020, and the decline is surely continuing.[10] Overall editorial employment in other journalistic media has not fallen as rapidly, but newspapers are especially important because in most communities they do the lion's share of the kind of original reporting that we associate with professional journalism's social value. Digital-only news organizations like HuffPost and Vox, which not so long ago were being touted as journalistic replacements for newspapers, are laying journalists off too; Buzzfeed, also much touted, has entirely shut down its news organization.[11]

Journalism, especially the newspaper industry, didn't see this coming. In the spring of 2008, the Newseum opened a grand new headquarters, on Pennsylvania Avenue in Washington, D.C., midway between Congress and the White House, featuring a seventy-five-foot-high rendition of the First Amendment carved on a stone tablet that God might have been embarrassed to hand to Moses at Mount Sinai lest He appear immodest. Gannett, the nation's largest newspaper company and chief sponsor of the Newseum, was sold to a private equity company in 2019, after a vertiginous economic decline. That same year, the Newseum went out of business. At around the same time that the Newseum was opening, the three remaining major party presidential candidates – John McCain, Barack Obama, and Hillary Clinton – gave speeches at the annual convention of the American Society of Newspaper Editors (ASNE), in accordance with long-standing custom. The next year, there was no ASNE convention. The organization has since been reconstituted twice under different names, but it's a safe bet that the 2024 presidential candidates didn't come to its convention.

One sometimes hears the argument that the decline of the newspaper business owes to its having lost our trust, or to some other moral failing. That's nonsense, and indicative of the long-running failure of not just the courts, but also the public conversation overall, to recognize the meaningful difference between speech and journalism. The lost-trust theory rests on objections to the press's role as a platform for opinions, or opinions disguised as reporting, not as an information-

providing institution of the kind Potter Stewart envisioned. The professional reportorial press has long been underrecognized in debates about journalism. Even a journalism establishment production like the 1947 Hutchins Report, officially called "A Free and Responsible Press" and financed by Henry Luce of Time Inc., was primarily worried about the effect of concentration of media ownership on diversity of opinion and only secondarily worried about too-low professional standards in journalism. The more recent "media reform" movement has similarly focused its critique on corporate media ownership – and in this it has something in common with the antimedia aspect of the conservative movement, which for decades has assumed that big media companies are promoting a liberal agenda, just as media reformers assume they are promoting a conservative agenda. In all these forms, critiques of the press have rested on the assumption that organized journalism entails the privileged few speaking to the voiceless many, so redressing that balance would be a good cause.

If this was one's frame of reference, then the advent of the internet – in particular, the World Wide Web – seemed providential. It would be a medium unregulated by government, and therefore immune to the most obvious threat to freedom of speech and press, and it would permit anybody to publish anything, without interference, to a potentially infinitely large global public, and anybody to have access to any and all publications, corporate-approved or *samizdat*. The persistent top-down problem inherent in "press," as opposed to speech, would vanish. Even in journalism there was a sweeping optimism about the effects of the internet's open-access aspect.

Obviously, we are in a very different moment now. New companies like Google and Facebook found ways to make themselves among the most valuable in the world by inserting themselves as an information-providing layer between billions of people and the web. Google, at least in its early days, referred to itself as a media company, but unlike traditional media companies, it didn't create content, but merely compiled content that already existed. It would have seemed fanciful to traditional newspaper publishers that this could pose an existential economic threat to them – but it did. The economic decline of newspapers happened entirely for business reasons, not because they lost our trust.

When the internet first appeared, there may have been some newspaper publishers who believed it was just a passing fad, but more common was the theory that the leading newspapers would launch free websites, develop enormous audiences for them, and make lots of money through advertising sales, their traditional main source of revenue, while gradually shedding the expenses associated with paper, printing, and distribution. Instead, classified advertising platforms like Craigslist and display advertising platforms like Google and Facebook, offering much more efficient targeting of potential customers at much lower prices, took away the bulk of the newspaper industry's revenues.

Even more humbling, platforms based on searching efficiently for information that already existed (like Google) or on soliciting voluntary editorial contributions from great masses of amateurs (like Facebook) showed that they could create unimaginably larger audiences for their content than newspapers could. And with very few exceptions, newspapers have found themselves unable to persuade more than a small fraction of their readers to pay for online subscriptions, partly because they had already become accustomed to reading online content, including from newspapers, without paying for it.

A good deal of journalistic content gets read not through the websites of the organizations that produced it, as news organizations had hoped, but in the form of individual stories, photographs, and videos that zoom around cyberspace on their own, searched for, aggregated, or passed around along with a mass of family photos, individual hot takes, memes, and so on. For years, the major news organizations and Google and Facebook have engaged in a game of chicken: if you don't compensate us for our content, the news organizations say, we will withdraw and you will see large reductions in your audiences. Google and Facebook have consistently declined, without the threat of audience reduction being realized. From a First Amendment point of view, the online platforms, and the internet more broadly, operate on the assumption that free press is merely a subcategory of free speech, with no consequential difference. The global citizenry seems to agree, and we see the result in the declining economic fortunes of journalism.

We have entered what are surely the early stages of a period of government regulation of the major internet companies that is analogous to the advent of regulation of major industrial and financial companies during the Progressive Era. Absolute free speech online has already ended – substantially because internet companies themselves actively censor certain kinds of content, partly as a way of staving off government's taking on that task – though they argue at the same time that they should be exempt from the legal responsibilities of conventional publishers. The debate about the proper role of governments, nongovernment organizations, and private companies in limiting expression online is not my subject here; I'll just note that it is taking place, with rising temperatures on all sides. Because my concern is with press as opposed to speech, I want to focus on nonmarket activity that is beginning there, and that isn't yet as widely known.

The Biden administration's multi-trillion-dollar Build Back Better Act of 2021, which fell victim to the objections of moderate Democratic Senators and then passed in smaller form as the Inflation Reduction Act of 2022, contained a $1.7 billion subsidy for local news reporting in the form of a payroll tax credit. The subsidy didn't make the transition from one bill to the other, but it is still waiting in the wings, as are a number of other proposed government policies to provide aid to journalism. Senator Amy Klobuchar, the daughter of a Minneapolis newspaperman, has rounded up fourteen cosponsors from both major parties in support of

a bill that would give news organizations an antitrust law exemption so they can bargain collectively with Facebook and other platforms for the use of their content. Senator Maria Cantwell has proposed a Local Journalism Sustainability Act that would give tax credits to businesses that take out advertising in local news publications. There are also several proposed state initiatives. In private philanthropy, the MacArthur Foundation is leading an effort called Press Forward, which has created a $500 million fund to support local journalism.

It seems inevitable that not-purely-market varieties of journalism are going to emerge more strongly in the coming years as a way of preserving the reportorial function of journalism in the wake of the collapse of its economic support. These will likely take a number of different forms: from public news organizations on the model of the BBC, to private for-profit organizations that get special help through various public policies, to not-for-profits that benefit greatly from federal tax policy. The advent of such policy-enabled news organizations reopens the question of the distinction between free speech and free press. The aim of the press-encouraging ideas that are circulating now is not to promote speech – the wide circulation of a variety of ideas that is essential in a healthy democracy – but to promote reportorial journalism, which is something different. They are aimed at enhancing a socially beneficial function, which both new and existing organizations can take on, not at bailing out a dying industry. So it also seems inevitable that the courts will be asked to state a principle for inclusion in the new policy-enabled world of journalism. This would require differentiating the speech and press clauses of the First Amendment. Already, for example, a coalition of big-tech lobbyists and free-expression organizations like the ACLU and Public Knowledge have criticized Klobuchar's bill as a violation of free speech. If the bill were enacted, and those groups challenged it legally, how would the courts rule?

It isn't always clear to the outside world what goes on in a first-rate newsroom, and therefore why these institutions might deserve special legal and policy consideration. Journalism is an open-access profession. It requires no specific credentials. It has no dispositive field-wide code of ethics. Almost all substantial news organizations combine journalism that matches our preferred rhetoric about public service with journalism that aims solely to entertain. Because it was pre-internet, we can't know exactly how many people were reading Carl Bernstein and Bob Woodward's Watergate stories in *The Washington Post*, but it's a fair bet that it was fewer than were reading the comics, or the movie listings, or the paper's coverage of the local sports teams.

Still, there are meaningful distinctions between professional journalism and other kinds of published expression that could more fairly be considered speech, not press. Reporters, most often through the primary research technique of interviewing, surface new information that previously had not been publicly available.

Reporting can be done well or badly, but when done well, it is meaningfully different from expressing a personal opinion, and much more time-consuming and expensive, and therefore hard to accomplish as a volunteer solo activity. At news organizations, even the opinion writers do active first-hand research. The organization as a whole has a stated commitment to the extremely difficult tasks of avoiding mistakes in the vast torrent of material they publish, and of not neglecting whatever is happening in the world that is most important. If they screw these up, they apologize. News organizations lay many hands other than the principal author's on the material they publish, which improves the expression and provides a check against purely personal blind spots. This too is resource-intensive.

It breaks my heart to see all of the above, as violated as it regularly is in the breach, dismissed as merely "corporate," or overidentified with a few spectacular mistakes, and therefore happily replaceable by unorganized, distributed citizen journalism. Corporations that no longer exist – Knight Ridder, Times Mirror, Time Inc., all of whose grand headquarters towers now stand with the Newseum as Ozymandias-like monuments to vanished confidence – produced a great deal of excellent and valuable journalism. These institutions in particular have not been replaced, and in general it isn't easy to reconstitute the advantages that come with a large and varied institution after it's gone. (Imagine the disappearance of the university where you work.)

I know from experience that news organizations don't have to be huge or corporate-owned to hew to the better values of professional journalism. When I was twenty-four, I went to work for *Texas Monthly* in Austin, a magazine then five years old, independently owned, started by people in their twenties and thirties with no journalistic experience. The magazine paid for me to go on the road and do extensive original reporting for every story. The aforementioned David Anderson read everything I wrote and returned it with legal suggestions; he was one of two first-rate lawyers who vetted every story (the other, R. James George, was a former Supreme Court clerk, in private practice). There were also editors, copy-editors, fact-checkers (who would regularly go out in the field and re-interview the people I had interviewed, to make sure I had gotten it right), and photographers. All this happened because there was an established professional ethos that upstarts like us could tap into. And we succeeded partly because we did stories that, at the time, the established Texas newspapers were too cautious or unimaginative to do themselves.

There is a case to be made against all professions. They have the aspect of self-protection from economic or intellectual competition. They force the discourse in their fields into narrowed paths. They close ranks against critics. They resist external regulation. They lack diversity. They don't offer full transparency about their activities to the people they serve. What makes the professions we have worth having, despite these flaws, is a series of venerable rationales. Profes-

sions usually operate in the market economy, but their members are supposed to hold most dear a set of values that are separate from the pure economic motive, such as (in the case of journalism) public service. Professionals have special skills that empower them to operate in unusual situations, often crises, in ways that benefit others. "Objectivity" is a highly contentious word these days, so I'll use a term from sociologist Everett Hughes to describe the professional mindset: "detachment," meaning that the way you conduct yourself when practicing your profession is meaningfully different – more empowered in some ways, more restrained in others – from the way you would ordinarily conduct yourself simply as yourself.

In some professions, the practitioners have individual or institutional clients who have limited information about the fields in which they are seeking professional help, and who therefore need to be protected from the risk of real harm. That logic would apply to doctors, or to architects. Another rationale is that the competent practice of a profession requires the acquisition of a body of specialized knowledge and of techniques particular to the profession – that professionals must inform practice with theory. This would be the reason that law and academe are professions. Another is that members of the profession have confidential relationships with their clients that need legal protection. That would apply to members of the clergy.

For journalists, professionalization would have the same disadvantages as in other professions, but the speech clause of the First Amendment – standing for the principle of unrestricted public discourse – gives these disadvantages a special force. For the sake of argument, though, what would be the advantage of journalism's becoming a profession, with the First Amendment's press clause being the legal justification for that? The traditional rationale is that professional status could endow journalists with formal privileges, with the expectation that having these would enable journalism to perform its public-service mission more fully. I would add to this my own prediction that some standard of professionalism will be necessary to justify a variety of public policies aimed at helping news organizations, and to determine which organizations will benefit from those policies. A more profound (and surely controversial) rationale would be to ensure that journalists have a set of capabilities that go above and beyond merely the ability to perform the work of a newsroom, and would push that work in the direction of better fulfilling journalism's social obligations.

I have been working as a journalist for fifty years, and as an educator of journalists for twenty years. I know both worlds well enough to know that many of my colleagues in journalism don't think there's anything that could be characterized as "academic" that would be pertinent to working in a newsroom. They're wrong. In journalism, as in every other profession, there ought to be an intimate and unbreakable connection between practicing as a professional and what a uni-

versity education in the profession can provide. The connection in some other professions can be understood as purely logistic: I'm not allowed to set myself up in medical practice without a degree or a license. For journalism, it can't be that – I don't envision a world in which the door to self-admission into journalistic practice ever closes. That means the case has to be made purely on its conceptual merits.

Professional education should not be pure practical training, properly accomplished by replicating what goes on in an entry-level job. Unfortunately, that has been the dominant construct in journalism education for more than a century, and it has gained force with the steep decline in newsroom employment: if newsrooms no longer have the resources to operate in-house apprenticeship systems, journalism schools can step into the breach.

But think about what goes on in professional schools in other fields. They treat practice not simply as a set of skills to be mastered, but as a body of evidence from which to make inferences about better ways of performing the profession's mission, which can then be taught to practitioners in training so they will do a better job than their predecessors. They identify a body of knowledge and a set of distinctive intellectual methods that future practitioners should acquire. They confer something of the history of the profession and of its relationship to the other parts of society that make up the context for professional practice. They teach professional ethics. They blend a measure of academic learning with a measure of professional doing.

Journalism schools – which overall, to be clear, are overwhelmingly oriented toward undergraduate teaching and preparing their students to work in "communications" fields like advertising, marketing, and public relations, not toward graduate professional education for journalists – have been good at adopting some of these overall precepts of professional education, not so good at others. Their strengths are guiding students through producing their own journalism, teaching ethics, and acting as conveners, cheerleaders, and critics for practitioners. Ironically, since journalists are supposed to be people who can quickly figure out how the world works, their weaknesses are in finding a place in their teaching for things that lie outside of current newsroom practice. These might include skills like statistical and computational literacy and locating expertise on one's topic, conceptual material like scholarly critiques of journalism, and habits of mind like becoming aware of one's prior assumptions, developing and testing hypotheses, and learning to understand the changing world by means that go beyond just tracking the activities of leaders and the unfolding of events, into identifying underlying systems and structures. We have experimented with all of this at Columbia Journalism School, in ways that by now have demonstrated its fruitfulness in producing not academic media experts, but working reporters who are now producing work at journalism's highest levels.

Hardly anybody is suggesting that journalists be formally licensed in order to practice, so we don't have to settle once and for all the semantic question of whether journalism is a profession. Sociologist Elihu Katz suggested a few years ago that journalists aren't professionals, but applied scientists, usefully thought of in a pairing with meteorologists, because each field "tells about departures from the normal and threats to societal well-being."[12] The question is whether a clearer distinction between free speech and free press could be used not just to shore up journalism but to improve it, to make it more socially useful by raising its standards. This wouldn't entail suppressing anyone's speech – again, the difficult free speech questions that social media platforms present are not my subject in this essay – but it would entail creating a meaningful categorical distinction for journalists that would be the basis not just for legal privileges, but also for special policy and funding consideration.

The most obvious and most common objection to this idea is that putting government in charge of determining who is and isn't a legitimate journalist or news organization, in order to confer or deny privileges, is an unacceptably scary prospect. There are many current examples available from all over the world to show that it isn't wrong to worry about this. During what I've called the golden age of press law, the Supreme Court's decisions were libertarian in the sense that they gave the press more freedom from outside claims that would limit its autonomy. In those days, broadcast journalism was far more heavily regulated than it is today; at the height of the golden age, in 1969, in the case of *Red Lion Broadcasting v. FCC*, the Supreme Court ruled unanimously that for a federal regulatory agency, under the Fairness Doctrine, to require a local radio station to offer time to someone criticized on a broadcast was not a violation of the First Amendment. Four years later, Justice William O. Douglas, who had not voted in the *Red Lion* case, wrote a concurring opinion in another case in which he said it had been wrongly decided: "The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."[13] Douglas's opinion was in line with the general antiregulatory mood that was stirring at the time, including among liberals, and sentiments like his were surely part of the background to the reluctance of Congress and the Supreme Court to create additional special protections for the press. The Fairness Doctrine was abolished in 1987.

One argument for regulating broadcast journalism but not print journalism was that broadcast journalism required government's presence as the referee of scarce and lucrative access to the spectrum. The advent of the internet obliterated that argument and opened the way for the complete deregulation and open access that reformers had been longing for. But now we see the disadvantages of that change, both in terms of what is now published and, just as important, what

is no longer published because of the economic effect that the internet-era market structure has had on news organizations. In this light, the half-century era of American broadcast regulation doesn't look so bad. Neither does government-involved public broadcasting, here and elsewhere. One could even argue (perversely, I know) that, back in the early days of broadcast regulation, government delivered the crucial push to private companies that led them to offer education and news programming, rather than just entertainment. And even after the deregulation of broadcasting, American governments at all levels continue to make distinctions among claimants to the title of journalist, for example, in granting access to legislative press galleries.

Journalism isn't unique among professions in being in danger of disastrous government interference or censorship. A common way of avoiding this danger – imperfect, like everything else in life, but roughly effective – is peer review. This means creating a body of government-appointed experts in the field who can then make specific and consequential decisions about a profession – for example about funding – on their own. Most of what we know about climate science is the result of government-funded research conducted at universities, even though climate change is an extremely difficult issue for government officials to deal with. Even in areas without formal peer review bodies that have decision-making power, government often shows respect for professional opinion. You may not like the current Supreme Court, but you can't argue that the Justices were not outstanding students at top law schools. In journalism, it's easy to imagine peer-review panels being created to serve as a meaningful layer between politicians and news organizations that were selected to benefit from the various policy ideas that may soon be enacted to strengthen journalism.

The advent of powerful social media platforms, unanticipated in the early days of the internet, has generated large questions about free speech – so large, perhaps, as to have obscured the devastating economic effects of the internet, and social media in particular, on the professional press. We might make the situation better by beefing up the distinction between the speech and press clauses of the First Amendment, as a way of giving press, as distinct from speech, favorable treatment that it badly needs. Social media platforms have made it obvious how different speech and press really are. The risk of treating free press, legally, as identical to free speech is that we'll wind up with a lot more speech and a lot less press. That is the path we are on now.

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The Fate of American Democracy Depends on Free Speech

Suzanne Nossel

The freedom of speech – an essential cornerstone of American democracy – is under direct attack, leaving American institutions, civic culture, and society deeply vulnerable. Restrictions on books and educational curricula, limits on assembly rights, the rampant spread of disinformation, the chill of "cancel culture" and online abuse – all impinge upon the open exchange of ideas that the First Amendment was intended to underwrite. Encroachments on freedom of expression emanate from all sides of the political spectrum and through both formal and informal channels. It is imperative that efforts to contain and surmount the crisis of American democracy include a sharpened focus on the defense of free speech, an essential counterpart to voting rights, civil rights, and a healthy democratic culture.

In response to our democratic crisis – polarization, contested elections, political violence – philanthropists, activists, and civic leaders have set about trying to find ways to restore democracy and a vibrant civic culture. Foundations have launched ambitious new programs. Individual philanthropists have convened collaboratives – the Democracy Alliance, the Democracy Funders Network, New Pluralists – aimed to pool resources and insights to shore up the polity. A cottage industry of new organizations has grown over the last seven years to work on voting rights, voter access, election laws and systems, civic participation, and more. These valiant efforts have collectively helped tamp down political unrest, fend off demands to reject the 2020 election result, and defend vulnerable democratic systems at the state level across the country. Many of these efforts are geared not just toward fortifying American democracy in its current form, but also to reinventing it to better meet the needs of a country buffeted by technological, demographic, and social change.

One bulwark of a healthy democracy that these efforts have not sufficiently prioritized, however, is free speech. This is doubly surprising. First, because alongside voting rights and systems, good governance, and civic participation, free speech and open discourse have always formed part of the backbone of a healthy democracy. And second, because free speech and open expression are so clearly under threat today. Controversies over free speech – what can and cannot

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be said, taught, studied, and read – are fueling grievances that are deepening polarization and distrust in our political system. Yet the battle to uphold free speech has not been incorporated into the broader movement for democracy. It must be.

In this essay, I first describe the loss of faith in free speech on the left and the right and the reasons for it. I then detail the relationship between free speech and democracy, and how it has come under pressure from growing pluralism, polarization, and digitization. I follow by outlining how a flagging commitment to free speech in education, in terms of protest and assembly rights and in relation to the role of the free press, are collectively weakening American democracy. I conclude with a series of recommendations that can help shore up the place of free speech as a democratic cornerstone now and for generations to come.

Free speech is in danger of losing its status as a prime American value. The courts still uphold the right to free speech; indeed, free speech protections were steadily widened by judicial decisions throughout the twentieth century. But free speech ideals are now faring poorly in the hands of legislators, politicians, institutions, and citizens. Meanwhile, a growing slice of twenty-first-century challenges to free speech – the harms of social media, so-called cancel culture or informal reprisals for errant speech, hot button subjects that are effectively off-limits for discussion on college campuses and in the media – do not implicate state action and, for the most part, cannot be redressed through constitutional channels.

Embedding the place of free speech in American society and culture thus requires recognizing that the freedom of speech is not just an individual right, but also a collective cultural value. The violation of free speech rights by the government in relation to specific citizens is not the only threat to free speech in the United States today. Rather, the perception that one cannot speak freely – coupled with the fear of reprisal or exasperation that our discourse makes it impossible to be heard – is feeding corrosive levels of social and political frustration. In Florida, outrage over so-called wokeness has fueled the most comprehensive legislative assault on free speech rights in memory, with limitations on what can be taught and studied in schools and colleges.[1] The defense of free speech and open discourse cannot be left up to attorneys, legal scholars, and courts. The obligation rests with individual citizens and with a wide range of institutions and leaders, in and out of government. At a time of deep political schisms, free speech must be elevated as a cause above politics, with leaders across the spectrum recognizing that the free exchange of ideas is a prerequisite to achieving their own political priorities and social visions.

Too many young progressives see free speech as a smoke screen for hatred. Loose talk about the harms of speech has cordoned entire subject areas – transgender rights, affirmative action, reparations for the historic mis-

treatment of minority populations, public safety, the Israeli-Palestinian conflict – as virtually off-limits for discussion in classrooms and other campus settings (as well as in workplaces), lest errant comments cause offense and lead to hard-to-shake accusations of bigotry or inexcusable callousness.[2] Invited speakers on these and other topics have been shouted down at universities by irate student protesters who cast free speech – or, more specifically, open discussions of contrary views on topics such as racial justice, gender identity, or war – as inimical to their causes.[3] Administrators have fired professors for depicting paintings considered offensive, supporting union activity, and criticizing mask mandates.[4] That the loudest voices asserting and defending free speech rights on campus are sometimes libertarian or conservative can compound the perception in some quarters that free speech rights are about protecting the powerful and privileged (or at least the white and the male), and are at odds with social justice causes.

Ironically, although some on the right have denounced enforced ideological orthodoxies in higher education and elsewhere in the name of free speech, some conservatives have emerged in recent years as some of our most aggressive censors. Republican-controlled statehouses and schools have embraced legislated book bans and restrictions on curricula in classrooms and higher educational institutions.[5] They have disproportionately targeted books and theories by and about minority authors and gays, lesbians, and transgender people, rejecting newer, broader ideas about racial equality, gender identity, and sexual orientation. The move to marginalize these viewpoints has been accompanied by a reversion to old-fashioned, even prudish notions of sexuality, with objections being lodged against books like the *Diary of Anne Frank* or Toni Morrison's *Bluest Eye* on the grounds that they are pornographic.[6] As an antidote to what they regard as wokeness run amok, they choose censorship. While courts may curb some of the overreach, states and school systems have wide latitude to determine what is taught in public classrooms. Moreover, research shows that, in hearing free speech cases, judges tend to be more vigilant in guarding speech that aligns with their own political values.[7] Staunchly conservative district and circuit courts in parts of the country where educational censorship is afoot may sympathize with legislators who see the suppression of ideas considered controversial, inappropriate, or subversive as justified.

These pressures from the left and right are undermining free speech as a bedrock constitutional, cultural, and democratic value in the United States. If young people view free speech as an alien concept at odds with their beliefs, it will only be a matter of time before such attitudes – now widespread on college campuses and among organizations where progressives predominate – pervade all forms of workplaces, editorial pages, statehouses, and courthouses. If restrictive content-based laws dictating what can and cannot be taught in schools and universities become the norm, these educational systems will cede their influence as breeding grounds for democratic citizenship and as settings in which students learn to

grapple with the widest breadth of ideas. Meanwhile, fast-evolving digital technologies are reshaping how we find and absorb information, making it harder to distinguish between fact and falsehood (including on pressing civic matters such as elections), raising the costs of certain kinds of speech, and creating new methods to intimidate and silence others. These trends pose a proximate risk to American democracy and reversing them is essential to the future of the democratic project.

The nexus between free speech and democracy is both abstract and concrete, universal and particular. As set out in the First Amendment, free speech is a series of interlocking rights that collectively ensure that citizens have the ability to perpetuate and perfect their system of governance. The First Amendment's protections – of freedom of belief, speech, the press, and assembly, and the right to petition the government for the redress of grievances – operate on a spectrum from the personal and private to the public and political. They protect the right to think and believe as you choose, express those beliefs to others, syndicate those views through media, rally fellow citizens behind a cause, and press the government for action. Those freedoms are the essence of democratic citizenship. Being a citizen in a democracy allows and, indeed, demands that an individual do more than just cast a vote on election day. To cast a ballot conscientiously requires receiving information, forming personal beliefs, understanding public concerns, and being ready to hold officials accountable. Absent such forethought and engagement, casting a vote is an empty act. A vote cast willfully and conscientiously depends upon the exercise of the freedoms enshrined in the First Amendment and on the existence of public discourse that allows people to be informed. In places where local news outlets have dried up and there are few sources of reliable information about candidates or policy issues, it is hard to cast a meaningful vote.[8]

Free speech not only underpins democracy at the level of the individual citizen, but also provides scaffolding for democratic systems that govern communities, states, and nations. Free speech makes possible open deliberations in search of improved policies and new solutions. Debate, media scrutiny, and public questioning help to vet current and prospective leaders, enabling the polity to find those who are most visionary, honest, and capable. Without robust protections for press freedom, journalists might have to risk their lives or freedoms for exposing the scandals of the #MeToo era, political corruption, or the ethical lapses of justices of the Supreme Court. Around the world, hundreds of journalists are killed each year, many in retaliation for their reporting about the misdeeds of the powerful, including public officials. Democracies do not let that happen. Open debate makes possible the rigorous exchange of ideas and perspectives necessary to adjudicate conflicting interests and to move society forward. Free speech also

acts as a safety valve, allowing tensions to be aired and addressed rather than to fester and erupt into violence. Free speech is a catalyst for uncovering the truth in that it protects those who question received wisdom and express heretical ideas. Free speech also safeguards and helps advance minority rights by preventing majorities from silencing those who challenge their prerogatives. Protections for free speech create an enabling environment for creativity, pathbreaking scholarship, scientific progress, and innovation, making possible a dynamic society that can invent ways to improve upon democracy.

Free speech is also a crucial tool to safeguard democratic freedoms when they come under threat. It allows the press and individual citizens to expose corruption and wrongdoing in government and among the powerful while lessening the risk of retaliation. In a society with robust speech protections, advocates of all political persuasions are free to expose and protest curtailments of voting rights and the integrity of electoral systems. Free speech makes it possible to sound the alarm if a society is eroding other democratic values or lurching toward authoritarianism. Without free speech, there is no right to take to the streets in resistance.

This is not to say that democracy and free speech are never in tension. Democratic societies have always debated where free speech should give way to other values, such as national security, public order and welfare, peace, and different conceptions of morality. From the passage of the Sedition Act in 1798 to the jailing of antidraft agitators during World War I to the loyalty oaths required during the Red Scare, free speech has never been absolute in the United States (or in any society). Every generation must revisit thorny questions of how to preserve free speech in an evolving political and social climate in which open discourse brings not just great advantages but genuine risks.

It is not controversial to assert that, in the last decade or two, the relationship between free speech and democracy has come under distinct pressure. There are many reasons for this development, but we can identify three factors in particular: technology, the increasing diversity of our society, and political polarization. These forces have combined to undermine the sanctity of free speech as a principle that transcends partisan politics.

The rise of digital technologies has challenged the once-vaunted place of free speech in democracy in several ways. In eras dominated by oral and print communication, countering mendacious, hateful, or dangerous speech was a relatively straightforward matter. Even with the advent of radio, film, and television, government officials and the citizenry could generally have confidence, in a liberal spirit, that allowing a wide berth for free speech would allow reason and truth to triumph. In 1927, Justice Louis Brandeis famously wrote that the best antidote to "falsehoods and fallacies" is "more speech, not enforced silence."[9] While the American past has not lacked for episodes of demagoguery, hysteria, and other

instances of mass unreason, we have generally placed trust in the Brandeisian formulation.

But new communication mediums (the internet), devices (mobile phones), and platforms (social media and forms of artificial intelligence) have allowed speech to spread with unprecedented rapidity and geographic reach, and to resist countering or correction by traditional authorities. Algorithmically driven online platforms propel speech with a velocity that far outpaces the analog world. Digital media algorithms propagate the posts that animate online users most. Such content disproportionately includes incendiary, hateful, and false speech. Defenders of the wisdom of Brandeis must confront difficult questions about how speech functions online and how its hazards can be managed.

One paradox that the prevalence of online speech has exposed is that "more" speech can – contra Brandeis – itself serve to enforce silence. A controversial or objectionable post online can unleash a torrent of vitriol and harassment, including physical-world threats and retaliation. The outcry may lead the original speaker to delete the post, close their account, or avoid bringing up the subject of their comment publicly ever again. Others witnessing the abuse may vow never to expose themselves to that kind of menacing outrage. Over time, such effects exert a powerful chilling force on online discourse, circumscribing entire subject areas and perspectives that cannot be touched without unleashing a virtual fusillade.

Online speech is also more easily manipulated than traditional spoken, written, or even broadcast communications. Foreign governments, ideological extremists, and other political operatives have new, cheap, and potent ways to interfere with democratic deliberations, manipulating media, sowing disinformation and fanning distrust in democratic institutions. Traditional First Amendment doctrines, centered on stopping the government from suppressing speech, have little to offer when it comes to these conundrums. Courts are now grappling with whether and how to arbitrate government efforts to intervene in online discourse, including through new laws adopted by Texas and Florida to dictate how social media platforms moderate online content.[10] In the 2022–2023 term, the Supreme Court brushed away two cases claiming that social media companies fostered terrorist content, deciding that the plaintiffs, who were family members of ISIS victims, had failed to state a cognizable claim.[11] The decisions brought little clarity to key questions including whether, and to what degree, the First Amendment constrains the discretion of digital platforms to moderate online content, or what bounds may exist – or be legislatively imposed – to circumscribe the broad immunity from liability that online providers have long enjoyed.

The rise of digital technologies has also coincided with an intensified focus by social activists and institutional leaders on making society more equitable and inclusive according to newer conceptions of what constitutes fairness and equality. Reckoning with institutionalized forms of racism and discrimination has raised

questions about how we think and talk about identity, and which experiences and perspectives deserve emphasis. The past exclusion of certain groups from opportunities to publish, broadcast, and create art has given rise to pitched debates over who is entitled to tell which stories and whether new forms of gatekeeping are necessary to ensure that lesser heard voices get their due. The growing visibility and acceptance of gays, lesbians, and transgender people has called into question long-established ways of talking about individuals and families, fueling a harsh and censorious backlash against queer representation in books and culture, especially for the young. With formal equality in spheres including education and employment having now been guaranteed for decades by law and endorsed by society, the lingering residue of entrenched bias implicates how people see and relate to one another, touching unavoidably on how they speak to and about other people.

Another factor contributing to the encroachment on free speech has been the effort, often born of good intentions, to make sure that American society, as it becomes more racially and ethnically diverse and more tolerant of gender differences, better protects and enables voices long excluded from spheres of discourse. Some critics have turned against free speech because they have come to believe that hateful speech – when directed at members of vulnerable groups – is not just insulting to individuals but threatens the quest to forge a diverse and equitable society. In their view, this threat justifies the silencing of what they deem to be noxious speech – by shouting it down or calling on authorities to withdraw, ban, or punish it if necessary. The argument in favor of vanquishing offensive speech is frequently framed in terms of harm. Some falsely equate wounded feelings or even lingering psychological distress with physical violence, claiming that such repercussions should be grounds to silence speech. Social science research has documented that individuals subjected to pervasive discriminatory language and stereotyping – hearing racial slurs each day as they walk to school, for example – can experience psychological, academic, and even physiological consequences.[12] Short of such calculable and lasting effects, speech may cause people to feel vulnerable or discomforted, or may bring back disturbing memories. But such aftereffects, while they may be difficult to endure, cannot be avoided in speech any more than they can be in life writ large. We are bombarded with stimuli on television, in social media, in newspapers, and in other contexts that may give rise to feelings of disquiet or upset. But the argument about harmful speech, rather than being applied with precision and sensitivity to a spectrum of distinct effects – from fleeting upset to lifelong feelings of inferiority – has become elastic and generalized. The putative harms of speech can be speculative, exaggerated, or projected onto others without any sign that actual harm has been experienced by any identifiable individual. Feelings of disquiet, anger, or frustration are too easily conflated with the notion of harm, and used as a justification to shut down speech,

or suggest that certain subjects – guns, abortion, or immigration – should be entirely out of bounds for discussion lest someone be "triggered."

The third factor shaping the place of free speech in American democracy is polarization, which has compounded the perennial problem of hypocrisy in the defense of free speech. Critic and columnist Nat Hentoff's classic indictment of those who defend "free speech for me, but not for thee" has curdled into an entrenched belief that some speech is more worthy of protection than other, with the "some" determined by who is doing the protecting.[13] Some on the left invoke the potential of "harm" as grounds for shutting down speech on sensitive questions of race, gender, and other topics typically related to identity. Some on the right have convinced themselves that these new left-wing orthodoxies can be countered only through state intervention to dictate what books can be read and what topics studied. Even some right-leaning libertarians have been silent about book and curriculum bans, torn between the ends of combatting wokeness and of fighting censorship. The left, in turn, has protested legislation and book bans that target books by and about specific identities, while remaining mostly silent when conservative speakers are shouted down on campus, in an exercise of the censorious heckler's veto. For both sides, the principled defense of free speech can be sidelined by the extremes that moral certitude demands.

These many attacks on free speech are corroding American democracy. Encroachments on free speech in education, the proliferation of misleading political propaganda, the denigration of credible journalism, the legitimization of restrictions on the role of the press, mounting constraints on protest and assembly rights – each of these threats has the potential to undermine the project of fortifying democracy. Each should be a call to action in defense of the role of free speech.

In the education arena, both informal censoriousness and official censorship are thwarting the cultivation of a democratic citizenry. A February 2023 study carried out by the University of Wisconsin illustrates a series of interlocking challenges in higher education.[14] When questioned about their willingness to consider viewpoints other than their own on issues such as immigration, abortion, religion, and transgender issues, only 10 percent of students responding said they would be "extremely likely" to consider such opinions.[15] Asked how comfortable they felt expressing their own views on the same set of issues, fewer than 36 percent were at ease voicing their convictions on topics including gun control and police misconduct.[16] Conflating offense with harm, 65 percent of students said that if someone says something offensive, they are at least "somewhat" causing "harm" to those they offend.[17] Fifty-seven percent of respondents reported thinking that expressing "offensive" views can at least "somewhat" be seen as a form of "violence toward vulnerable people."[18] Substantial portions of students agreed with a series of propositions about the rights and obligations of campus

officials and faculty to silence offensive speech.[19] In each of the areas, answers to the questions varied significantly based upon students' reported political leanings, with progressive students being much more likely to endorse the muzzling of such speech.

Because universities are where many Americans first encounter individuals from backgrounds dissimilar to their own, the chilling of campus speech on sensitive topics sets a dangerous precedent. It teaches young people that in navigating a diverse society, silence and avoidance are key tools. If subjects like affirmative action, women's rights, trans rights, the war in Gaza, and immigration policy cannot be discussed openly on campus, there is little hope for dealing with them effectively in workplaces or legislatures. To be prepared for their role as citizens, students need skills to confront views they disagree with, marshal evidence behind their viewpoints, find common ground, and compromise. They also need to cultivate the insight and empathy to engage with those who hold sharply different attitudes, rather than vilifying them or simply tuning them out. For colleges to perform their indispensable role in cultivating democratic citizenries, robust and freewheeling campus discourse is essential.

Education is under siege on a second front: the wave of book and curriculum restrictions that have surged since 2021. PEN America has documented more than six thousand instances of book banning, mostly in schools and classrooms but also affecting public libraries, between 2021 and 2024.[20] Overwhelmingly, book bans target stories by and about members of historically marginalized racial and ethnic groups and gay and queer individuals; more than half of all books banned fall into at least one of these categories.[21] And increasingly, book bans are being imposed by state legislation rather than arising from the complaints of individual parents. In some jurisdictions, just a single objection to a book can force volumes off shelves throughout an entire county. Lists of controversial books, or simply books identified as promoting discussion on diversity, are passed around from state to state and district to district as the basis for wholesale bans; a book can be removed from shelves without anyone in the local community having read it. In some districts, the restrictions are so broad and ill-defined that classroom and school libraries have been silenced or emptied of books to avoid falling afoul of the rules.

New laws are also constricting teaching and learning in K–12 and higher education. Twenty-one states now have laws on the books that PEN America has dubbed "educational gag orders," to restrict topics, theories, and perspectives that may be introduced in the classroom.[22] The most notorious is Florida's so-called Don't Say Gay law, which was expanded by the state school board in April of 2023 to restrict discussions of queer identities not only through the third grade (as had previously been the case) but up through the twelfth grade.[23] Other gag laws restrict discussions of racial justice, aspects of American history, and other topics deemed divi-

sive. Additional measures passed in Florida give parents the right to contest readings and headings on school curricula, abolish campus offices of diversity and inclusion, and aim to fundamentally remake the New College of Florida, a liberal arts university, into a conservative institution modeled on a religious private college.[24]

These measures amount to a response to efforts within schools and universities to serve student populations that are more diverse than ever before in terms of race, ethnicity, and gender. The proponents of these restrictive measures point out, rightly, that some efforts to promote equity and inclusion may be heavy-handed, reductionist, or even counterproductive.[25] Theories that are predicated on racial essentialism or pressing individuals to feel guilt over their race or identity are ill-conceived and do not belong in the classroom. But the proper way to handle misguided lesson plans is through established channels of communication between students, parents, teachers, faculty, and administrators. Where curricular materials are poorly thought-out or ill-conceived, the problems should be pointed out and the materials replaced. The imposition of legislation dictating curriculum sends the message that any politically sensitive lessons may prompt reprisals. When such laws are in effect, teachers adopt a cautious approach, skirting controversy and eschewing open discussion. This runs counter to the spirit of unfettered inquiry and freewheeling debate necessary to prepare citizens to engage in the democratic process.

Protest rights are a third arena in which traditional free speech protections are being pared back. Since 2017, when protests erupted after the presidential election of Donald Trump, a wave of bills have been introduced by legislators at the state and federal level to limit assembly rights.[26] These measures are typically invoked in response to mass protest movements, including demonstrations for racial justice, against the creation of new oil and gas pipelines, against speakers considered offensive, and on contentious educational matters. While many such bills are justified by their proponents on the basis that they are necessary to tamp down violence, very few demonstrations in recent years have erupted into unrest, and existing laws against property destruction and lawlessness already allow for prosecution of those who cross the line.

Newly enacted laws narrow protest rights by making it easier for authorities to suppress "rioting," a vague term that can be used to target peaceful protesters who find themselves at gatherings that teeter on the edge of violence, even if they themselves are not involved in the unrest.[27] Under a 2021 Florida law, the "imminent danger" of destruction of property can qualify as a riot, even if no actual damage occurs.[28] Other measures impose stiff penalties for protests that interfere in any way with the flow of traffic. For example, a measure enacted in Tennessee in 2020 imposes punishments of up to a year in jail for the offense of obstructing a sidewalk or street.[29] Eighteen measures enacted in recent years impose harsh

punishments for protests taking place at or near critical infrastructure, including pipelines and other energy facilities. A 2018 Louisiana law provides for up to five years in prison for demonstrators who trespass near the construction site of a pipeline.[30] Eleven new bills impose fines and penalties on protesters for the cost of policing, clean-up, and other administrative burdens associated with the exercise of protest rights.[31] Other measures expand conspiracy provisions to target not just protesters, but those who organize such assemblies. A 2017 law passed in Oklahoma imposes up to $1 million in liability for organizations that "conspire" with protesters who trespass near pipelines.[32] In a direct response to the vehicular murder of pedestrian Heather Heyer during the 2017 white nationalist rally in Charlottesville, states including Iowa and Florida have passed legislation to shield drivers from civil liability for hitting demonstrators with their vehicles.[33]

Conservative legislatures have not been the only institutions to restrict and punish protest. In 2024, in response to student encampments protesting Israel's conduct in its war in Gaza, many university administrators suspended, expelled from campus, and had arrested student protestors. In some instances, the clampdowns were carried out peacefully as a means of enforcing viewpoint-neutral time, place, and manner restrictions on demonstrations that were disrupting the campus learning environment. In other cases, university leaders and police resorted to overly aggressive methods of muzzling protests and unduly limiting students' right to peaceful expression. The controversies raised fresh questions about the proper limits of protest and how they should be enforced.

A free and vibrant press has long been recognized as an essential pillar of democracy. Thomas Jefferson famously concluded that if forced to choose between "a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."[34] But the free press today is under siege as well. Economic pressures and changing consumer habits have all but eliminated the traditional financial base of support for many forms of news. The situation is especially acute for local news, giving rise to an "extinction crisis" for city- and state-based media organizations.[35] These news outlets have for decades played a crucial part in nurturing an informed citizenry and holding accountable those in government, business, education, and other spheres of power. The crisis has exposed systemic gaps in coverage and the atrophying of relationships between local news outlets and the communities they serve. Inventive new business models and philanthropic interventions are being explored in an effort to shore up these vital local institutions. But it is doubtful that such efforts will ever make up for the $30 billion in lost revenue that resulted from the evaporation of print advertising as media consumption shifted from paper to digital.[36] The loss of local media has had an impact on the vibrancy of local democracy; in communities without local media coverage, polarization has

intensified, with voters less likely to split their tickets across political parties and more likely to self-identify as intensely partisan.

In addition to the demise of local media, democracy is being undercut by the eclipse of mainstream national news organizations that we used to rely on to provide a widely trusted collective account of events in our culture and society. Instead, partisan media outlets have arisen, reflecting and reinforcing the sharp bifurcation we see in the political arena. President Donald Trump's campaign to discredit the media and credible journalism through his cries of "fake news" helped to convince a substantial segment of the voting population that the mainstream media should not be believed. So, too, did some mainstream outlets backing away from neutral, fact-based journalism that aspired to objectivity.

Coupled with drastic shifts in media consumption from print to online, the result is an information ecosystem in which Americans are adrift in a sea of news sources without the tools to ascertain what to trust, to sniff out motives and biases, or to verify dubious claims. A substantial minority of the U.S. population is in thrall to media sources like Fox News that eschew traditional journalistic norms of objectivity and fact-based reporting. Such audiences are seemingly impervious to revelations that the network has deliberately fed its audience unreliable and false election-related information.

Solidifying free speech as a democratic cornerstone will require concerted action at every level of society, including legislatures, the executive branch, courts, universities, corporations, civic institutions, and more.

Legislators, governors, school board members, and other public officials need to renew their vows of fealty to the First Amendment, reaffirming its place as a constitutional value above politics. Those in leadership positions should enlist experts to inform and enlighten colleagues concerning their First Amendment obligations and why certain types of legislation and decisions run afoul of constitutional protections for free speech. Officials who believe strongly in the First Amendment need to speak out on behalf of speech with which they disagree or that they find objectionable, modeling a principled approach. Legislators should form free speech caucuses that enlist the advice of scholars and legal practitioners to advise them on proposed legislation and to rally across political and ideological lines in support of free speech principles. Officials should hold town hall meetings to educate their constituents about free speech and explain how the First Amendment and free speech protections influence policy. They should engage openly with credible journalists and resist the temptation to vilify the press, even in the face of critical media coverage.

Courts have a crucial role to play in applying First Amendment principles neutrally and fairly, notwithstanding their own ideological leanings. At a time of expanding resort to bans on books and curriculum, courts need to fill in gaps in existing case law to fortify the freedom to read, teach, and learn.

Schools and universities are laboratories for democracy and training grounds for the exercise of free speech rights. But free speech, and civic education more broadly, has fallen out of favor in the U.S. educational system, sidelined in favor of science, technology, engineering, and math. The future of American democracy will depend upon a concerted push to educate rising generations of citizens in the principles of coexistence within a pluralistic polity, including respect for free speech rights. Curricula on free speech rights should be introduced from a young age, when pupils can make an intuitive link between their own desire to express their wishes and ideas and the principle of open discourse in society. When young people are introduced to the precepts of free speech and helped to understand the vast differences between open and autocratic societies, they become inspired by the benefits of free speech and are more willing to defend it. American history, government, and world history curricula should introduce students to the place of free speech and free press in democracies, and how it has been tested over time.

On college campuses, just as students are introduced through first-year orientations or similar programs to policies and culture regarding sexual assault, discrimination, and other fundamentals, so, too, should they be exposed to the role and importance of free speech as foundational to their college experience. Such training and education sessions can offer opportunities to voice and explore the linkages and tensions between free speech, diversity, and inclusion, helping students to see how these precepts can be reconciled and even mutually reinforcing. In the classroom, professors should introduce free speech norms at the beginning of each semester, stressing the importance of conscientiousness with language, but also encouraging students to be comfortable speaking their minds. They should also check periodically to assess whether students from varied backgrounds and perspectives feel able to voice their viewpoints in class and other discussions.

Just as universities have established offices or committees for diversity, equity, and inclusion, religious affairs, and other priority facets of campus life, they should consider creating focused functions for the promotion and defense of free speech, such as campus-wide education and celebration, and providing advice to students, faculty, and administrators on free speech questions. Campus leaders should seize opportunities to communicate the importance of free speech, speaking up forthrightly in response to incidents when free speech principles are challenged.

Other societal institutions also have a role to play in fostering open discourse in our culture, pushing back against the demise and denigration of journalism, providing platforms for controversial viewpoints, and standing on the side of free speech when there are calls to ban or punish expression. Philanthropists, for example, should integrate support for free speech into their agendas to shore up democracy by funding litigation, public awareness, campaigning, advocacy, and public outreach. Other components of the private sector also have a role to play.

This includes entertainment companies that platform edgy satirists, book publishers that put out works by politically and ideologically diverse authors, media outlets that seek to expose their audiences to heterodox views, and corporations of all kinds that demonstrate respect for speech rights within the ranks of their employees. As a society, we should maintain and defend those remaining institutions that serve ideologically diverse groups of consumers. Extending political litmus tests risks turning even more of our collective discourse into the balkanized world of cable news, where entire outlets are devoted to programming on just one side of the political spectrum.

Free speech is the lifeblood of American democracy. With democracy ailing, a recommitment to free speech must be part of the cure.

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[20] PEN America, *Banned in the USA: Narrating the Crisis* (New York: PEN America, 2024), https://pen.org/report/narrating-the-crisis/; and PEN America, "2023 Banned Books Update: Banned in the USA," April 20, 2023, https://pen.org/report/state-laws-supercharge-book-suppression-in-schools.

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] See Elizabeth A. Harris and Alexandra Alter, "Book Ban Efforts Spread Across the U.S.," *The New York Times*, January 30, 2022, https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html ("Those who are demanding certain books be removed insist this is an issue of parental rights and choice, that all parents should be free to direct the upbringing of their own children").

[26] See Nora Benavidez, James Tager, and Andy Gottlieb, "Closing Ranks: State Legislators Deepen Assaults on the Right to Protest," PEN America, June 1, 2021, https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest.

[27] Ibid.

[28] See ACLU Florida, "What Did HB 1 Do?" April 21, 2021, https://www.aclufl.org/en/what-did-hb-1-do.

[29] See Natalie Allison, "Tennessee Legislature Cracks Down on Protesters," *The Tennessean*, August 13, 2020, https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001.

[30] See "Pipeline Opponents Challenge Louisiana Law Targeting Protesters," Reuters, May 22, 2019, https://www.reuters.com/article/us-louisiana-pipeline-lawsuit/pipeline-opponents-challenge-louisiana-law-targeting-protesters-idUSKCN1SS2I0.

[31] For example, see Janelle Griffith, "N.Y. County Exec Vetoes Bill That Would Allow Police to Sue Protesters," NBC News, August 11, 2021, https://www.nbcnews.com/news/us-news/n-y-county-exec-vetoes-bill-would-allow-police-sue-n1276568.

[32] PEN America, *Arresting Dissent: Legislative Restrictions on The Right to Protest* (New York: PEN America, 2020), 15, 33–34, https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf.

[33] Ibid., 24.

[34] Extract from Thomas Jefferson to Edward Carrington, January 16, 1787, Jefferson Quotes and Family Letters, https://tjrs.monticello.org/letter/1289 (accessed May 30, 2024).

[35] Sullivan, "Every Week, Two More Newspapers Close."

[36] Michael Barthel, "Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall," Pew Research Center, June 1, 2017, https://www.pewresearch.org/short-reads/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry.

The Unfortunate Consequences of a Misguided Free Speech Principle

Robert C. Post

For at least the past half-century, Americans have been committed to a "free speech principle," holding that speech is to be encouraged because it serves to produce knowledge, to enable the development of personal autonomy, and to facilitate the self-governance of the nation. In this essay, I argue that any such abstract free speech principle is fundamentally misguided. The value of speech is instead the value of the social practice within which speech occurs. Speech is to be encouraged when it advances the purpose of the social practice in which it is embedded. For constitutional purposes, the most important social practice established by communication is the public sphere, whose development in the eighteenth century made possible democratic self-governance. The health of a democracy depends upon whether its public sphere can produce a public opinion capable of legitimating the state. This turns on the quality of a nation's politics, not on the quantity of its speech. Americans who conceptualize the current crisis as requiring rededication to the free speech principle thus essentially misdiagnose the nature of our contemporary emergency. We need to repair our politics, not our speech.

There is growing pessimism about the future of free speech in the United States. Crusaders from all sides of the political spectrum seem intent on suppressing objectionable discussion.[1] The worry is that Americans may be losing their appetite for candid and constructive dialogue. It has become too costly to participate in public discourse. We fear that incorrect speech will be canceled by the left or bullied by the right.

This is surely a troubling state of affairs. But it can be cured only if we first correctly diagnose its causes. There is a widespread tendency to conceptualize the problem as one of free speech. We imagine that the crisis would be resolved if only we could speak more freely. But this diagnosis puts the cart before the horse. The difficulty we now face is not one of free speech, but of politics. Our capacity to speak has been disrupted because our politics has become diseased. We misconceive the problem because American culture is obsessed with what has become known as the free speech principle. It is a principle that is widely misunderstood. Our misconceptions are as deep and as they are consequential.

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I shall take as my text a representative and much-discussed 2022 opinion piece by the editorial board of *The New York Times* entitled "America Has a Free Speech Problem." In its first sentence, the editorial warned that Americans "are losing hold" of the "fundamental right" to "speak their minds and voice their opinions in public without fear of being shamed or shunned."[2] The editorial did not focus its attention on government regulation of speech, which is the particular domain of the constitutional law of the First Amendment, but instead on the more basic question of free speech itself. It urged Americans to extend to each other the fundamental right to say whatever is on their minds. The editorial suggested that the more speakers could express their thoughts, the more our politics would heal. It implied that the current dislocation of our politics could be solved by more speech.

The editorial's framing of the issue is not idiosyncratic.[3] Advocates of a free speech principle abound. Yet the editorial rests on a misguided understanding of free speech. Whatever freedom of speech might signify, it does not mean that unrestrained expression is inherently desirable. It does not mean that more speech is always better. One can see this clearly if one imagines the limit case. Those who cannot stop talking, who cannot exercise self-control, do not exemplify the value of free speech. They instead suffer from narcissism. Unrestrained expression may be appropriate for patients in primal scream therapy, but scarcely anywhere else.

Normal persons ordinarily feel constrained to speak discreetly. I might detest my friend's wife, but I will refrain from telling him so in ways that might hurt his feelings. Speech is the foundation of all human relationships, but no human relationship can exist without tact or discretion. No friendship can survive unrestrained communication that ruptures elemental norms of mutual respect. More speech is not always better.

No doubt friendship also requires candor and spontaneity. Sometimes friends must articulate to each other truths that are unpalatable and difficult to express. How then do we balance the need to speak freely against the need for tact? The answer is that we should choose to speak in ways that will make our friendship as good as it can be. We speak when it improves the quality of friendship; we exercise self-restraint when it improves the quality of friendship.[4] The relevant good we seek to achieve is friendship, not more speech.[5]

The same logic applies to almost all human relationships. We do not value speech from the solipsistic perspective of the speaker. Instead, speech that contributes to the excellence of a relationship is valued; speech that undermines the value of a relationship is suppressed. Consider, for example, the lawyer who speaks to a court or a client. The lawyer does not simply say what is on her mind, nor would it be a good thing if she did. The lawyer's goal is not to produce the maximum number of words. The goal of the lawyer is instead to produce the best possible results for her client. To achieve that goal, a lawyer must balance candid expression against tactful self-restraint.

In my own capacity as a professor of law, I would never assess the success of my classes by the number of words I have expressed. I rarely simply blurt out what is on my mind. I instead try to speak in ways that maximize the educational value of my classes. This means that I always balance self-restraint against spontaneous self-expression. There is no principle of free speech that can override this simple, essential, and universal logic.

This suggests that the premise of the *New York Times* editorial, while familiar from continuous iteration, is fundamentally misguided. Abstract principles of free speech tend to rest on unstated and undefended premises about the desirability of an uninhibited and unrestrained flow of words. But in actual life, we know full well that human speech always transpires in the context of concrete relationships. This means that we never value speech *as such*. We instead prize the good of the relationships within which speech is embedded. We do not honor the speech of friends; we honor friendship. The eloquence and advice of lawyers are not important except insofar as they advance the rule of law. Classroom discussion is not significant in itself; it is only valuable insofar as it facilitates education. And so on. All such judgments are substantive and contextual.

When we speak about freedom of speech in the abstract, however, we tend to lose touch with this basic insight. Like the *New York Times* editorial, we almost imagine that the more we speak, the more we vindicate the principle of freedom of speech. This is a confusion that nicely illustrates the deceptive allure of abstraction. If we think only of speech, and if we lose track of the context of speech, it sometimes seems as if speech itself produces many important goods. It is often said, for example, that freedom of speech is required to increase our knowledge of the world.

In the context of American legal thought, this understanding of freedom of speech originated in the pathbreaking 1919 dissent of Oliver Wendell Holmes, Jr., in *Abrams v. United States*, which virtually invented modern First Amendment doctrine.[6] Holmes argued:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[7]

The echoes of Holmes can be heard in the *New York Times* editorial, which asserts that "Freedom of speech and expression is vital to human beings' search for truth and knowledge about our world." Yet if we think carefully about this asser-

tion, we can see that it is only a half-truth that obscures how we actually talk when we seek to add to the store of human knowledge. When we aspire to new knowledge, we do not merely speak our minds. We speak in ways guided by the norms of persuasive intellectual discourse.

In modern society, universities are institutions that increase the scope of human knowledge. Professional scholars do not believe that more speech is necessarily better. They do not simply say whatever is on their minds. Instead, they try to express themselves in ways that comply with the best possible applicable disciplinary standards. In modern society, contributions to knowledge do not depend upon popular acclaim. Speech can be fashionable on the internet and yet be worthless as scholarship. Influencers do not produce knowledge. The best test of truth, it turns out, is not the marketplace, but instead the judgment of those trained to assess intellectual quality. And intellectual quality is inseparable from compliance with relevant disciplinary standards. Of course, those who seek to acquire new knowledge must be free to criticize received truths. They must be free to speak from their beliefs. But the value of this speech depends upon whether it meets accepted scholarly standards. Those who merely invoke a free speech principle, who are determined to express their minds without regard to the criteria by which the merit of scholarship is evaluated, do not contribute to knowledge. They are simply cranks.

It follows that an abstract principle of freedom of speech will not tell us much about how to advance knowledge. Any such principle will always miss half the equation. It will ignore the self-restraint required by norms of professional scholarship. That is why "academic freedom" does not rest upon any simple principle of freedom of speech. The boundaries of academic freedom are always determined by reference to the baseline of professional competence.[8]

An abstract free speech principle is misguided because it obscures these boundaries. The point becomes plainly visible when the free speech principle is defended by those who celebrate the value of personal autonomy. We are often told that free speech is necessary for authentic self-fulfillment.[9] The influence of this approach is visible in the *New York Times* editorial when it argues that "human beings cannot flourish without the confidence to take risks, pursue ideas and express thoughts that others might reject."[10]

A healthy society will no doubt encourage its members to be creative, to take risks, to pursue their own ideas. And the achievement of these values surely requires a certain freedom of expression. But it is a non sequitur to conclude that these values require for their vindication an abstract principle of free speech. All societies encourage individual autonomy and initiative up to the point that it contributes to the success of relevant social practices, and they discourage individual autonomy to the extent that it undermines these practices.

Consider, for example, the profession of scholarship. We encourage scholars to take the initiative to express their own individual insights. But when a scholar's

autonomy prompts him to speak in ways that are incompetent, the scholar is sanctioned. He may not receive a job or tenure; his manuscripts will not be accepted for publication by scholarly journals; his grant proposals will be rejected. These sanctions are not a bug of academic freedom; they are a feature. Without them, academics would be merely prima donnas, divas captivated by the sounds of their own voices.

Professional speech follows an analogous logic. Doctors are encouraged to find authentic expression in their work. But any doctor whose autonomy leads her to the incompetent practice of medicine will be sanctioned. It does not matter that a doctor may sincerely believe, and in fact stake her personal identity, on the belief that hydroxychloroquine cures COVID-19.[11] No doctor's need for personal autonomy will ever trump her responsibility to competently practice medicine.

This point can be generalized. All social practices are defined by boundaries that distinguish unacceptable from acceptable behavior.[12] These boundaries apply to speech as well as to action. To privilege the individual autonomy of speakers and to insulate their communication from the enforcement of these boundaries is to undermine the practices. The speech of the *New York Times* editorial board illustrates the point. However much it might celebrate freedom of speech, I am confident that the *Times* editorial board does not itself feel free to publish whatever comes into its mind. The board instead carefully curates its own speech so as to maintain credibility with its readers. It disciplines its own autonomy so as to participate competently in the social practices that endow it with persuasive authority.

Consider what it means to treat others with respect.[13] We accord "dignity" to those around us by complying with relevant norms.[14] These norms apply to speech as well as to action. I demean the dignity of those around me when I speak to them in abusive or outrageous ways. We ordinarily enforce these norms through social disapproval.[15] I can expect to arouse indignation and condemnation if I spew shocking and shameful insults. All well-socialized persons are cognizant of the boundaries that distinguish acceptable from unacceptable forms of speech. It is therefore puzzling why the *New York Times* editorial board might complain that we are losing the "fundamental right" of speaking our minds "without fear of being shamed or shunned."[16] No such right exists in any well-ordered society. If I walk into a room shouting outrageous slurs, I should expect to be shamed and shunned. Only a demoralized community would passively accept irresponsibly hurtful speech.[17]

It is possible, however, that the *New York Times* editorial board is concerned less with the *existence* of a boundary between acceptable and unacceptable speech than it is with the *location* of that boundary. Perhaps the board members are worried that we are being shamed for the wrong kind of speech. Or perhaps they are alarmed that the distinction between appropriate and inappropriate speech has become so confused and ambiguous that we have become fearful of saying anything at all. These are of course serious matters that deserve careful attention.

The norms by which any society distinguishes acceptable from unacceptable speech typically evolve in time, and, in moments of extreme polarization, can become subject to intense and unresolved social conflict.[18] The *Times* editorial suggests how deeply unsettling such controversies can be. But this is not ultimately a point about freedom of speech. It is instead a point about the need for social relations to be governed by clearer or more defensible substantive principles of respect than those that now seem to be paralyzing our public discourse.

The thrust of my argument so far is that, in most instances, an abstract principle of freedom of speech does little work.[19] We balance self-restraint against the need for candor by reference to the goods of the social practice in which we happen at any given moment to be engaged. It is plainly important to discuss the nature of these goods, as well as the many ways in which freer speech will advance or undermine these goods. But any such discussion is not ultimately about free speech as such. It is instead about the social practices that create most of the social goods that we value in our lives.[20] The difficulty with an abstract free speech principle is that it purports to set the value of speech, as well as the goods obtainable by speech, independently of the social context of speech.

Does it follow that a century of obsession with freedom of speech has been simply a delusion? I think not. There is one social practice that we have not yet discussed and that is of immense relevance to how we understand freedom of speech. The nature of that practice is indicated by the fact that the *New York Times* editorial is especially concerned to protect the right to speak one's mind *in public*.[21] This seemingly innocuous qualification is of great importance. Although the *Times* editorial is systematically blurry on the point, those who invoke the principle of freedom of speech frequently have in mind a very specific social practice: the freedom to engage in public discourse.

Although the concept of public speech goes back to the ancient classical world of Greece and Rome, it acquired a different character after the invention of printing. The printing press gave rise to an entirely new form of social organization: the "public sphere."[22] What we now call the "public"[23] emerged within the public sphere. It was created by "the circulation of texts among strangers who become, by virtue of their reflexively circulating discourse, a social entity."[24]

The public sphere, and its corresponding "public," are maintained by an infrastructure of media, like newspapers or museums, that connect strangers to each other. To speak "in public" is to speak to those one doesn't otherwise know, but whom one expects to reach through the media that underwrite the public sphere. In our own time, social media and the internet have created a vast and comprehensive virtual public sphere that is intimately connected to our everyday lives.[25]

What we call "public opinion" arises within the public sphere. Public opinion has in turn facilitated new forms of political governance. For the past century, it

has been common to observe that democracy is best understood as "government by public opinion."[26] The public, in the words of sociologist Michael Schudson, is "the fiction that brings self-government to life."[27]

Public discourse is the medium through which modern societies create a public opinion capable of controlling state institutions. If the seventeenth century witnessed the creation of modern states powerful enough to be charged with the elemental task of imposing social peace, those states had by the eighteenth century become so successful that nations struggled to ensure their accountability to civil society.[28] During the age of constitutionalism, the ambition was to find a way to use politics to cabin state power.

As Hannah Arendt has taught us, politics shifts "the emphasis . . . from action to speech, and to speech as a means of persuasion"; "to be political" is to reach decisions "through words and persuasion and not through force and violence."[29] The upshot is that for modern societies, the public sphere has become a distinctive social organization, oriented around forms of communication that we carefully distinguish from action. The hope is that the public sphere will produce a public opinion capable of exercising political control over state power.

Nothing like this social practice has ever existed before in history. Modern theories of freedom of speech are basically efforts to understand the principles that ought to govern this new and enormously important social practice. The basic structure of America's First Amendment doctrine can best be understood as an effort to work out rules for restraining state control over public discourse in a nation in which "authority . . . is to be controlled by public opinion, not public opinion by authority."[30] At the heart of these rules is the strange and counterintuitive separation of speech from action that Arendt theorized must characterize all political participation.[31]

The tug of the political is plainly apparent in the *New York Times* editorial. The *Times* argues that

> freedom of speech is the bedrock of democratic self-government. . . . When speech is stifled or when dissenters are shut out of public discourse, a society loses its ability to resolve conflict, and it faces the risk of political violence. . . . Every day, in communities across the country, Americans must speak to one another freely to refine and improve the elements of our social contract: What do we owe the most vulnerable in our neighborhoods? What conduct should we expect from public servants? . . . When public discourse in America is narrowed, it becomes harder to answer these and the many other urgent questions we face as a society.[32]

These are powerful arguments. The essential point, however, is that they are not arguments about freedom of speech. They are instead arguments about how a robust and free public discourse is necessary to legitimate the American state. The basic thought is that those excluded from public discourse have little incentive to

abide by the rules of the political game.[33] Toleration of widely divergent views and forms of address within public discourse is necessary if the American state is to maintain legitimacy throughout its wildly diverse population. This insight lies at the root of much contemporary First Amendment doctrine.[34]

It is important to emphasize that arguments usually proposed for freedom of speech in fact apply much more naturally and convincingly to public discourse. Although the marketplace of ideas may not produce knowledge, it does accurately describe the endless debate out of which public opinion continuously emerges.[35] Although the value of individual autonomy is not persuasive with regard to speech *qua* speech, it does carry traction within public discourse. The whole point of public discourse is to express the independent and voluntary views of the demos. Within public discourse, the state must treat citizens as self-determining and sovereign.

What are characterized as theories of freedom of speech, in other words, are far more convincing as theories of public discourse. Yet even in this context, such theories can be highly misleading. They occlude the fact that public discourse is itself a practice that we have adopted in order to govern ourselves through communication in the public sphere. By focusing abstractly on speech instead of on the concrete purpose of this practice, our theories of free speech encourage us to forget that the fundamental point of public discourse is the political legitimation of the state. Our public discourse is successful when it produces a healthy public opinion capable of making state power answerable to politics.[36] Our public discourse is not successful merely because every speaker expresses his thoughts in an uninhibited way. Standard theories of free speech mistake means for ends.

Although as a general matter greater participation in public discourse is more desirable than less participation, there may be circumstances in which certain kinds of speech can hinder, rather than advance, the successful formation of healthy public opinion.[37] We cannot begin to identify and analyze these circumstances until we first grasp that public discourse is not a mere collection of individual speech acts. It is a purposive social practice whose object is to produce a healthy politics. Suppose, for example, that the speech of the rich has come to so dominate public discussion during elections that people no longer believe that *their* opinion is fairly represented. In such circumstances, the function of public discourse will be undermined. But we will not recognize this problem if we focus only on the freedom of individual speakers. We will lose sight of the systemic function of the practice of public discourse.[38]

The appropriate balance between freedom and restraint must always be determined by the social practice within which communication is embedded. Public discourse is no exception to this generalization. At the present time, American courts have lost track of this basic insight. They have developed strict trans-

substantive First Amendment doctrines that restrict speech regulation regardless of its context. They have even begun to apply to ordinary commercial and professional transactions First Amendment doctrines designed to protect public discourse. It should be obvious, however, that political discussion merits different forms of protection than does, for example, the professional speech of a doctor.[39] Our courts have lost their way because their focus has been distracted by what Justice David Souter once called "speech as such."[40]

One of the very great dangers hanging over the future of free speech in the United States is the present tendency of the Supreme Court to extend to all speech the protections properly due only to public discourse, and thus to use the First Amendment to impose a libertarian, deregulatory agenda on ordinary social and economic regulations.[41] In the long run, the only sound defense against such abuse is to conceptualize the value of free speech squarely in terms of the discrete social practices that speech constitutes.

Within the context of public discourse, Americans have been confident for more than a century that merely by participating in public debate we could somehow overcome sharp differences of opinion and produce a democratically legitimate political will. The remedy for disaffection has been more participation, more engagement, and more speech. By conceptualizing our current crisis as one of speech, the *Times* editorial doubles down on this traditional understanding. The problem can be solved, it intimates, if only Americans could more freely speak their minds.

An entirely different perspective on the crisis emerges, however, if public discourse is seen as a distinct social practice designed to produce a democratic and healthy politics. The problem of radical polarization, which has become so deep and so rancid that Americans now no longer seem to inhabit the same factual or normative universe, is not a simple question of speech. It is the corrosive dissolution of the political commitments by which Americans have forged themselves into a single nation. If we conceptualize public discourse as a social practice, we can see that its failures stem from this fundamental problem. The clear implication is that curing public discourse is not just a matter of speaking more freely.

Politics is possible only when diverse persons agree to be bound by a common fate.[42] Lacking that fundamental commitment, politics can easily slide into an existential struggle for survival that is the equivalent of war.[43] We can too easily come to imagine our opponents as enemies whose victory would mean the collapse of the nation.[44] In such circumstances, political debate can no longer produce a healthy and legitimate democratic will. However inclusive we may make our public discourse, however tolerant of the infinite realms of potential diversity we may become, the social practice of public discourse will fail to achieve its purpose so long as we no longer experience ourselves as tied to a common destiny. Politics always requires that participants remain faithful to some shared ideal that is larger and more important than any particular issue that may separate them.

It follows that those who care about American democracy ought to think, first and foremost, about how we can revive our experience of a shared fate. This is a political challenge, not a problem of free speech. Its solution will require political interventions of a kind that we have not yet begun to imagine. The editorial board at *The New York Times* is undoubtedly correct to fear that we cannot generate the political will to support these interventions if we cannot speak to each other in ways that authentically communicate our priorities and values. But the board confuses a symptom with a cause.

We cannot now speak to each other because something has already gone violently wrong with our political community, which is to say with our antecedent commitments to a common political destiny. To conceptualize this problem as one of free speech is to imagine that the cure is simply to encourage more speech. It is to fantasize that the ties that bind us together will somehow be refreshed merely because we speak to each other more freely. But this is an illusion, a cruel mirage cast by the allure of a free speech principle that has somehow floated free from the social practices in which it should be embedded.

Now more than ever we need to understand why we have come to distrust each other, to mistrust political authority, and to imagine ourselves as tribal groups at war with one another. More speech of the wrong kind can exacerbate, not heal, these terrible divisions. The underlying issue is not our speech, but our politics. So long as we insist on allegiance to a mythical free speech principle that exists immaculately distinct from concrete social practices, we shall look for solutions in all the wrong places.

Our country is now so fragile, our democratic future so precarious, that every such misstep is fraught with danger. It is imperative that we arrive at a clear and accurate diagnosis of the disease that each day further corrodes our precious polity. It is time to open our eyes.

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ENDNOTES

[1] If there is so-called cancel culture on the left–for example, see Philip W. Magness, "The Suicide of the American Historical Association," American Institute for Economic Research, August 20, 2022, https://www.aier.org/article/the-suicide-of-the-american-historical-association–there is outright state censorship on the right. See Rashawn Ray and Alexandra Gibbons, "Why Are States Banning Critical Race Theory?" Brookings Institution, November 2021, https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory; and Keith E. Whittington, "Professorial Speech, the First Amendment, and the 'Anti-CRT' Laws," August 12, 2022, https://ssrn.com/abstract=4188926. The hypocrisy of the latter, given the right's recent insistent campaign to enforce free speech within schools, cannot be overstated. See Tennessee Campus Free Speech Protection Act, Tenn. Rev. Code Ann., Title 49, Chapter 7, § 2–9 (passed May 9, 2017).

[2] New York Times Editorial Board, "America Has a Free Speech Problem," *The New York Times*, March 18, 2022, https://www.nytimes.com/2022/03/18/ opinion/cancel-culture-free-speech-poll.html.

[3] Erin L. Miller, "Amplified Speech," *Cardozo Law Review* 43 (1) (2021): 1–69; and Robert D. Richards and Clay Calvert, "Counterspeech 2000: A New Look at the Old Remedy for 'Bad' Speech," *Brigham Young University Law Review* 553 (2000): 553–586.

[4] In such contexts, it does not help much to say that we do not value the freedom to *speak*, but instead value the *freedom* or the *liberty* that allows us to speak. Freedom and liberty are no doubt important human goods. But in this essay, I am evaluating freedom of speech–the liberty to speak–which is to say the *exercise* of a certain kind of freedom or liberty.

[5] This formulation of the issue adopts a first-person point of view. In deciding whether we ourselves ought to speak, we typically pursue the good of the social practice within which we seek to express ourselves. A more complicated analysis attaches to third-party contexts. If I evaluate the speech of my friend, I might conclude that she was mistaken to express herself, but I might also conclude that her speech does not deserve condemnation. To condemn my friend's speech would signify that I regard her speech as inconsistent with the practice of friendship itself. In third-party contexts, punitive reactions characteristically define and police the boundaries of the social practices within which speech transpires. For a discussion, see endnotes 12–15. The boundaries of social practices are typically wide enough to tolerate much speech that is merely mistaken.

[6] *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Oliver Wendell Holmes, Jr., dissenting).

[7] Ibid., 630. On Holmes's dissent, see Robert C. Post, "Writing the Dissent in *Abrams*," *Seton Hall Law Review* 51 (2021): 21–39.

[8] On academic freedom and its relationship to freedom of speech, see Robert Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven, Conn.: Yale University Press, 2012); and Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Conn.: Yale University Press, 2009).

[9] For example, see Martin H. Redish, "The Value of Free Speech," *University of Pennsylvania Law Review* 130 (1982): 591–645.

[10] New York Times Editorial Board, "America Has a Free Speech Problem."

[11] Dickens Olewe, "Stella Immanuel–The Doctor Behind Unproven Coronavirus Cure Claim," BBC News, July 29, 2020, https://www.bbc.com/news/world-africa-53579773.

[12] Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London: Routledge, 2008).

[13] On the nature and enactment of these norms, see Erving Goffman, *Interaction Ritual: Essays on Face-to-Face Behavior* (Chicago: Aldine Publishing Co., 1967).

[14] Charles Taylor refers to "dignity" as rooted in "our sense of ourselves as commanding (attitudinal) respect." Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989), 15. See also Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry* 4 (4) (1970): 243, 252.

[15] We use law to sanction violations of the most important of these norms, which I have elsewhere called "civility rules." See Robert C. Post, "The Social Foundations of Privacy: Community and Self in the Common Law Tort," *California Law Review* 77 (1989): 957–1010; and Robert C. Post, "The Social Foundations of Defamation Law: Reputation and the Constitution," *California Law Review* 74 (1986): 691.

[16] New York Times Editorial Board, "America Has a Free Speech Problem."

[17] The argument in text is distinct from that made in Thomas Healy, "Social Sanctions on Speech," *Journal of Free Speech Law* 2 (2022): 21–62, which is that social sanctions are themselves a form of speech that deserve protection. Like much modern scholarship, Healy takes as a given the existence of an abstract principle of free speech against which the constructive contributions of social sanctions are to be weighed.

[18] Robert C. Post, "Law and Cultural Conflict," *Chicago-Kent Law Review* 78 (2003): 485–508; and Robert C. Post, "Community and the First Amendment," *Arizona State Law Journal* 473 (1997): 475–76.

[19] It might be possible to conceptualize the free speech principle as a simple heuristic designed to remind us of the value of speech in any given situation, a value we might perhaps otherwise be inclined to ignore or underestimate due to a persistent bias in favor of the status quo. I should stress that the free speech principle is not usually understood in this way; it is instead conceived, as it is in the *New York Times* editorial, as a substantive standard that determines when speech should and should not be tolerated. But if the free speech principle were advanced as a simple heuristic, its value would depend upon whether it focuses our attention on a constructive framework for reaching the best possible conclusions. The subject of this essay is the unnoticed tendency of the free speech principle to mislead us.

[20] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1981).

[21] New York Times Editorial Board, "America Has a Free Speech Problem."

[22] On the public sphere, see Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, Mass.: The MIT Press, 1989); and Charles Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), 257–287.

[23] John B. Thompson, *The Media and Modernity: A Social Theory of the Media* (Redwood City, Calif.: Stanford University Press, 1995), 126.

[24] Michael Warner, *Publics and Counterpublics* (New York: Zone Books, 2002), 11–12. Warner adds that "one of the most striking features of publics, in the modern public sphere, is that they can in some contexts acquire agency. . . . They are said to rise up, to speak, to reject false promises, to demand answers, to change sovereigns, to support troops, to give mandates for change, to be satisfied, to scrutinize public conduct, to take role models, to deride counterfeits." Ibid., 122–123.

[25] See Robert Post, "Data Privacy and Dignitary Privacy: *Google Spain*, The Right to be Forgotten, and the Construction of the Public Sphere," *Duke Law Journal* 67 (2018): 981–1072.

[26] Carl Schmitt, *Constitutional Theory*, ed. and trans. Jeffrey Seitzer (Durham, N.C.: Duke University Press, 2008), 275. Democracy is "the organized sway of public opinion." Charles Horton Cooley, *Social Organization: A Study of the Larger Mind* (New York: Charles Scribner's Sons, 1909), 118. For an account of the emergence of this concept of democracy, see Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (Cambridge, Mass.: Harvard University Press, 2014).

[27] Michael Schudson, "Why Conversation Is Not the Soul of Democracy," *Critical Studies in Media Communication* 14 (4) (1997): 297, 304–305. On the relationship between the development of printing and the creation of the nation-state, see Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso Books, 1991).

[28] The great seventeenth-century theorist Hobbes argued that the essential task of the state was to preserve peace and prevent what otherwise would be a war of all against all.

[29] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 26.

[30] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). See Post, *Citizens Divided*; and Robert C. Post, "The Classic First Amendment Tradition Under Stress: Freedom of Speech and the University," in *The Free Speech Century*, ed. Lee C. Bollinger and Geoffrey R. Stone (Oxford: Oxford University Press, 2019).

[31] Robert C. Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*," *Harvard Law Review* 103 (1990): 601–686.

[32] New York Times Editorial Board, "America Has a Free Speech Problem."

[33] Robert C. Post, "The Legality and Politics of Hatred," in *Hate, Politics, Law: Critical Perspectives on Combating Hate*, ed. Thomas Brudholm and Birgitte Schepelern Johansen (Oxford: Oxford University Press, 2018).

[34] Post, "The Constitutional Concept of Public Discourse."

[35] Post, *Citizens Divided*.

[36] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: The MIT Press, 1996).

[37] These circumstances are analyzed in Robert C. Post, "Between Democracy and Community: The Legal Constitution of Social Form," in *Democratic Community: NOMOS XXXV*, ed. John W. Chapman and Ian Shapiro (New York: New York University Press, 1993), 163.

[38] The failure to understand this point is the essential flaw in the Court's notorious opinion in *Citizens United v. FEC*, 558 U.S. 310 (2010). For a discussion, see Post, *Citizens Divided*.

[39] Our current Supreme Court, with its aggressively libertarian agenda, seems perversely unable to understand this seemingly obvious point. See *National Institute of Family & Life Advocates ["NIFLA"] v. Becerra*, 138 S. Ct. 2361 (2018). See also Robert C. Post, "*NIFLA* and the Construction of Compelled Speech Doctrine," *Indiana Law Journal* 97 (2022): 1071. As a federal court recently, candidly, and naively affirmed when analyzing restrictions on the professional speech of physicians: "Simply put, speech is speech, and it must be analyzed as such for the purposes of the First Amendment." *King v. Governor of the State of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014).

[40] *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 478 (1997) (David Souter, dissenting).

[41] See Post, "*NIFLA* and the Construction of Compelled Speech Doctrine"; and Amanda Shanor, "The New Lochner," *Wisconsin Law Review* 2016 (1) (2016): 133–208.

[42] For a discussion, see Robert C. Post, "Theorizing Disagreement: Reconceiving the Relationship between Law and Politics," *California Law Review* 98 (4) (2010): 1319–1350.

[43] Chantal Mouffe, *On the Political* (London: Routledge, 2005).

[44] For a perfect example, see Michael Anton, "The Flight 93 Election," *The Claremont Review of Books*, September 5, 2016, https://claremontreviewofbooks.com/digital/the-flight-93-election. Anton's essay begins with the sentence: "2016 is the Flight 93 election: charge the cockpit or you die." The essay embodies Nazi political theorist Carl Schmitt's notorious concept of politics as an existential battle between friends and enemies. Schmitt's concept of politics may accurately describe the orientation of the Nazi Party, but it is inconsistent with the practice of politics in any modern, peaceful democracy. See Post, "Theorizing Disagreement."

Academic Freedom & the Politics of the University

Joan Wallach Scott

In this essay, I explore the relationship between the politics of the production of knowledge and partisan attempts to interfere with it. I argue that, despite changing historical contexts, the line between this politics (understood as contests about meaning and power) and partisanship has never been secured. That is because there is a tension inherent in knowledge production that cannot be resolved by legislation, administrative fiat, or academic punditry. Academic freedom mediates the tension but does not resolve it because knowledge production is inherently critical of prevailing norms (whether in the sciences, social sciences, or humanities) – norms whose partisans seek to defend their integrity and their truth. The tension between politics and partisanship is the state (or the fate) of democratic higher education in America.

The United States is in a difficult moment: what basic faith there was in the institutions of democracy has been eroded, constitutional protections have been undermined by the Supreme Court's radical right-wing majority, and reason is no barrier against the libidinal release enabled by former president Donald Trump. In the wild proliferation of paranoia, accusation, retribution, and hate speech that flourishes on the internet and translates into dangerous, sometimes lethal activism in "real life," education in general and the university in particular have been singled out for attack. The attack on education is itself not new – right-wing think tanks and politicians have been at it for decades. But this moment seems somehow more dangerous, as Republican lawmakers and militant activists use their power to send censors directly into classrooms and libraries, promising conservative parents they will regain control of their children against the specter of "woke" indoctrination.

In one of those inversions of meaning so adroitly practiced by the right, censorship is being enacted in the name of free speech and/or academic freedom. The terms themselves seem to have lost their purchase: once weapons of the weak, they now have been seized as legal instruments by the powerful, who censor what they take to be unacceptable criticism – of state policy, of inequality, of injustice – in the name of freedom. And, perhaps most hypocritical of all, the censors claim they are ridding the university of "politics." Heightened politicization, in the

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name of the purging of "politics," is the stunning result. The two are not the same. Politics (as I want to use the term) refers to contests about meaning and power in which outcomes are not predetermined; those who politicize – or, better, rely on partisanship – know in advance the outcomes they want to impose, the enemies they want to defeat. In theory, politics is at the heart of the free inquiry associated with democratic education, partisanship is its antithesis. In fact, the relationship between the two is never as simple as that opposition suggests.

The line between politics and partisanship has been difficult to maintain, if not impossible, as demonstrated by more than a century of cases investigated by the American Association of University Professors (AAUP).[1] Critical scholarship that challenged the interests of businessmen and/or politicians, however rigorous and disciplined, inevitably met the (partisan) charge that it was unacceptably "political"; its proponents were often fired as a result. In the course of its long history, the AAUP has sought to strengthen the boundary between politics and partisanship with conceptual and practical tools: disciplinary certification of the "competence" of scholars; insistence on the objectivity or neutrality of "scientific" work; tenure; faculty governance; "responsibility"; and the designation of "extramural speech" as warranting the protection of academic freedom. There is now a rich body of material (statements of principles, guides to good practice, reports) that serves to codify the meaning of that freedom, periodically updated in the Association's *Red Book*.[2] It provides important ammunition for the struggle to protect democratic education from its censors, even as the need to constantly refine and update the protocols suggests the ongoing (seemingly eternal) nature of the struggle.

Despite changing historical contexts, the line between politics and partisanship has never been secured. That is because it constitutes a tension inherent in knowledge production that cannot be resolved either by legislation, administrative fiat, or academic punditry. Academic freedom mediates the tension, but does not resolve it because when knowledge production is critical of prevailing norms (whether in the sciences, social sciences, or humanities), it incurs the wrath of partisans of those norms, who seek to defend their integrity and their truth.[3] The tension between politics and partisanship is the state (or the fate) of democratic higher education in America, a state of uncertainty (political theorist Claude Lefort associates uncertainty with democracy), that requires the kind of ongoing critical engagement – interpretative nuance, attention to complexity, philosophical reflection, openness to change – that ought to be the aim of any university education.[4]

There's no question that politics, as I've defined it, is evident in the space of the university, but that is not as uncommon or as unprecedented as the censors today would have us believe. As English literature scholar Julia Schleck reminds us, knowledge production has always been "dirty." It was "never clean, disinterested, impartial, or productive of a universally recognized good."[5] The produc-

tion of knowledge in the human sciences has always been organized and produced through power relations, whether or not they are acknowledged as such. At least since the emergence of research universities in the United States in the nineteenth century, faculties have been embroiled in controversies with one another and with outsiders to the academy about the public import of their research and teaching.

In the United States, the need to rid the university of partisan interference was formulated when the public interest research of Progressive economists (on such issues as child labor, the exploitation of immigrant labor, privatized utilities, and the gold standard) led to their firings by university presidents responding to outraged trustees. As they framed a collective response to a succession of individual incidents, the leaders of newly formed disciplinary societies and, in 1915, the AAUP took up the German notion of *lehrfreiheit* to argue their case.[6] The AAUP's founders maintained that the search for truth (unending and necessarily controversial) needed autonomy from interested parties (politicians, businessmen, religious ideologues), who lacked the competence and expertise to ensure social and scientific progress for the public or common good.[7] The academic leaders effectively offered a bargain to the state, promising progressive innovation in return for the unfettered pursuit of their research and teaching. Tenure slowly became part of the bargain as the century advanced, since research universities needed stable faculties to teach expanding numbers of undergraduate and graduate students. In return for autonomy – and as a justification for its reliability – the disciplinary societies would certify the competence and expertise of their members.[8]

The men (they were all white men) who articulated the definition of academic freedom did not deny that there were political implications to academic work – ideas that contested and conflicted with prevailing views. It was precisely because there were political implications to those views that academic freedom was needed. Philosopher and psychologist John Dewey noted that while sciences like biology faced criticism for the concept of evolution, "the right and duty of academic freedom are even greater" in fields like "political economy, sociology, historical interpretation, psychology" that "deal face-to-face with problems of life, not . . . technical theory."[9] These disciplines faced "deep-rooted prejudice and intense emotional reaction," which "exist because of habits and modes of life to which people have become accustomed. . . . To attack them is to appear to be hostile to institutions in which the worth of life is bound up."[10] Dewey and his colleagues acknowledged the political implications of their work in two ways. Those efforts not only enabled progress by challenging traditional beliefs and practices, but also conveyed to students the relationship between intellectual integrity and the values and practices of democracy, and in so doing, prepared them for the critical thinking required for democratic citizenship. Even as they were pushed to think beyond their comfort, the confidence of students would be impaired, the founders of the AAUP noted, if

> there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with that candor and courage which youth always demands in those whom it is to esteem. There must be in the mind of the teacher no mental reservation. He must give the student the best of what he has and what he is.[11]

Of course, the founders noted, the freedom to express oneself in the classroom came with a responsibility to the disciplined search for truth and the manner of its presentation. The risk of partisan backlash against the political import of a teacher's teaching might be minimized or repressed by an appeal to "science," the rigorous methods by which evidence was examined and conclusions drawn. Especially when their views were critical of prevailing norms, faculty must appear to be dispassionate and disinterested, removed from the prejudices and emotions of the public whose common good they served. It is here that partisanship is divorced from knowledge production, not only by insistence on the disciplined methods of truth-seeking, but also in the contrast between the dogmatic behavior of those located outside the university, and the "manner of conveying the truth" adopted by scholars.[12]

> One might . . . be scientifically convinced of the transitional character of the existing capitalistic control of industrial affairs and its reflected institutions upon political life; one might be convinced that many and grave evils and injustices are incident to it, and yet never raise the question of academic freedom, although developing his views with definiteness and explicitness. He might go at the problem in such an objective, historical, and constructive manner as not to excite the prejudices or inflame the passions even of those who thoroughly disagreed with him.[13]

In effect, the "scientific" posture of the researcher or teacher served to legitimate his critical views, denying any crass "interest" as motive for the conclusions he had drawn. That the ability to hold the line between partisanship and knowledge production depended not only on the substance of their research, but on the teachers' performance of a certain "scholarly-ness," revealed something of the intractability of the tension that Dewey and his colleagues sought to address. Performance was somehow a compensation (a cover?) for the inherently political nature of the scholarly work.

The strong claim for faculty autonomy rested not in individual performance, however, but in the disciplinary societies, the "organized societ[ies] of truth-seekers," whose job was to certify the competence of their members as knowledge-producers.[14] The deal negotiated with the state and businesses rested on the idea that progress was achieved best by an autonomous faculty, critical

of and unburdened by prevailing public beliefs – those beliefs in which "the worth of life is bound up," and to which politicians were pressured to respond.[15]

As the power of disciplinary associations developed over the course of the twentieth century, the ideal of their autonomy increasingly involved representing them as free of conflict within and among themselves. The notion of the neutrality of knowledge production was emphasized as the internal politics of disciplines were denied or repressed. Academic freedom came to mean the protection of this neutrality (of faculty and the university) from outside political forces, the policing of the line between knowledge and partisanship. "Qualified bodies" of professionals were said to be animated not by passions or interests, the validity of their findings not enabled by any appeal to "political authority."[16] The disciplinary societies were defined as "communities of scholars and scientists cooperating with one another through mutual criticism and electing and recruiting new members through disciplined and systematic training. . . . [A] community animated by a professional spirit and resentful of any attempts by incompetent outside authorities to control its activities or judge its results."[17] The distinction between incompetent outsiders and cooperative insiders secured the distinctions between knowledge and politics, insider and outsider, inclusion and exclusion. In contrast, "mutual criticism" carried no idea of deep-seated conflict or exclusion, thereby denying the powerful authority (the internal politics) of the discipline itself.[18] It also presumed the role consensus played in the regulation of "mutual criticism" and the recruitment and certification of new members.

Consensus rested on a common culture, what historian Carl Bridenbaugh referred to in his 1962 presidential address to the American Historical Association as a series of codified rules, "manners, courtesy, etiquette and protocol," along with "taste – a sense of the fitness of things." "Historians of our Recent Past," he maintained, "shared a common culture," now disappearing. If the title of his talk, "The Great Mutation," anticipates "The Great Replacement," there is good reason for it. Bridenbaugh lamented the fact that "so deeply has the virus of secularism penetrated our society that religion is very far gone. . . . The common religious and cultural bond of *Bible* reading exists no more." The source of this contamination was, at least in part, younger historians who "are products of lower middle-class or foreign origins, and [whose] emotions not infrequently get in the way of historical reconstructions. They find themselves in a very real sense outsiders on our past and feel themselves shut out." Indeed, Bridenbaugh's definition of the community that was being lost had long rested precisely on the exclusion of these plebeians from the comfortable society of dispassionate gentlemen scholars who could identify with the subjects about whom they wrote ("*our* past"), subjects he assumed were the only historical actors worth writing about.[19]

In the 1980s and 1990s, as critical challenges tore through the disciplinary societies, a number of scholars tried to make sense of the storm. They noted that

efforts since the 1960s to produce new knowledge from hitherto unrecognized and excluded perspectives (those of colonial subjects, racialized subjects, women, workers) were coming up against what seemed an unlikely resistance from the disciplines' liberal commitments to pluralism, understood as an ethic of openness and tolerance. The critics concluded that pluralism might be open, but it was conflict averse, its supporters believed instead in the necessity of "peacefully coexisting diversity."[20] Historian Hayden White observed that "the 'politics' of the disciplinization of history, conceived as all disciplinization must be, as a set of negations, consists of what it marks out for repression for those who wish to claim the authority of the discipline itself for their learning."[21] He added that utopian thinking in general and, in the Cold War climate of the 1950s, Marxism in particular were marked out for exclusion. Others noted that feminism and race were added to the list in the 1980s.

The critics further pointed out that in the field of history, conflicts of interpretation were incorporated into a chronology that detailed successive waves of consensus, revision, and new consensus, one leading to the next. In science, one "paradigm" was seen as replacing an earlier one; the never-ending search for truth was represented in terms of successive advances, not irreconcilable differences. Philosopher Slavoj Žižek notes that this kind of narrative is a way of obscuring conflict: "Some fundamental antagonism [is resolved] by rearranging its terms into a temporal succession."[22] In literary studies, the critics drew attention to the presumption of a "universal reader" who could be persuaded by a "disinterested" interpretation that refused any reference to the social location or historical context of the author or the reader. Literary critic Ellen Rooney pointed out that "pluralistic forms of discourse imagine a universal community in which every individual . . . is a potential convert, vulnerable to persuasion, and this requires that each critical utterance aims at the successful persuasion of this community in general, that is, in its entirety."[23] Rooney cited members of her discipline who refused the idea that different social experiences might fracture this universal community; those who introduced these experiences must be excluded on the grounds of their "irrationality" (a term frequently applied to feminists).[24]

Philosopher Samuel Weber's reflections on the operations of disciplines offer a useful way of thinking about the history of the relationship between liberalism, pluralism, and the American university in its formative years. He cites historian Louis Hartz to suggest that, early on, American liberalism took conflict out of the idea of liberty, unlike Europeans who tied it to "real social and political antagonisms."[25] This antipathy to conflict informed the creation of secular universities and the disciplinary societies that organized them.

> Disciplines must exclude or at least reduce the purport of their own inner disunity and internal conflictuality, and above all, of the inevitably conflictual process by which,

> through exclusion and subordination, disciplines define their borders and constitute their fields. And they must deny such exclusivity in the name of an ideal of knowledge, of science, and of truth that deems these to be intrinsically conflict-free, self-identical, and hence, reproducible as such and transmissible to students. . . . [This] reflects and supports the self-image of a society that imposes its authority . . . by denying the legitimacy of structural conflicts, and hence of its relation to alterity.[26]

In other words, the issue is much larger than the organization of academic life. It has to do with the prevailing liberal ideology that organizes both our institutions of politics and of higher learning. Still, I am interested in the specificity of the matter, in the ways the disciplinary communities sought to contain their politics, grounding their autonomy and their authority on a notion of consensus that rested on the homogeneity of their members (white, male, Christian); that homogeneity made possible the belief (assumed and unexamined) that the differences among them could be reconciled.[27] The repression of disciplinary politics constituted a way of managing the tension I have been discussing, between the politics of knowledge production and partisan interference with that effort. Although it had many scholarly critics in the course of its articulation, the notion of consensus became untenable in the 1960s, as newcomers to the university exposed the disciplines' repression of politics as a politics itself.

In the popular imagination and in some historical writing as well, the 1960s are synonymous only with student-inspired cultural and political upheaval. Not enough mention is made of the larger context: the Supreme Court's decision in *Brown v. Board of Education* in 1954; economic expansion and the antidiscrimination legislation of Lyndon B. Johnson's administration (the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Executive Order on Affirmative Action of 1965, the Immigration Act of 1965); the doubling of the number of colleges and universities and their recruitment of increasing numbers of students and faculty from more diverse domestic and international backgrounds; decolonization and continuing wars of national liberation (Algeria, Vietnam), all of which brought difference(s) into social and political consciousness. Difference was not named as such in the discourses of the 1960s and 1970s: the relevant terms were inequalities of class, race, and sex; discrimination and domination; capitalism and imperialism. Difference as an analytic came into focus (and into our vocabularies) later, with deconstruction and poststructuralism. But it is a useful term to grasp retrospectively what happened to the disciplinary consensus exemplified by Bridenbaugh. The 1960s brought into view the antagonistic differences (culture, class, race, sex) long excluded by the pluralist consensus that underwrote earlier visions of academic freedom.

The student/faculty movements challenged the ways in which knowledge was produced and by whom. The demands for African American or women's history

and for the literature of others than those in the white Western canon articulated an alternative "standpoint epistemology," insisting on the validity of noncanonical, suppressed, subaltern voices (in the words of historian Lucien Febvre, "history from below") and the need to disinter them, to make them audible and visible as knowledge worth knowing.[28] The insistence on the different experiences of racial minorities and women required a rethinking of disciplinary orthodoxies and the power that maintained them, of who counted as a professional scholar and what counted as suitable areas of inquiry and the methods used to study them. It meant acknowledging the implications of the public's interest in the work, its intersection with partisanship. This was a moment when equality and justice were deemed political priorities (the Kennedy-Johnson Great Society), vital to the then-definition of the common good. Inevitably, some scholarly research was directed to "the study of contemporary social problems of all people."[29] Cultural critic Roderick Ferguson points out that the university's contribution was not out of line with global capitalism's turn to local cultures and differentiated markets.

What followed was a process of backlash and recognition, challenge and accommodation. The movements' success was indicated by the hiring of minority and women faculty, the numbers of "studies" programs and centers founded from the 1960s onward, and the remarkable profusion of scholarship that has flowed from them ever since. Difference was not only documented (women, African Americans, LGBTQIA+ persons as active agents in public and private), it was also theorized as a structure of power from a variety of perspectives: indeed, this was the formative period that gave rise to feminist theory, theories about race (eventually, in the 1980s, to critical race theory), and renewed attention to Marxism among them.

But the success was achieved by partisan methods – demonstrations, sit-ins, petitions – that pitted some faculty and administrators against the demands; and others, who were sympathetic to the philosophical and epistemological issues of difference, against what one of them deemed – dismissively – the student movements' "sociopolitical" advocacy.[30] I don't think there would have been gender studies or African American studies or any other similarly named programs without these protests – so entrenched were disciplinary orthodoxies and structures of misogyny and racism. This was a moment when partisanship forced open the world of knowledge production.

But I also don't want to underestimate the difficulties some of us had in maintaining a notion of scholarly rigor (itself under siege) even as we sought to accommodate the demands for curricular change. At that time, the blurring of the lines between partisanship and knowledge production at once enabled and complicated the changes that needed to be made. It was no longer possible to deny the politics of knowledge production, but difficult to separate it from the advocacy that had exposed it, and to defend it from its external critics who were horrified at the militancy that accompanied demands for university reform.

The challenges took many forms. Students armed with theories of power (and, at Cornell University in 1969, with real guns) made nonnegotiable demands about what would be taught. In my discipline, for example, calls for "her-story" (offering contemporary evidence of the experience of patriarchy as the universal lot of all women) could interrupt a lecture on the history of women in other eras and cultures. How to recognize students' need for new knowledge and at the same time teach them to remain open as they sought to achieve it? Sympathetic faculty were divided about the substance and methods of their teaching, even as they sought to demonstrate to their colleagues that remedying the prior exclusion (their own as well as research and curricular content) did not mean departure from accepted disciplinary methods of investigation.[31] This was a remarkable moment – a tense one. For radical scholars, it meant at once meeting and subverting disciplinary norms, as well as invoking academic freedom to protect the process of change that was underway. None of this was smooth, as democratic processes rarely are; this was an openly political scene, characterized by contentious, conflicted attempts to meet the challenges posed by the newcomers to university life. The university survived those challenges; they are not the source of the current predicament, despite the narratives that insist they are.[32] The difference between then and now was that the debates took place in the context of the (rhetorically at least) expansive, egalitarian 1960s. The university's wrestling with its procedures resonated with (even while it both recognized and coopted) a general commitment to social justice. The age of neoliberalism has provided a very different framework: market-oriented, austerity-driven, individualized, anti-egalitarian. This is not the legacy of the 1960s but its repudiation.

As the contests that constitute the politics of knowledge production were unfolding, another set of developments was taking place. Some of it was aimed specifically at muting those politics; some was associated more generally with neoliberal ideas and practices that had the same muting effect.

After what now seems a brief opening to "antagonism," the disciplines managed to reassert a certain authority, one that recognized the epistemic radicalism of the new scholarship by attempting to contain its most radical edge. In my own field of history, this meant depicting "theory" as a momentary "turn" away from empirical certainty; its replacement by a return to positivist belief in the transparency of archival evidence.[33] Yet despite the reassertion of orthodoxy, there remain historians whose radical critiques continue to trouble the field. Traces of those 1960s innovations, those theoretical "turns" remain, much to the dismay of conservatives seeking to eliminate critique entirely.[34]

Then there were the discourses of multiculturalism and diversity that also played down structural issues the 1960s radicals had emphasized. When university administrators described their populations as multicultural, they stressed a rich variety of differences, underplaying or denying the hierarchies among them

that obtained in the social world and that followed women and minorities into the academy.[35] They avoided the language of inequality, emphasizing – as Justice Lewis F. Powell Jr. did in *Regents of the University of California v. Bakke* (1978) – the educational value of heterogeneity for the enrichment of the homogeneous majority.[36] Ferguson says that the "hegemonic incorporation of minorities and minoritized knowledges into dominant institutions, was not only part of an affirmation, but a preemption as well." He continues, "differences that were often articulated as critiques of the presumed benevolence of political and economic institutions became absorbed within an administrative ethos that recast those differences as testaments to the progress of the university and the resuscitation of a common national culture."[37]

But cooptation or preemption weren't the only effects of multiculturalism and diversity. These discourses also enabled significant change within university cultures. Despite the turn away from inequality, administrators and faculty have been able to achieve an important measure of attention to the injustices of discrimination (if not to its eradication). The very rubric of diversity, equity, and inclusion (DEI) signaled that aim. DEI has effectively salvaged some forms of affirmative action, despite conservative attempts to dismantle it. Indeed, the current attack on DEI by right-wing Republicans is a continuation of that dismantling effort. Along with the Supreme Court decision declaring unconstitutional the use of race as a criterion for admission at Harvard and the University of North Carolina, the end of DEI will spell the end of affirmative action and a return, if not entirely to the more homogeneous faculty and student bodies of the pre-1960s era, to a re-imposition of a "classical" conservative curriculum (without all those troublesome "studies" programs that call into question "the habits and modes of life to which [some] people have become accustomed").[38] Florida governor Ron DeSantis's adoption of the model offered by Hillsdale College, a conservative Christian school in Michigan, to New College of Florida, a public liberal arts college, is exemplary. According to its website, Hillsdale College "maintains by 'precept and example' the immemorial teachings and practices of the Christian faith."[39]

The positive aspects of DEI have been undermined, even as they are implemented, by a corporate discourse that historian Amna Khalid and cultural critic Jeffrey Aaron Snyder refer to as "DEI, Inc."[40] This discourse not only erases conflict and hierarchy from difference; it assumes that discrimination can be "fixed" by encouraging kind thoughts about others who are not like "us." Instead of addressing structures of power, its proponents invoke the language of care and respect – as the president of Hamline University, Fayneese Miller, did when she fired an art history instructor who was accused by a Muslim student of disrespecting her religion. Academic freedom, President Miller said, had to be superseded because "It was important that our Muslim students, as well as all other students, feel safe, supported and respected both in and out of our classrooms."[41] Cases like this

are repeated in other places: for example, Black students sometimes refer to racist experiences in terms of "disrespect." (Lack of care and respect can, of course, be signs of discrimination, but they are not its cause.) The language can be used, too, to confuse political disagreement with discrimination, as when Zionist students, protesting a teacher's presentation of material that calls into question Israel's official story of itself, claim they do not feel "safe" in the face of what they deem anti-Semitism. In the Hamline case, it seems clear that student grievances had to do with structural issues that were not being addressed; the comforting language and the firing of an (innocent) instructor did nothing to rectify those issues.

The administrative emphasis on individual comfort is sometimes the only language students have to make legible the discrimination they are experiencing. For that reason, they invoke their status as paying customers of the institution to demand their money's worth as they point to individual experiences of racism and sexism. They insist on censorship in the name of "respect" for their religion or in the name of "recognition" for a fixed notion of their identity. Ignoring the power dynamics of sex and race entirely, some conservative students have joined the chorus, seeking affirmation of their identity as victims of the intolerant left. These instances use the language of individual harm and the authority of individual experience, even as they refer to some notion of collective identity and to systemic issues; confusion abounds about where the problem actually lies and how to effectively analyze and address it. In response to the confusion, academic freedom needs to be invoked to protect the politics of knowledge production as the place where these issues can be addressed; its job is precisely to mediate the inevitable tension. The dismissal or disregard of academic freedom by administrators, as in the Hamline case, opens the door to those powerful outside forces always waiting to step in.

The attack on the university today is the product of conservative political forces that have long conspired to curtail the 1960s newcomers' presence and their influence. The Supreme Court decision in *Brown v. Board of Education* was probably the initial impetus, followed by state referendums and lawsuits (which continue today) contesting affirmative action admissions policies, and – most powerfully – the steady decline of federal and state funding of higher education.[42] As public funds were dramatically reduced universities opted to rely on student tuition and fees, outside philanthropy, and partnerships with industry to develop new products or to prepare students as future employees, in this way becoming dependent upon exactly those forces whose interference in knowledge production was the danger academic freedom was invented to deter. Perhaps the most egregious example of this is the Koch Foundation's funding of new academic centers staffed by professors of their own choosing with little or no input from existing faculty. When faculty do offer critical input, they may be ignored or punished. This represents nothing less than seizure of curricular initiative and the

denial of faculty governance by administrators willing to bargain away academic freedom for the large sums of money the foundation provides.[43]

Although universities had long practiced forms of corporate management (there are condemnations of these practices that date to the early 1900s),[44] the embrace of neoliberalism brought new attention to market practices – the "academic capitalism" that Sheila Slaughter and Gary Rhoades describe.[45] There followed a steady decline in tenured faculty positions as administrators sought a more disposable labor force, relying increasingly on graduate students and adjuncts to meet changing "consumer demand." (The current move in red states to outlaw tenure entirely, driven by a desire to get rid of troublesome critical faculty and not necessarily motivated by workforce calculations, will surely finish the job.) The institutions and practices that embodied the autonomous, self-regulating, tenured faculty (the basis for the recognition and implementation of academic freedom) have shriveled, replaced by administrative fiat or task forces appointed by university officials. This left fewer structural positions within which faculty could engage in the debates that revise and animate institutional and curricular policy; it leaves fewer tenured faculty to resist these changes.

In the process, too, a new definition of education has been articulated. The point of a college degree is to enhance a student's "human capital"; vocational advancement rather than intellectual development is the value being sold. Political theorist Wendy Brown has aptly labeled this downgrading of education a means of "undoing the demos."[46] The Progressives' understanding of the public good that was higher education – of the unending pursuit of truth as a way of moving democracy forward – seems to have been lost, and with it their justification for academic freedom. Academic freedom itself has been increasingly redefined as the protection of an individual's speech rights. This conflation of free speech and academic freedom undermines the collective identity of the university and its faculty, individualizing knowledge production in the process.

The "culture wars" are not, as some have argued, a way of distracting from these material issues; they are, instead, another weapon in the right-wing arsenal, aimed at imposing a singular vision of the common or public good. The legislative power to "cancel" (tenure, critical theory, scholarship that casts a negative light on our triumphal national history or that questions norms of gender and race, curricular offerings, and library holdings) is far more dangerous to free inquiry than the censorious left "cancel culture" it is meant to combat. Although a hardened, reactive culture on the left, insisting that its interpretations are the only truths worth teaching, is also at odds with free inquiry, it is met on the right by demands for affirmative action for equally dogmatic conservative interpretations. Sometimes it seems that partisanship is all that remains. I think that is to overstate the problem. There is university research and teaching still devoted to the production of knowledge, with all its politics – the politics Schleck called "dirty knowledge."[47]

Academic freedom mediates what I have been referring to as the constitutive tension between open contests about the interpretive understandings of facts and partisan attempts to shut down those contests. It has to be understood as a collective freedom (not an individual right or a human right) that refers to processes of knowledge production. Those processes are conflictual and contested, they challenge and structure relations of power within the institution and in the society at large. They involve difficult debates as motors of disciplinary accommodation and change; arguments about curricular innovation as a way of acknowledging, but then theorizing the sources and aims of student (and for that matter all forms of public) protest; research understood to be the pursuit of untried ideas, however outrageous, obscure, or irrelevant they may seem; and teaching, conceived not as the transmission of received truths, but as a mode of the provocation of the desire to know the unknown – critical inquiry into the most hallowed premises of our disciplines, our cultures, and our societies.[48] In his prescient 1997 book *The University in Ruins*, literary critic Bill Readings argued that in the face of the corporate transformation of the academy, there were still spaces in which Thought – by which he meant critical interrogation – could be pursued: "Thought does not function as an answer but as a *question*."[49]

Academic freedom was invented in the United States to protect the space of "Thought": that is, of free inquiry as practiced in university settings. But where do we turn for its protection? Who is it that recognizes the principle and stands by it in these turbulent, partisan times? Not many university administrators, who are confused about how to juggle competing claims upon their interests and their principles; not many judges, whose decisions rest academic freedom on the First Amendment right to free speech (thus conflating, even as they try to distinguish, collective and individual rights); and certainly not many politicians, even those opposed to the authoritarian takeover being enacted in a number of Republican-led states. And not enough faculty, who have been deprived of the governance practices that were once their customary right – although the growing ranks of the unionized suggest a renewed sense of collective identity, which academic freedom rested on for its legitimacy. The problem, though, is that it is not only a shared identity as wage-earners that ought to unite us, but one as knowledge-producers – a particular category of employment that, whatever its so-called elitist pretentions, distinguishes this kind of work. Faculty are frontline workers in the cultivation of a democratic citizenry. Their collective-bargaining needs to make academic freedom a nonnegotiable part of any contract, the first principle on which all the other clauses rest. This, arguably, is the only way to retain what is left of free inquiry in the academy.

My paradoxically pessimistic hope for the future of academic freedom rests on the fact that – despite media hype and right-wing politicians' claims to the contrary – there are still spaces within the "ruins" of the university where the crit-

ical practice of academic free inquiry continues, the free inquiry that the Progressives identified as vital for the common good. These days, those spaces are under dramatic assault (from without and within), but they continue to function. They are spaces in which faculty and their students seek to carry on the critical mission of democratic education, always a process of open, relentless, and never-ending questioning. They are not spared the tension between politics and partisanship, but they try to manage it productively. It is over those embattled spaces of critical knowledge production that we need to fly the banner of academic freedom, as an aspirational principle at least, even if its protections are hard to come by. In that way, despite the authoritarian turn currently suppressing it, we may leave to future generations a model they can return to.

AUTHOR'S NOTE

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ENDNOTES

[1] Cases can be accessed at the American Association of University Professors website, https://www.aaup.org (accessed May 28, 2024).

[2] See American Association of University Professors, *Policy Documents and Reports*, 11th ed. (Baltimore: Johns Hopkins University Press, 2015).

[3] Of course, there is knowledge production that accords with prevailing norms, whether disciplinary or public. But one never knows when the pursuit of new ideas will meet with orthodox objections. It is the process of constant questioning that constitutes academic inquiry, and that ought to be protected by academic freedom.

[4] Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity Press, 1988).

[5] Julia Schleck, *Dirty Knowledge: Academic Freedom in the Age of Neoliberalism* (Lincoln: University of Nebraska Press, 2022), xi.

[6] Although they gestured to *lehrnfreiheit*–the freedom to learn–students were not included in the major arguments the Progressives made for academic freedom.

[7] Robert C. Post, *Democracy, Expertise, and Academic Freedom* (New Haven, Conn.: Yale University Press, 2012), 65–66.

[8] On the history of this early period, see Richard Hofstadter and Walter Metzger, *The Development of Academic Freedom in the United States* (New York: Columbia University Press, 1955). See also Hans-Joerg Tiede, *University Reform: The Founding of the American Association of University Professors* (Baltimore: Johns Hopkins University Press, 2015); and Matthew Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Conn.: Yale University Press, 2009). For contemporary issues, see Henry Reichman, *The Future of Academic Freedom* (Baltimore: Johns Hopkins University Press, 2019); and Henry Reichman, *Understanding Academic Freedom* (Baltimore: Johns Hopkins University Press, 2021).

[9] John Dewey, "Academic Freedom," in *John Dewey: The Middle Works, 1899–1924*, ed. Jo Ann Boydston (Carbondale: Southern Illinois University Press, 1976), 53, 57.

[10] Ibid., 58.

[11] American Association of University Professors, "1915 Declaration of Principles on Academic Freedom and Academic Tenure," *Bulletin of the AAUP* 1 (28) (1915): 296, https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf.

[12] Dewey, "Academic Freedom," 59.

[13] Ibid.

[14] Ibid., 66.

[15] Ibid., 58.

[16] For "qualified bodies," see Arthur O. Lovejoy, "Academic Freedom," in *Encyclopaedia of the Social Sciences, Volume I*, ed. Edwin R. A Seligman and Alvin Saunders Johnson (New York: Macmillan, 1937), 384. For "political authority," see Hayden White, "The Politics of Historical Interpretation: Discipline and De-Sublimation," in *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: John Hopkins University Press, 1987), 59.

[17] Glenn Morrow, "Academic Freedom," in *International Encyclopedia of the Social Sciences, Volume I*, ed. David L. Sills (New York: Macmillan and the Free Press, 1968), 24.

[18] Joan Wallach Scott, *Knowledge, Power, and Academic Freedom* (New York: Columbia University Press, 2019), 23–24.

[19] Carl Bridenbaugh, "The Great Mutation," Presidential Address at the American Historical Association Annual Meeting, Chicago, Ill., December 29, 1962, https://www.historians.org/about-aha-and-membership/aha-history-and-archives/presidential-addresses/carl-bridenbaugh. Emphasis to *our* in "our past" is mine.

[20] Samuel Weber, *Institution and Interpretation* (Minneapolis: University of Minnesota Press, 1987), 42.

[21] Hayden White, "The Politics of Historical Interpretation: Discipline and De-Sublimation," *Critical Inquiry* 9 (1) (1982): 113, 119.

[22] Slavoj Žižek, *The Plague of Fantasies* (New York: Verso Books, 1997), 11–12.

[23] Ellen Rooney, *Seductive Reasoning: Pluralism as the Problematic of Contemporary Literary Theory* (Ithaca, N.Y.: Cornell University Press, 1989), 1–2.

[24] Ibid., 62.

[25] Weber, *Institution and Interpretation*, 41.

[26] Ibid., 44.

[27] As late as 1969, 96 percent of the faculty were white and 81 percent were male. Cited in Henry Reichman, "Academic Capitalism and the Crisis of the Professoriate," *Journal of the Early Republic* 42 (4) (2022): 543, 545.

[28] Febvre's terms were "histoire vue d'en bas et non d'en haut," or "history viewed from below, not from above." Lucien Febvre, "Albert Mathiez: Un Tempérament, Une Éducation" [Albert Mathiez: One Temperament, One Education], *Annales d'Histoire Économique et Sociale* 4 (18) (1932): 576.

[29] Roderick Ferguson, *The Reorder of Things: The University and Its Pedagogies of Minority Difference* (Minneapolis: University of Minnesota Press, 2012), 42.

[30] Philosopher Richard Rorty argues that, despite profound philosophical disagreement on questions of language, he and John Searle "are equally suspicious of attempts to require courses which will shape students sociopolitical attitudes." Richard Rorty, "Does Academic Freedom Have Philosophical Presuppositions?" *Academe* 80 (6) (1994): 52, 54.

[31] This process warrants a study of its own and would shed important light on the ways–under pressure from the organized student movements–scholars obtained disciplinary recognition for work that was once considered anathema and, in the process, changed the disciplines, opening them to new objects of research, as well as new theories and methods.

[32] A recent example is Daniel Gordon, *What is Academic Freedom? A Century of Debate, 1915 – Present* (London: Routledge, 2023).

[33] Judith Surkis, "When Was the Linguistic Turn? A Genealogy," *American History Review* 117 (3) (2012): 700.

[34] Ethan Kleinberg, Joan Wallach Scott, and Gary Wilder, "Theses on Theory and History," *History and Theory* (2018), https://historyandtheory.org/theoryrevolt. See also two journals with "critical" in their titles: *History of the Present: A Journal of Critical History* and *Critical Historical Studies*.

[35] See Avery Gordon and Christopher Newfield, eds., *Mapping Multiculturalism* (Minneapolis: University of Minnesota Press, 1996).

[36] *Regents of the University of California v. Bakke*, 438 U.S. 265 312–314 (1978).

[37] Ferguson, *The Reorder of Things*, 191, 214.

[38] Dewey, "Academic Freedom."

[39] "Mission Statement," Hillsdale College, https://www.hillsdale.edu/about/mission (accessed October 7, 2023).

[40] Amna Khalid and Jeffrey Aaron Snyder, "Yes, DEI Can Erode Academic Freedom. Let's Not Pretend Otherwise," *Chronicle of Higher Education*, February 22, 2023, https://www.chronicle.com/article/yes-dei-can-erode-academic-freedom-lets-not-pretend-otherwise.

[41] Scott Jaschik, "Academic Freedom vs. Rights of Muslim Students," *Inside Higher Ed*, January 3, 2023, https://www.insidehighered.com/news/2023/01/03/debates-whether-academic-freedom-includes-images-offensive-muslims.

[42] See Nancy Maclean, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (New York: Penguin, 2017). See also Christopher Newfield, *The Great Mistake: How We Wrecked Public Universities and How We Can Fix Them* (Baltimore: Johns Hopkins University Press, 2016).

[43] The magnificent work of the student-initiated group "UnKoch My Campus" should be cited here as a movement seeking to protect free inquiry in universities against the incursion of outside, well-financed partisan groups: namely, those financed by the Koch brothers and their affiliated lobbyists. UnKoch My Campus, http://www.unkochmycampus.org (accessed May 30, 2024).

[44] Opposition to corporate practices were at the heart of early efforts to formulate principles of academic freedom. Just two examples: Henry S. Pritchett, "Shall the University Become a Business Corporation?" *The Atlantic*, September 1905; and Randolph Bourne, "The Idea of a University," *The Dial*, November 22, 1917, https://www.jamesgmartin.center/2019/10/the-idea-of-a-university-when-trustees-turn-a-college-into-a-commodity. A quote from Bourne: "The excuses, causes, and reasons given by the university authorities and the current comment of the newspapers show how frankly the American university has become a financial corporation, strictly analogous in its motives and responses, to the corporation which is concerned in the production of industrial commodities."

[45] Sheila Slaughter and Gary Rhoades, *Academic Capitalism and the New Economy: Markets, State, and Higher Education* (Baltimore: Johns Hopkins University Press, 2004).

[46] See Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge, Mass.: Zone Books, 2017). Brown's new book, *Nihilistic Times*, takes up many of these issues as well. Wendy Brown, *Nihilistic Times: Thinking with Max Weber* (Cambridge, Mass.: Harvard University Press, 2023).

[47] Schleck, *Dirty Knowledge*, xi.

[48] Gayatri Spivak describes education in the humanities as "a persistent attempt at an uncoercive rearrangement of desires through teaching and reading." Gayatri Chakravorty Spivak, "Terror: A Speech after 9-11," *boundary 2* 31 (2) (2004): 81.

[49] Bill Readings, *The University in Ruins* (Cambridge, Mass.: Harvard University Press, 1997), 160.

The Connected City of Ideas

Robert Mark Simpson

We should drop the marketplace of ideas as our go-to metaphor in free speech discourse and take up a new metaphor of the connected city. Cities are more liveable when they have an integrated mix of transport options providing their occupants with a variety of locomotive affordances. Similarly, societies are more liveable when they have a mix of communication platforms that provide a variety of communicative affordances. Whereas the marketplace metaphor invites us to worry primarily about authoritarian control over the content that circulates through our communication networks, the connected-city metaphor invites us to worry, more so, about the homogenization of the tools and formats through which we communicate. I argue that the latter worry demands greater attention under emerging technological conditions.

What is the purpose of a moral metaphor? Think of the boss who says, "our company is a family." Or someone lobbying for corporate tax cuts, who says a strong business sector is "a rising tide that lifts all boats." These metaphors seem to be issuing moral appeals, of a sort. But how are they meant to work exactly?

Here's a rough proposal. The point of a moral metaphor is to highlight an aspect of a thing, and tell us that this aspect matters in how we deal with the thing, or that it matters more than we usually suppose. Moral metaphors provide *perspectives*, in philosopher Elisabeth Camp's sense of the word. They organize our thinking "by imposing a complex structure of relative prominence . . . so that some features stick out in our minds," and by imposing "evaluative attitudes and emotional valences on [a thing's] constituent features."[1] The rising-tide metaphor tells us that the aggregate benefits of a buoyant economy matter more than how evenly they trickle down. The family metaphor tells us that commerce isn't the only aspect of corporate life to be valued. Relationships matter too. The way we imagine the world, as philosopher Mary Midgeley says, determines "what we select for our attention among the welter of facts that constantly flood in upon us."[2] Moral metaphors are devices for imaginative reflection that highlight morally underappreciated aspects of things.[3]

If we want to judge the aptness of a moral metaphor, we have to ask, "does it make sense to shine a moral spotlight on that part of the stage?" Consider the corporate-family metaphor. It highlights the way that companies give us relation-

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ships, not just commerce. Its aptness depends on whether this part of corporate life is in fact underappreciated. Maybe we judge that it is. Or maybe we think it isn't, and that it is mainly about guilting workers into doing unpaid overtime.

I am talking about how moral metaphors work because I think we need to update the metaphors we use around free speech. Everyone can see that our communication tools and practices are evolving fast, with a mix of welcome and unwelcome results. But there is an aspect of this evolution that is seriously underappreciated. Our communication tools and practices are increasingly subject to standardizing and homogenizing pressures. We are being corralled into a narrower range of devices and methods for talking to each other. We need to actively strategize about how to deal with the threat that this homogenization poses to our abilities as creative, reflective, thinking beings. But first, we need to recognize it as a threat.

The dominant moral metaphor in free speech discourse – namely, the marketplace of ideas – inadvertently desensitizes us to this threat. This metaphor invites us to worry, primarily, about authorities controlling the ideological content of public communication. At the same time, it analogically portrays homogenization in our methods of communication as something benign or even good. We need another metaphor that frames this homogenization as something to worry about.

Cities are more liveable when they are connected, when they have an integrated mix of trains, cars, buses, cycle paths, and walking paths, which provide a diverse array of locomotive affordances. Similarly, societies are more liveable if they enable us to use a variety of idea-transmission media with diverse communicative affordances with respect to expressive formats (text, voice), stylistic options, breadths of audience, and tempos of exchange. We should be able to freely exchange ideas and information, subject to reasonable caveats. But we should not be content with this measure of freedom. We should also be free to exchange ideas using a heterogeneous repertoire of media and methods, suited to various communicative purposes. We should have a connected city of ideas.

John Stuart Mill's writing inspired the marketplace of ideas metaphor. But that metaphor has become a dead dogma of the kind that Mill saw as inhibiting our mental vitality.[4] If we want to carry the free speech tradition's underlying ideals into the future, and refashion liberal society, we need interpretive lenses that have a deeper focal point than the marketplace metaphor gives us. We need lenses that orient our gaze toward problems that Mill, in the nineteenth century, and the lawmakers who implemented his ideals in the twentieth, couldn't yet envision.

The marketplace metaphor has established rivals. Alexander Meiklejohn used the image of a town hall meeting to illustrate the normative appeal and pragmatic implications of a democratic conception of free speech.[5]

Robert Goodin and Robert Sparrow have riffed on marketplace lingo, inviting us to think of free speech culture as a garden of ideas.[6] Seana Shiffrin's "thinker-based" theory of free speech has, at its heart, a striking simile, likening censorship to solitary confinement.[7]

By pitting my connected-city metaphor against the marketplace of ideas I am not insisting that the latter is the best of the currently available options. I am targeting the marketplace metaphor mainly because it is so influential. At the same time, I disagree with those critics who regard it as a totally hollow or disingenuous piece of rhetoric.[8] I believe it has some enduring merit as a highlighting device.

To appreciate this, we have to decode the metaphor by asking, first, why markets per se are presumed valuable and, second, how the benefits of not having censorship resemble the benefits of using free markets to organize certain activities.

The key convictions behind a promarket ethos, for present purposes, are 1) that preference-satisfaction is good, or a reasonable proxy for the good, 2) that people are decent at knowing their own preferences, and 3) that people do better in acting to satisfy their preferences than third parties. Except in special circumstances, then, we should avoid things like centrally planned economies or protectionist limits on trade. These are bad because they interfere – ineptly, or based on insufficient information – with the satisfaction of our preferences, which are better satisfiable if we are left to conduct voluntary, mutually beneficial exchange. Or so the theory says.[9] In essence, markets are good because they distribute stuff in a way that efficiently satisfies people's preferences and, crucially for our purposes, they take the work of stuff-distribution out of authorities' incapable hands.[10]

Analogously, free speech principles take the work of information- and opinion-distribution out of the authorities' incapable hands. Authorities are liable to think they know better than the folk themselves which ideas and opinions (as with, which products) are good for the folk to receive. When we say that free speech principles give us a marketplace of ideas, we are highlighting how these principles limit the ability of authorities to use censorship to impose paternalistic controls upon public discourse, much like markets stand in the way of authorities' centralized, bureaucratic, and ultimately counterproductive controls on product allocation. The critical resemblance is in how free speech and consumer markets both spare us the troubles of having incompetent authorities deciding, on our behalf, what things, produced by others, we may access or consume.[11]

One objection to the metaphor is that the marketplace of ideas is rigged. The market doesn't necessarily give people ideas and information they want. Often, instead, it gives people the ideas that ideologues and media corporations want them to have. What exists in most liberal societies is more like an *oligopoly* of ideas.[12] The notion that we have a free market in ideas is libertarian

mythology, distracting us from the oppressive power structures that are manifest in, and reified by, liberal society's communication systems.[13]

But even if we grant the key premises here, this doesn't problematize the marketplace metaphor's prescriptive use. Suppose we are in a society where free speech rules are limiting content-based censorship – just as our metaphor recommends – but where media oligopolies wield great influence over public discourse. In this context, it would be spurious to suggest that public discourse is giving people the ideas they really want. If the marketplace metaphor is used as a way of conveying that suggestion, that's bad. But it doesn't nullify our worries about government control over ideas distribution, or make it illicit to highlight these worries using marketplace imagery. We might object to a fixation upon these worries that simultaneously overlooks nongovernment threats to the integrity of public discourse.[14] But the problem there, again, is with the metaphor's context-specific misuse, not with the validity of the moral concerns that it encapsulates.

Another objection points to a mismatch between what friends of the marketplace of ideas want it to deliver and what it actually delivers, even if it hasn't been transformed into an oligopoly. The English forefathers of free speech theory, Milton and Mill, seemed to believe that truths will outcompete falsehoods in an open contest.[15] Our metaphor is often deployed in defense of this notion.[16] However, so this second objection says, in a marketplace of ideas, people don't reliably "buy" truths. People buy the ideas *they like*. And people don't reliably like truths better than falsehoods. What the invisible hand does, all going well, is efficiently allocate goods to people based on what they want. Market-based systems of interaction will not magically popularize truths, then, any more than they will magically guarantee the popularity of higher-quality consumer products.[17]

All that this objection shows, though, is that some champions of the marketplace of ideas misconstrue their metaphor's main lesson. Truth-based justifications for free speech are out of favor nowadays, largely replaced with claims about free speech's role in realizing democracy.[18] We have little reason to think free speech reliably furthers our epistemic aims (like truth, understanding), given the fragility of what we know about human rationality and credulity. It is still a mistake to believe that authorities know better than the folk which ideas are good for the folk to receive. But this isn't because people are in fact great at judging what is plausible or who is credible.[19] Rather, it's a mistake because authorities have the same weaknesses on this front, as well as additional weaknesses that come with trying to advance the folk's informational interests using centralized bureaucratic processes, which all-too-easily end up pre- or mis-judging complex issues.[20]

Free speech isn't a royal road to truth. If it can be justified, it is with reference to other (for instance, democratic) ideals, and claims about how free speech principles help to realize them. The marketplace metaphor's utility is in supplementing these justifications by highlighting the perennial risk of government overreach.

Complex distribution networks, through which people with varied needs interact to try to fulfill their preferences, cannot be micromanaged by authorities, even decent authorities, much less inept or corrupt ones. Many factors bear on how we resist this overreach, in practice. But in principle, in complex networks, a decent strategy for satisfying preferences is to let people themselves decide what they want from whom, while limiting government's power to dictate how things go. The marketplace metaphor has been one of our ways of culturally encoding this lesson over the last century and reminding ourselves of its relevance to free speech policy.

So, what's the problem? What other aspect of free speech policy should we emphasize, and how does the marketplace metaphor get in the way?

Here is a thought experiment. Suppose you're in a world that has a well-functioning, universally accessible communication network – call it *the System* – that is used by nearly everyone and that has largely displaced the use of other communication tools, including other digital tools, as well as older options like telephone and mail. Use of the System isn't legally mandated. But it is ubiquitously used all the same because it is a low-cost option that many find useful, and its widespread usage creates network effects that discourage opting out. Moreover, the System is a free speech zone, with few or no ideological constraints on content. Some criminal and tortious expression, which falls outside the coverage of free speech, is restricted. But otherwise, the System's users can say whatever they please and engage with whomever they please.

But suppose, also, crucially, that the System has a limited expressive palate, which to a nontrivial extent standardizes the style and format of people's speech.

We can toy with the setup here depending on how realistic we want to make it. In a less fantastical version, we might imagine the System being roughly similar to Facebook. It is a text-based tool through which you can write posts of varying lengths and decide whether to let others comment. But the System still dictates a number of parameters. Very long messages must be broken up into shorter ones. You can embed links but not footnotes. Fonts and other visual features are uniform. And readers can react to posts using a menu of preset emojis. These parameters may only have a mildly homogenizing effect on how the System's users communicate there. Nevertheless, the medium partly shapes people's messages.

If we wanted to make things more contrived, we could imagine the System being far more restrictive, for example by limiting messages to fifty characters, or not giving users any say over who sees their posts. Granted, the stricter and less user-friendly we imagine the System, the less realistic it is to envision it as a widely preferred platform. But within the range of ways that the System could be set up, while plausibly retaining its global popularity, we can imagine it building in a more or less stringently homogenizing suite of expressive capabilities. The medium may only shape people's messages subtly, but it may be more obtrusive.

The System is a free speech zone, by stipulation. So if you are primarily worried about ideological control over communication networks, you should be happy, in theory, being in a world where the System is the dominant discursive hub. Indeed, we could further stipulate that the System isn't just a free speech zone but that its governance makes its libertarian character counterfactually stable. The more modally robust the System is in protecting speech, the happier you should be having it locked-in as a dominant discursive hub.[21] And if it gains dominance because everyone freely opts into it, then what is there to worry about?

There is something blinkered in that perspective. If the System's limited expressive affordances – combined with its ubiquity – homogenize the world's methods and styles of communication, then something valuable is imperiled, if not already lost. We should worry about the openness and variety of the communicative formats available to people for the same kinds of reasons that we worry about the openness and variety of the viewpoints people are allowed to convey. In both cases, variety and openness support people's ability to think deeply, and think for themselves. Much like the homogenization of ideas that people can express, homogenization in the style and format in which people can express ideas is liable to inhibit people's ability to critically reflect upon what they share and hear.[22] Whether you care about free speech for democratic reasons, or truth-seeking reasons, or because you place a high moral value on individual autonomy, this inhibition of people's critical faculties is bad news.

The marketplace metaphor tells us to worry about communication policies that are akin to price-fixing or five-year agricultural plans – to worry about authorities deciding what ideas we receive. Simultaneously, it invites a neutral or positive view of policies that expedite the exchange of ideas. Just like free trade pacts make it easier to exchange goods, ideologically open communication hubs lubricate the flow of ideas. Any big institution can be corrupted, of course. But as long as our central hubs are not commandeered by bad actors, we should be pleased to have them. When operating within the marketplace metaphor's normative horizons, we have no more reason to worry about the ubiquity and uniformity of the System than to worry about free trade pacts or stable currency exchanges.[23]

This brings the metaphor's principal drawbacks into focus. Even a gung ho free market fanatic should recognize that the trade in ideas is critically unlike a trade in goods and services. The platforms mediating our idea transactions more deeply condition the character and texture of – and thus, potentially, affect the quality of – what is being exchanged. Communicative life under the System would make it harder for us to transact in certain kinds of ideas, while also homogenizing and thus depleting the richness and vitality of the cognitive activities involved in those transactions.[24] The marketplace metaphor's spotlight keeps all of this in the shadows, and hence dampens the anxieties we should be feeling about the homogenizing forces that are bearing down on our communication networks.

These homogenizing forces, to which the marketplace metaphor desensitizes us, are precisely what the connected-city metaphor encourages us to worry about.

Cars are useful. But it is hard living in a big city like Los Angeles where cars are the only decent way to get around. The car's privacy and manoeuvrability upsides have corresponding downsides, like space inefficiency. Vast tracts of land must be turned into roads and parking lots in order for the car's benefits to be realized. And excessively asphalted places are tough to inhabit, to say nothing of how issues of dynamic demand and static supply make traffic jams near-inevitable. This doesn't mean that roads and cars have no place in a locomotively optimized city. People with mobility challenges can't always catch trains. No one wants to ride a bike to the hospital to give birth. And roads accommodate buses, delivery vans, ambulances, and fire trucks, as well as cars. The problem with places like Los Angeles isn't just that they have loads of cars, it's that they lack (quality versions of) other transport options.

What is it that makes connected cities – cities with good trains, buses, roads, bicycle lanes, and walking paths that are all linked up so we can move from one to another – more liveable? First, people have diverse locomotive needs, depending on their age, fitness, and sensory/mobility capacities. Second, people have diverse locomotive desires. Some people like walking and cycling, others don't. Third, locomotive needs and desires vary circumstantially, depending on the weather, what we drank last night, whether it's a busy day, or whether we are moving tricky cargo, like a cake, a bassoon, or a toddler. Fourth, our locomotive needs can change if we are traveling solo or in smaller or larger groups.[25]

In light of this diversity, the connected city's mixture of locomotive affordances makes the incomprehensibly intricate collective choreography of urban transport more fluent at a group level and less frustrating for individuals. It also partly mitigates the drabness and dreariness of a landscape smothered in asphalt.[26]

When we communicate, we share information and beliefs, while also trading in a range of subtler sociolinguistic currencies.[27] The conveyance of these things in speech isn't perfectly analogous to the conveyance of myself or my family around a city. But it is analogous enough for our purposes. The superficial layer is easy to grasp. Humans have diverse communicative needs and desires much like our diverse locomotive needs and desires. Just as some people can't easily catch trains and therefore need taxis, some people can't easily write long emails and therefore need to be able to leave voice messages. Just as some people like bikes but not buses, some people like texting but hate going back-and-forth on X (formerly Twitter).

The analogy's deeper layers need more unpacking. Apart from pressing concerns about the need to limit our carbon dioxide emissions, we might think of transport options simply as a means to our ends. Other things being equal (time,

cost, ease, accessibility), you may be fairly indifferent about whether you travel to work on a bike or a train. It seems like a mistake, though, to approach modes of speech in this blasé frame of mind. Even if two expressive tools are on par, vis-à-vis time, cost, ease, and so on, if the expression that's involved matters to you, then the choice of medium should matter too. An intimate conversation about a delicate issue might go very differently in person versus by phone. Or think about trying to make a persuasive argument. Your odds of nailing it can vary enormously depending on whether you produce an essay, a podcast, or a tweetstorm, and on how your argument's specifics and nuances – combined with your own communicative abilities – lend themselves to your chosen medium's communicative affordances.

The benefits of a connected city of ideas – a system in which we can readily utilize various communicative tools, with varied affordances – seem to run deeper than the benefits of a locomotively connected city. In a liberal society, we want locations and ideas to be accessible to everyone interested in them. Diverse locomotive and communicative options support both kinds of access. Often, though, accessing locations is purely about logistics. With ideas, the means of access are less fungible. Some ideas might not be communicable – not as easily and fluently, or in all their specificity and subtlety – except through a particular medium: a documentary film, a satirical essay, a piece of long-form investigative journalism, a talk radio discussion, a meme on a WhatsApp group, or a slowly unfolding face-to-face conversation. Part of how a connected city of ideas works is by offering assorted communicative options to groups with diverse expressive predilections. But it also makes it easier for anyone's communicative aims to be pursued in media that are better-suited to their realization, style- and format-wise.

So, here is the argument boiled down. Communicative homogenization is something we should worry about from a free speech perspective. The connected-city metaphor highlights this worry. The marketplace metaphor, which dominates free speech discourse, obscures it. So we should replace the latter with the former.

We can buttress the argument by working through three objections. First, why think that the homogenization of communication methods has the negative effects I am claiming? Second, in what way is homogenization a genuine danger, either now or under emerging technological conditions? Third, why situate these antihomogenization worries within the ambit of a free speech politics?

Objection 1 is simply a flat-footed skeptical rejoinder. Why think that homogenization is such a bad thing? That our communicative abilities *are* inhibited by the homogenization of our communication tools and practices? Yes, arguments or intimate chats are liable to go differently in different formats. But this is merely due to life's complexity and unpredictability. There is nothing about an essay, a

podcast, a phone call, or an intimate face-to-face conversation that dictates what kinds of ideas or other sociolinguistic stuff can be exchanged within it.

What can we say to this? I have mentioned affordances at a few points. I am using this term in the sense pioneered by psychologist James Gibson in the 1960s, and taken up in various research programs in the sciences, such as perceptual psychology, and the humanities, such as philosophy of action.[28] In its simplest form, the idea is that locations and objects make some opportunities for action more available to agents than others – certain things that are easier for agents to do or perceive. The deeper conceptual thesis in the background is that thought and action aren't products of free-floating minds, but of material beings interacting with environments. Agency emerges out of organism-environment interactions.[29]

Insofar as this is a sound portrayal of agency's underpinnings, it seems like an important starting point for critical thinking about the moral implications of changing technologies. Technological innovations re-landscape the agential environment from which thoughts and actions interactively arise. As philosopher Shannon Vallor has noted, technologies "afford specific patterns of thought, behavior, and valuing," while opening up "new possibilities for human action, and foreclos[ing] or obscur[ing] others."[30] Acts of creating or adopting communicative devices are, then, we might say, meta acts that alter the choice architectures contained in an environment. We can differentiate technologies from mere tools in terms of how much they change our sense of which thoughts/actions are available to think/perform.[31]

This view of affordances and technology undermines the idea that technologies are merely utensils that we use as we please. It helps us see why this idea is misleading, in the same way that "guns don't kill people, people kill people" is misleading. Tools and technologies elicit certain usages, not inexorably, but probabilistically. They are integral to the processes by which preferences form.

Trying to fully vindicate this picture would take us far afield. How plausible you find it, in general, or with respect to communicative media specifically, will probably depend on how it chimes with your own experience. Some people may have a livelier sense of how communicative media shape their thinking. Others, including people whose expressive abilities are well-suited to a variety of media, may not feel this much at all. In any case, to say that media provide affordances for thought that affect our critical and interpretative abilities isn't to say that we are all affected to the same extent or in the same way. Moreover, we can ultimately concede the skeptic's point that the communicative medium does not dictate its contents. After all, *dictation* is an overloaded way of characterizing the type of interactive, probabilistic influence that an affordance exerts. At one point in his most famous work, cultural critic Neil Postman – an author who is deeply invested in the affordances framework that I am endorsing – writes:

> How we are obliged to conduct . . . conversations will have the strongest possible influence on what ideas we can conveniently express. And what ideas are convenient to express inevitably become the important content of a culture.[32]

Expressive media have a formidable influence by Postman's lights – indeed, "the strongest possible." But the upshot isn't to dictate exactly which ideas we can access. Rather, our media affect which ideas become communicatively convenient and, in turn, become ready reference points in our culture. Theorizing expressive affordances in a plausible way seems to require some caveat along these lines. A homogenized communicative milieu, style- and format-wise, probably won't make any communicative purposes totally unachievable. But whichever styles and formats predominate, they will make certain communicative aims easier to realize, and others harder, in ways that influence everyone's reflective capabilities.[33]

Patricia Lockwood's *No One Is Talking about This* is one of the better (and funnier) English-language novels to date about being on the internet. Its protagonist is interested in how online platforms – she calls them, collectively, *the portal* – are formatting her language and configuring her thinking. She wonders:

> Why were we all writing like this now? Because a new kind of connection had to be made, and blink, synapse, little space between was the only way to make it. Or because, and this was more frightening, it was the way the portal wrote.[34]

I don't think Lockwood is misguided in these apprehensions. The advent of social media platforms has given us unfamiliar ways of writing and speaking, and thus, via some alchemy of form and content, novel thoughts. New communication tools have shepherded us toward new ways of accessing and traversing ideas. Were these mental routes totally unreachable before? Maybe not. But accessible tracks into them have been trodden and cleared by many pairs of feet. When things go the other way, though – when communicative options are subtracted or standardized – the opposite occurs. We lose some of our cognitive affordances.

But why believe this homogenization is a genuine danger? Don't the points I have just made belie the anxieties I am trying to provoke? New communication technologies provide *new* affordances for thinking and speaking. No one is taking existing affordances away! Some devices, like fax machines, fall into disuse organically, taking their redundant expressive affordances (the redundancy of which is manifest in their organic demise) with them. Overall, though, our repertoire of communicative options, and the richness and diversity of the communicative affordances that they provide us with, needn't become depleted. Right?

When it comes to futurological claims, we are all in the same speculative boat. This essay appears in a volume on the future of free speech, and I wanted to write it because I have hunches about the trajectory we are tracing vis-à-vis free speech's

future that seem to be out-of-step with many other people's hunches. If you believe the possibilities I am fretting about are far-fetched, then you won't see much reason to embrace my proposed shake-up of metaphors. But it is hard to turn futurological claims into anything more than guesstimates. The best I can do is to state the factors that underlie my key hunch: that on our current trajectory, a significant homogenization in our communicative media is likely in our lifetimes. What factors point to such a trajectory?

1. *Monopolies*. Plausibly, we are seeing a historically unprecedented level of centralization and monopolization in the ownership and management structures of widely used communication technologies, including devices and platforms whose operations are radically global in scope.[35]
2. *Privatization*. Many countries have ailing public communication infrastructure, such as phone lines, broadcasting facilities, cable internet, and postal services. The pressures on maintaining public communication utilities may either lead to their collapse, or otherwise enable cashed-up global tech corporations to acquire legacy communication infrastructures and incorporate them into cross-platform networks.[36]
3. *Compulsion*. In many countries, it is hard to participate in public life without a smartphone. In some sub-enclaves, social media is similarly de facto mandatory. Participation in public life may always force people to use particular communicative media. But the demandingness of these requirements vis-à-vis the captivating potential of the technologies that they mandate seems historically unprecedented.[37]
4. *Biointegration*. The advent of commercially available biointegrated communication technologies, like Neuralink, is just around the corner. It seems possible that by virtue of their biointegrated nature, these technologies will create more resilient network effects compared with existing technologies. This would amplify the costs for those preferring to opt out, thus strengthening the de facto mandates noted above.[38]
5. *Stylistic standardization*. Widely used assistive technologies like Grammarly stylistically standardize written expression in unprecedented ways: standardization is faster and more integrated with otherwise familiar expressive tools and affordances than ever before. The power, ubiquity, and integration of these technologies are steadily increasing.[39]
6. *Linguistic standardization*. Many languages are dying, English is increasingly entrenched as a global *lingua franca*, and autotranslation tools are becoming more powerful. Plausibly, the combination of these factors will mean that a larger portion of global communication is conducted in standardized and expressively flattened languages.[40]

What does this all add up to, once all the relevant counterforces are factored into our conjectures? Could we soon be living under a ubiquitous, homogenizing communication network, like the System, if only to a lesser degree? Some homogenizing forces, potentiated by emerging technologies, are likely to have an impact on near-future communication systems. How these merge with other economic and political forces, and whether everything gets derailed by cataclysmic events, is a giant unknown. But I don't think the homogenization anxieties are baseless.

Of course, so much depends on how the tools and practices we end up with interact with each other, and with other political and economic forces. As the supporters of new communication technologies like to point out, there were once great panics over novels and radio. The fact that a transformative suite of communicative media is becoming dominant isn't yet a reason to think that our communicative interests are in peril. Social systems are super complex, and the devil is in the details. But it is complacent to use these observations as an excuse to ignore worries about homogenization, as we have largely been doing. People who are more optimistic about our current technological trajectory need to explain either why communicative homogenization isn't going to occur, or why it isn't such a bad thing. It isn't enough to just circle back to banal reminders about how society survived the printing press and wireless radio.

Even if that's right, why think that these antihomogenization issues fall within the ambit of free speech theory? Free speech principles are principles of restraint, which limit the means governments may use – via legislation or direct coercive and administrative acts – to interfere with the exercise of people's speech rights. They aren't principles that oblige governments (or other actors) to support speech or to otherwise try to realize the interests that speech rights purportedly serve. Even if communicative homogenization poses a real threat to human well-being, remedying this problem isn't on the agenda for free speech politics, except where antihomogenization measures happen to coincide with constraining governments from impinging upon people's speech rights.

This isn't an idiosyncratic view.[41] But I favor a more capacious conception of free speech, encompassing both duties of restraint and "positive" duties to support our speech-related interests. This is actually an old-fashioned view, from Mill. In the nineteenth-century liberal mind, free speech isn't just about constraining state power. It is about everyone working to achieve a culture of open discussion, free from conformist pressures of all kinds.[42] Even in American constitutional law, in which the narrower, negative conception of free speech principles is widely accepted, there are good reasons to think that the efficacy of these principles depends upon them operating in a culture supportive of free speech.[43] And insofar as that's true, it's somewhat arbitrary to situate positive speech-related duties outside of free speech's domain, in some bundle of adjacent supplementary norms.

Recent U.S. legal scholarship on free speech and tech policy lends support to the more capacious conception. In his work on platform regulation, legal scholar Jack Balkin defends a *triangulated* model of free speech. Free speech isn't just about states not interfering with citizens. It is a three-way relation between states, citizens, and expressive platforms, in which one of the state's duties is to create a regulatory environment that incentivizes platforms to support citizens' expressive interests. Balkin's overall argument, roughly, is that speech platforms are essential in realizing healthy public discourse, and that a dyadic state-versus-citizen notion of free speech obscures this, while encouraging us to disempower states from fulfilling their regulatory responsibilities in constructively incentivizing platforms. If we follow Balkin in replacing the dyadic framework with a triangulated framework, this *ipso facto* means including certain positive state duties – that is, duties to regulate speech platforms – within the "official" scope of free speech principles and policies.[44]

In a similar vein, legal scholar Evelyn Douek argues that the regulation of speech platforms should take a systems approach. It should embed upstream norms – promoting good speech and algorithmically suppressing harmful speech – rather than norms that, in a downstream fashion, identify and remove harmful instances of speech based on case-by-case appraisals of their harmfulness. Her argument, in essence, is that the latter approach is unfeasible with large platforms, given the scale of the regulatory task and the need for relatively quick action, since speech's harmful potential often depends on how long it remains visible.[45] We could still situate the norms for regulating platforms outside the scope of free speech. But this seems odd, given that, again, such norms are essential to realizing the discursive ideals that free speech theory has long revolved around. It seems natural, instead, to include these norms – norms that don't impose constraints on states, but rather, positive duties of constructive discourse organization – within the scope of free speech. And this means embracing the broader conception.

It isn't stretching our normative categories beyond their proper bounds, then, to see a demand for antihomogenization regulations, in government or the private sector, as part of a free speech politics. What might these regulations consist of? They may include 1) special antimonopoly laws for tech companies, 2) regulations to make it harder for public communication utilities to be privatized, and 3) laws protecting workers from being unnecessarily forced to use specific communication platforms. Mapping out the goals of an antihomogenization regulatory agenda, let alone its details, is a big task.[46] I'm setting the stage. I want us to see why this agenda warrants our attention as free speech theorists, and, crucially, to see how free speech metaphors can sensitize or desensitize us to the concerns driving them. We need different imagery to enliven our perceptions. We have to shake off the interpretative languor that the marketplace metaphor, despite its legitimate uses, has instilled in us.

Even if you accept all of my arguments up to this point, you might nonetheless think I haven't shown that communicative homogenization is a more serious worry than ideological control over the content of public discourse. You might argue that we should only redirect our attention toward the issues highlighted by the connected-city metaphor, and away from the marketplace metaphor's implicit anti-authoritarian agenda, if we find that this comparative moral assessment holds.

But there are other good reasons to adjust our focus. Moral metaphors are imaginative devices for highlighting underappreciated aspects of things. Free speech theory's normative spotlight has long been illuminating anti-authoritarian concerns. I am not questioning those concerns themselves, so much as the amount of attention we have lavished upon them. In any case, whatever priority ordering ought to obtain among these concerns, my earlier point remains. The marketplace metaphor isn't only failing to highlight antihomogenization worries. It is camouflaging them. The point of the connected-city metaphor is to attune us to what ought to be an urgent concern in free speech theory, but one that our leading metaphor has encouraged us to tune out.

AUTHOR'S NOTE

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ENDNOTES

[1] Elisabeth Camp, "Two Varieties of Literary Imagination: Metaphor, Fiction, and Thought Experiments," *Midwest Studies in Philosophy* 33 (1) (2009): 107, 111.

[2] Mary Midgeley, *The Myths We Live By* (Abingdon: Routledge, 2004), 2.

[3] In his seminal work on the meaning of metaphors, Donald Davidson argues that metaphorical statements are (normally) straightforwardly untrue. He doesn't deny that metaphors convey truths about the entities they refer to. His point is about meaning,

narrowly construed. "Peter is an imp" can convey, truly, that "Peter is like an imp, in that he is mischievous." But for Davidson, "Peter is an imp" doesn't *mean* "Peter is mischievous like an imp." It means the false thing that it literally says: that Peter *is* an imp. The communicative utility of a metaphorical statement isn't due to its literal meaning–that is, its semantics–but to how it's used–that is, its pragmatics. For Davidson, we can't explain why metaphors convey what semantically adjacent nonmetaphorical statements don't, unless we interpret their communicative power in pragmatic terms. See Donald Davidson, "What Metaphors Mean," *Critical Inquiry* 5 (1) (1978): 31. Since I'm saying that metaphors *tell us* things, it may sound like I hold the view Davidson is criticizing. But, in fact, I'm uncommitted about whether the communicative power of metaphor is explicable in semantic terms. All I'm saying is that metaphors are highlighting devices. Both Davidson and his opponents agree on that. Admittedly, Davidson does want to say that metaphors convey things 1) subtly and ambiguously and 2) in a way that's liable to be oversimplified on a semantic analysis. But Davidson exaggerates his point with respect to the former. Yes, *some* metaphors are subtle and resist straightforward decoding. Still, even if it's right that metaphorical statements convey what they do pragmatically, rather than semantically, some metaphors–including the free speech metaphors that I'm analyzing–can be propositionally paraphrased with relative ease, and without losing any of the subtleties that their usage conveys.

[4] The phrase *marketplace of ideas* doesn't appear in Mill's *On Liberty*, and the metaphor arguably misrepresents the core content of Mill's arguments there, insofar as 1) Mill is opposed, above all, to forces of social conformity and 2) markets can enable these very forces by allowing wealthy people's unequal spending power to disproportionately influence society. See Jill Gordon, "John Stuart Mill and the 'Marketplace of Ideas,'" *Social Theory and Practice* 23 (2) (1997): 235, 239–243. Mill's work partly inspired the metaphor's inception and uptake, nonetheless. Taken at face value, the gist of Mill's argument for free speech in *On Liberty* is that free speech promotes truth. And when Oliver Wendell Holmes, Jr., gave his famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919)–"the best test of truth is the power of the thought to get itself accepted in the competition of the market"–he established a resilient associative link between market-based speech metaphors and Millian free speech justifications.

[5] Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper and Brothers, 1948).

[6] Robert Sparrow and Robert E. Goodin, "The Competition of Ideas: Market or Garden?" *Critical Review of International Social and Political Philosophy* 4 (2) (2001).

[7] Seana Valentine Shiffrin, "Chapter 3: A Thinker-Based Approach to Freedom of Speech," in *Speech Matters: On Lying, Morality, and the Law* (Princeton, N.J.: Princeton University Press, 2014).

[8] See Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth," *Duke Law Journal* 33 (1) (1984): 1; and Jason Stanley, *How Fascism Works: The Politics of Us and Them* (New York: Random House, 2018), 66.

[9] Probably the most influential presentation of this kind of argument for the benefits of markets comes from Friedrich Hayek, *The Road to Serfdom* (London: Routledge, 1944); and Friedrich Hayek, "The Use of Knowledge in Society," *The American Economic Review* 35 (4) (1945): 519.

[10] Naturally there are other evaluative arguments we might consider in addition to an efficiency-based defense of markets. We may think other factors count in favor of mar-

kets (such as fostering diplomacy, institutionalizing an ethos of respect for property rights), or that other factors count against them (such as the inequality they create and legitimize, which may be opposed either on intrinsic grounds, or in terms of how it leads to its own inefficiencies in preference-satisfaction). I'm not saying that the efficiency/decentralization justification is the best reason (or a decisive reason) to adopt a pro-market stance. I just think it's the most illuminating justification to focus on, in thinking about how the marketplace metaphor can be translated, via the identification of positive analogical resemblances, into a putative justification for free speech.

[11] Sarah Sorial presents a similar interpretation of the marketplace metaphor: that is, an interpretation centered on some notion of government authority's ineptitude or untrustworthiness. See Sarah Sorial, "Free Speech, Autonomy, and the Marketplace of Ideas," *Journal of Value Inquiry* 44 (1) (2010): 167, 173–175.

[12] I have used the phrase "oligopoly of ideas" in earlier coauthored work. See Sebastien Bishop and Robert Mark Simpson, "Disagreement and Free Speech," in *The Routledge Handbook of Philosophy of Disagreement*, ed. Maria Baghramian, J. Adam Carter, and Rach Cosker-Rowland (London: Routledge, forthcoming 2024).

[13] For arguments along these lines, see Herbert Marcuse, "Repressive Tolerance," in *A Critique of Pure Tolerance* (Boston: Beacon Press, 1965); Ingber, "The Marketplace of Ideas"; Edward S. Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (New York: Vintage, 1994); Louis Michael Seidman, "Can Free Speech Be Progressive?" *Columbia Law Review* 118 (7) (2018): 2219; and Anthony Leaker, *Against Free Speech* (Lanham, Md.: Rowman & Littlefield, 2020).

[14] This kind of exasperation often shows up in debates around media and press freedom, where pro forma libertarian concerns about government control over media are sometimes expressed in a way that seems indifferent to how private media monopolies can (and in some countries, do) degrade the quality of public discourse just as significantly as government censorship would. For discussion, see Damien Storey and Robert Mark Simpson, "Should We Unbundle Free Speech and Press Freedom?" in *The Routledge Handbook of Philosophy and Media Ethics*, ed. Carl Fox and Joe Saunders (London: Routledge, 2024).

[15] The key texts in this connection are John Milton's *Areopagitica* (1644) and Mill's *On Liberty* (1859). It's true, with respect to the latter, that Mill appears to be saying at certain points that truths will generally defeat falsehoods given a free and open contest between them. All the same, there is a compelling case against this commonplace reading of the overall argument in *On Liberty*, according to which that claim (about truth outcompeting falsehood) is the pivotal premise of Mill's whole defense of free speech. On the alternative reading that I favor, the pivotal premise in Mill's overall argument is that clashes between truth and falsehood generate mental vitality for participants and observers, and that this mental vitality is either necessary for, or highly conducive to, the attainment of the kind of higher-order pleasure that, under Mill's mature ethical theory, is the ultimate yardstick of all moral evaluations. For a defense of this general line of interpretation, see John Gray, *Mill on Liberty: A Defence*, 2nd ed. (New York: Routledge, 1996). See also Robert Mark Simpson, "'Lost, Enfeebled, and Deprived of its Vital Effect': Mill's Exaggerated View of the Relation Between Conflict and Vitality," *Aristotelian Society Supplementary* 95 (1) (2021): 97.

[16] See, again, my brief remarks on Justice Holmes's coining of the metaphor (endnote 4). For a recent attempt to defend the utility of the marketplace metaphor as a way of adverting to the pursuit to truth-related goods, see Eugene Volokh, "In Defense of the

Marketplace of Ideas / Search for Truth as a Theory of Free Speech Protection," *Virginia Law Review* 97 (3) (2011): 595.

[17] Alvin I. Goldman and James C. Cox, "Speech, Truth, and the Free Market for Ideas," *Legal Theory* 2 (1) (1996): 1. A related line of argument–one that puts more emphasis on the limitations of our rational capacities–is found in Robert Weissberg, "The Real Marketplace of Ideas," *Critical Review* 10 (1) (1996): 107. The passage leading up to this note is paraphrased from a public lecture and blog post I wrote a few years ago. See Robert Mark Simpson, "Universities and Democratic Legitimacy (Part 2)," Justice Everywhere, June 12, 2019, https://justice-everywhere.org/democracy/universities-and-democratic-legitimacy-part-2.

[18] The most influential twentieth-century text espousing a democratic theory of free speech is Alexander Meiklejohn's *Free Speech and its Relation to Self-Government*. More recent examples of democratic theories of free speech include Robert Post, "Racist Speech, Democracy, and the First Amendment," *William & Mary Law Review* 32 (2) (1991): 267; Ronald Dworkin, "Foreword," in *Extreme Speech and Democracy*, ed. Ivan Hare and James Weinstein (Oxford: Oxford University Press, 2009); James Weinstein, "Participatory Democracy as the Central Value of American Free Speech Doctrine," *Virginia Law Review* 97 (3) (2011): 491; and Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press, 2016).

[19] The fact that people aren't great at judging what is plausible, or who is credible, is the key starting point in contemporary defenses of epistemic paternalism: that is, roughly, the view that controlling people's access to information is sometimes justified, where this reliably results in a greater preponderance of true belief relative to false belief. See Kristoffer Ahlstrom-Vij, *Epistemic Paternalism: A Defence* (London: Palgrave-Macmillan, 2013). Similar thinking sometimes appears in discussions of free speech; see Brian Leiter, "The Case Against Free Speech," *Sydney Law Review* 38 (2016): 407. Naturally, someone who understands the primary justification for free speech in non-alethic/non-epistemic terms could agree that epistemic paternalism by governments will sometimes (or perhaps, often) have significant alethic/epistemic benefits, while nevertheless regarding such interventions as unjustifiable, for example on grounds of democratic illegitimacy.

[20] Without some caveats, this claim–that authorities trying to advance people's informational interests using centralized, bureaucratic processes tends to result in the pre-/misjudging of complex issues–seems likely to prove too much. *Prima facie*, this seems to entail that it is a mistake, from an epistemic point of view, to place any real trust in authorities in academic disciplines, or in public information agencies like meteorology bureaus. But there are sensible ways to caveat the claim so that it doesn't lead to this extreme and dubious conclusion, such as by distinguishing between authorities whose authorities is or isn't grounded in demonstrated methodological competence in a mature discipline of inquiry. For discussion, see Brian Leiter, "Why Academic Freedom?" in *The Value and Limits of Academic Speech: Philosophical, Political, and Legal Perspectives*, ed. Donald Downs and Chris Surprenant (London: Routledge, 2018); and Robert Mark Simpson, "The Relation Between Academic Freedom and Free Speech," *Ethics* 130 (3) (2020): 287.

[21] I'm using the term "modally robust" in the way that's common among contemporary analytic philosophers, to mean, roughly, stable across other ways the world could be. Some state of affairs is modally robust to the extent that it obtains not only in the actual world, but also in a majority of nearby possible worlds.

[22] If communicative homogenization is bad, on my account, because (by hypothesis) it inhibits people's ability to critically reflect upon the ideas they are engaging with, then what sort of overall justificatory theory of free speech am I committed to? What's in the background of my account is something similar to Seana Shiffrin's thinker-based theory of free speech (see Shiffrin, "Chapter 3: A Thinker-Based Approach to Freedom of Speech"). I would distinguish two levels of justification, addressing two different questions. Q1: What are the ideals, values, or aims–things like democracy, individual autonomy, truth, or an ethos of tolerance–that we should appeal to in trying to attain explanatory coherence in our defense of various free speech policies? Q2: What is our conception of the human person–of people's fundamental nature and interests–by the lights of which we can understand why restriction of expressive acts, in particular, poses a distinctive threat to the ideals, values, or aims we identify in answering Q1? In my remarks above, about homogenization inhibiting our ability to critically reflect, I am indicating an answer to Q2, similar to Shiffrin's answer: humans are by nature thinking beings, and our key interests are linked to that aspect of our nature. With respect to Q1, although I have criticized truth-based defenses of free speech, I otherwise want to leave my account open-ended, so it remains compatible, in principle, with a plurality of answers. For further discussion, see Robert Mark Simpson, "Defining Speech: Subtraction, Addition, and Division," *Canadian Journal of Law and Jurisprudence* 29 (2) (2016): 457; and Robert Mark Simpson, "Intellectual Agency and Responsibility for Belief in Free Speech Theory," *Legal Theory* 19 (3) (2013): 701.

[23] Granted, the speech-markets metaphor does suggest a reason to worry about homogenization-related problems. Freer global trade homogenizes the goods available across regions, such as giving us the same Starbucks cafes in every city. Thus, it undermines one of the things (real variety in options) that in theory makes the consumer's freedom valuable. This would be the point to emphasize if you wanted to retain the marketplace metaphor while also highlighting the concerns about communicative homogenization that I am pressing. But I believe the connected-city metaphor is better-suited to highlighting these concerns.

[24] I'm not saying this is the only significant disanalogy between markets for consumer products and markets for ideas. It's just the disanalogy that is most pertinent for my purposes here. See Sparrow and Goodin, "The Competition of Ideas," for detailed discussion of a number of other disanalogies.

[25] The literature on connected cities and the ethics of transport is vast, and I don't pretend to be an expert in it, although for one example of an influential work on these themes, see Jane Holtz Kay, *Asphalt Nation: How the Automobile Took Over America and How We Can Take It Back* (Berkeley: University of California Press, 1997). Naturally, many criticisms of car-dependent transport networks focus on harms associated with cars' atmospheric pollution, both local (like health issues linked to urban air quality) and global (that is, in terms of cars' contributions to anthropogenic atmospheric heating). Note, however, that my quick account of the benefits of connected cities doesn't advert to these harms. In large cities, the case for moving away from car-dependent transport systems is overdetermined. The point is that this case would still hold even if future-generation cars were made extremely clean, in terms of carbon dioxide emissions, airborne particulate matter, and so on.

[26] Naturally, it depends on what we leave in place of the asphalt. In principle, we could replace a car-centric city with a connected city while still neglecting to make space for trees and flower beds. In that case, improvements in locomotive efficiency wouldn't go hand-in-hand with aesthetic/botanical improvements.

[27] For a recent attempt to give an account of this subtler sociolinguistic stuff, see Ethan Nowak, "Sociolinguistic Variation, Slurs, and Speech Acts," *The Journal of Philosophy* (forthcoming).

[28] Gibson begins developing this concept in the 1960s, but the most widely cited account is James J. Gibson, "The Theory of Affordances," in *The Ecological Approach to Visual Perception* (Boston: Houghton Mifflin, 1979). Another recent example of this concept being deployed in a theoretical discussion of free speech and online communication platforms is Renée Diresta, "Algorithms, Affordances, and Agency," in *Social Media, Freedom of Speech, and the Future of our Democracy*, ed. Lee C. Bollinger and Geoffrey R. Stone (Oxford: Oxford University Press, 2022).

[29] For an elaboration of these claims regarding how agency emerges from organism-environment interactions, see Anna M. Borghi, "Affordances, Context and Sociality," *Synthese* 199 (5) (2018): 12485–12515.

[30] Shannon Vallor, *Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting* (Oxford: Oxford University Press, 2016), 2. See also Jeroen Hopster, Chirag Arora, Charlie Blunden, et al., "Pistols, Pills, Pork and Ploughs: The Structure of Technomoral Revolutions," *Inquiry: An Interdisciplinary Journal of Philosophy* (forthcoming).

[31] Neil Postman proposes a conceptual distinction along these lines in *Technopoly: The Surrender of Culture to Technology* (New York: Knopf, 1992), especially chapter 2.

[32] Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* (North Yorkshire: Methuen Publishing, 1985), 6. Consider also what Postman says at another point: "to be unaware that a technology comes equipped with a programme for social change, to maintain that technology is neutral, to make the assumption that technology is always a friend to culture is, at this late hour, stupidity plain and simple." Ibid., 162. In these claims, Postman takes himself to be working out some of the key ideas underpinning Marshall McLuhan's famous aphoristic claim that "the medium is the message."

[33] Something like this thesis is evident in Walter Benjamin's famous essay on "The Work of Art in the Age of Mechanical Reproduction" (1935), in particular, his observations about the advent of media in which artworks don't exist in one place and aren't produced by the handiwork of a particular artist, as well as his claims about how such media more easily lend themselves to certain uses like political propaganda.

[34] Patricia Lockwood, *No One Is Talking about This* (London: Bloomsbury, 2021), 64.

[35] For discussion, see Gregory Day and Abbey Stemler, "Infracompetitive Privacy," *Iowa Law Review* 105 (1) (2019): 61; Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (Oxford: Oxford University Press, 2020); Tim Wu, *The Curse of Bigness: How Corporate Giants Came to Rule the World* (London: Atlantic Books, 2020); and Francis Fukuyama, Barak Richman, and Ashish Goel, "How to Save Democracy from Technology: Ending Big Tech's Information Monopoly," *Foreign Affairs* 100 (1) (2021): 98.

[36] For discussion, see Johan From and Kjell A. Eliassen, eds., *The Privatisation of European Telecommunications* (Abingdon: Taylor & Francis, 2017); Erik Sherman, "7 Reasons Why Privatizing the Postal System Is Ridiculous and Foolish," *Forbes*, August 17, 2020, https://www.forbes.com/sites/eriksherman/2020/08/17/7-reasons-privatizing-postal-system-usps/?sh=6d58d8453034; Shane Greenstein, "The Basic Economics of Internet Infrastructure," *Journal of Economics Perspectives* 34 (2) (2020): 192; and Edward A. Smith,

"Technology, Market Change and the Privatisation of Communications in Britain," *Journal of Management History* 28 (2) (2022): 215.

37 For discussion, see *Jaron Lanier, Ten Arguments for Deleting Your Social Media Accounts Right Now* (New York: Random House, 2018); Susie Alegre, *Freedom to Think: The Long Struggle to Liberate Our Minds* (London: Atlantic Books, 2022); and Robert Mark Simpson, "The Ethics of Quitting Social Media," in *The Oxford Handbook of Digital Ethics*, ed. Carissa Véliz (Oxford: Oxford University Press, 2022).

38 For discussion, see Alexander N. Pisarchik, Vladimir A Maksimenko, and Alexander E. Hramov, "From Novel Technology to Novel Applications: Comment on 'An Integrated Brain-Machine Interface Platform With Thousands of Channels' by Elon Musk and Neuralink," *Journal of Medical Internet Research* 21 (10) (2019); Eric Fourneret, "The Hybridization of the Human with Brain Implants: The Neuralink Project," *Cambridge Quarterly of Healthcare Ethics* 29 (4) (2020): 668; Mengwei Liu, Yujia Zhang, and Tiger H. Tao, "Recent Progress in Bio-Integrated Intelligent Sensing System," *Advanced Intelligent Systems* 4 (6) (2022); and Nita A. Farahany, *The Battle for Your Brain: Defending the Right to Think Freely in the Age of Neurotechnology* (New York: Macmillan, 2023).

39 For discussion, see Neil Levy, "Writing is Not That Easy: Grammarly as Affordance," Practical Ethics, December 6, 2021, blog.practicalethics.ox.ac.uk/2021/12/writing-is-not-that-easy-grammarly-as-affordance; and Ethan Nowak, "Sociolinguistic Variation, Speech Acts, and Discursive Injustice," *Philosophical Quarterly* 73 (4) (2023).

40 For arguments about why language extinction should be seen not merely as a replacement of one linguistic tool with another, but rather as something that depletes humanity's communicative resources, see recent work by Ethan Nowak, in particular, "Language Loss and Illocutionary Silencing," *Mind* 129 (2020): 831; and "Language Extinction," in *The Routledge Handbook of Social and Political Philosophy of Language*, ed. Justin Khoo and Rachel Sterken (London: Routledge, 2021).

41 As David Strauss says, "a good argument can be made that government action should be the main concern of any system of free expression," because 1) "the government ordinarily has a greater capacity to suppress speech than any private entity," 2) "government officials have an incentive to suppress the speech of their political opponents," and 3) "the power of the government can be used by a dominant majority against nonconforming expression." David A. Strauss, "Social Media and First Amendment Fault Lines," in *Social Media, Freedom of Speech, and the Future of our Democracy*, ed. Bollinger and Stone, 5.

42 This point is at the heart of Mill's condemnation of the tyranny of the majority: "Like other tyrannies, the tyranny of the majority was at first . . . held in dread, chiefly as operating through the acts of the public authorities. But reflecting persons perceived that when society is itself the tyrant . . . its means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates . . . it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them." John Stuart Mill, *On Liberty* (Kitchener, Ontario:

Batoche, 2001 [1859]). For recent work on this kind of positive conception of free speech's scope and demands, see Andrew T. Kenyon and Andrew Scott, eds., *Positive Free Speech: Rationales, Methods, and Implications* (London: Bloomsbury, 2021).

[43] I take this point–about the necessity of a positive free speech culture as a precondition for realizing the moral purposes of liberal free speech principles–to be one of the main takeaways from Geoffrey R. Stone's work on the history of American free speech politics. See *Perilous Times: Free Speech in Wartime: From the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton, 2005); and "Free Speech in the Age of McCarthy: A Cautionary Tale," *California Law Review* 93 (5) (2005): 1387.

[44] See, in particular, Jack M. Balkin, "Free Speech is a Triangle," *Columbia Law Review* 118 (7) (2018): 2011. The triangulated model that Balkin proposes is also broadly defended in Balkin's other recent work: "The Future of Free Expression in a Digital Age," *Pepperdine Law Review* 36 (2) (2009): 427; and "How to Regulate (and not Regulate) Social Media," *Journal of Free Speech Law* 1 (1) (2021): 71.

[45] Evelyn Douek, "Content Moderation as Systems Thinking," *Harvard Law Review* 136 (2) (2022): 526.

[46] In the American context among scholars writing about the current and emerging landscape for regulating tech companies, Balkin draws attention to the type of antihomogenization worries I have been pressing. As part of sketching out a road map for social media regulation–or maybe more accurate to say, a wholesale institutional reform of social media and tech–Balkin highlights some homogenization-related concerns: "there need to be diverse and antagonistic sources of knowledge production and dissemination, which means there must be diverse and antagonistic curators and content regulators . . . this requirement means more than simply having lots of voices who disagree with each other. There must be also different institutions for knowledge production that are public-regarding and that have professional norms that guide how they produce, organize, and distribute knowledge." Jack M. Balkin, "To Reform Social Media, Reform Informational Capitalism," in *Social Media, Freedom of Speech, and the Future of our Democracy*, ed. Bollinger and Stone, 241.

The First Amendment Meets the Virtual Public Square

Allison Stanger

Section 230, the twenty-six words that created the internet, has become the twenty-six words that are breaking the First Amendment. Section 230's blanket liability shield for social media platforms is harming our children and our democracy. In this essay, I narrate the story of what Section 230 enabled – the rise of the virtual public square, a circumstance that the framers could never have imagined – and explore its consequences for human well-being and freedom of expression. I conclude that Section 230 must be repealed to unleash First Amendment jurisprudence to confront the threats to the republic in the age of generative AI, as well as to usher in the next round of internet innovation in service of constitutional democratic sustainability. Bipartisan legislation has been introduced to sunset Section 230 as of December 31, 2025. Those who believe in the enduring promise of American constitutional democracy should support its passage.

On January 6, 2021, with the encouragement of President Donald Trump, a motley crew of "Stop the Steal" zealots stormed the U.S. Capitol, destroying lives and property. In response, Twitter, YouTube, and Facebook took the unprecedented step of deplatforming a freely elected U.S. president. Twitter permanently suspended Trump's account, Google's YouTube shut him down indefinitely, and Facebook closed his account but referred its decision to Facebook's newly assembled Global Oversight Board for review. Yet two years later, in January 2023, Twitter's new owner Elon Musk reinstated Trump's Twitter account, and Facebook announced the lifting of Trump's ban, without any public explanation. There was no public outcry.

At the time of Trump's social media silencing, there had been considerable public debate over whether such dramatic action had been warranted. For liberal elites, it had happened far too late. For red-state America, the very idea of censoring a freely elected president was unacceptable. Both sides of this discussion had a point but were asking the wrong questions, and in doing so, lost the plotline of the real story. Things had gone too far so that *every* choice at the time was a bad choice. Rather than asking if Big Tech should have silenced Donald Trump after January 6, we should instead be asking: how and why did we reach the point at which that

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Hobson's choice had to be made in the first place?[1] The short answer to that question is that while the world's attention was focused elsewhere, Big Tech came to be the gatekeeper of our virtual public sphere, supplanting media institutions and national social norms, the latter of which no longer exist.

Whereas governance and civic engagement used to emerge from deliberation framed by the marketplace of ideas under the protection of the First Amendment (unless the speech incited violence), online harassment and cancel culture today, fueled by social media and framed by recommender algorithms, undermine reason-based public deliberation. For many younger people, freedom of speech has become the rallying cry of white people in red states. The Republican Party's attack on what it calls "wokeness" and its repeated calls for defending free speech feeds that perception.

While those on the extreme left and extreme right argue about their respective trampled free speech rights, they both overlook that the First Amendment protects citizens from *government* encroachment on freedom of speech and assembly; the First Amendment is mute on corporate suppression of free expression. If we want each and every voter to have an equal voice in public deliberation, the Constitution alone will no longer get us there.

Writing in 1968, J. C. R. Licklider, the founder of the Advanced Research Projects Agency Network, the forerunner to today's world wide web, foresaw this potential negative impact of technological change on society. "For the society, the impact will be good or bad," he predicted, "depending mainly on the question: Will 'to be on line' [*sic*] be a privilege or a right?"[2] Licklider envisioned the networked world of Web 2.0, but he could not foresee that it would develop without direct government involvement.[3] He did not foresee the ad-driven business model and its ramifications for the free marketplace of ideas.

Unfortunately, the laissez-faire approach to social media that Congress has pursued to date has allowed bad consequences to grow deep roots. Slowly, to be online with an unfettered voice is becoming a privilege rather than a right. The Trump administration repealed net neutrality, so the rich can have faster service than those who cannot afford speed. The ad-driven business model has rendered the right to privacy a luxury good, as those of lesser means give up their personal data and uninterrupted programming in exchange for free streaming services with ads and constant surveillance. The privileged pay subscription fees to imbibe their entertainment without unwanted interruptions. Since cyberspace has become our public square, this is a deeply disturbing development, both for justice by means of democracy and democratic sustainability. This is to say nothing of equal protection before the law, an assumption on which our Constitution depends, at least theoretically. At the time of this writing, there are several cases in the Supreme Court's docket regarding freedom of speech on social media, which means that either the Supreme Court or Congress could take steps to restore pub-

lic equality before the law in cyberspace or further entrench private power. To understand the challenges presently before the Court, we must first get a better idea of how we arrived at this particular juncture.

What does the 1912 sinking of the *Titanic* have to do with government regulation of radio? Some contended that congestion on the then-unregulated radio spectrum had muffled cries for help from the sinking *Titanic*, heightening the human losses. Government responded with the Radio Act of 1912, which marked the birth of the American telecommunications regulation regime. For the first time, Washington assigned frequency bands and licensed radio transmitters. The Federal Radio Commission was established in 1927 to oversee the entire industry until it was eventually replaced in 1934 with the Federal Communications Commission (FCC). The Communications Act of 1934 established the FCC's regulatory authority over telephone services and instructed the FCC to regulate the communications industry in a manner that served the public interest, benefiting society as a whole rather than serving particular private interests. In 1949, the Fairness Doctrine was introduced to ensure viewpoint diversity on controversial issues as a feature of upholding the common good.

One company, AT&T, grew to have monopolistic control over U.S. telecommunications. In 1974, the Justice Department filed an antitrust lawsuit that would eventually lead to the 1984 breakup of the Bell System, forcing AT&T to cede control of the Bell Operating Companies to smaller regional companies that would continue to provide the local telephone services in AT&T's place. As the internet became commonplace in homes nationwide, the Clinton administration enacted the 1996 Telecommunications Act to encourage innovation, competition, and equality of access in a transformed information ecosystem. While often forgotten, the Act also ensured *universal service*. Especially in a rapidly changing communications environment fueled by technological advances, all Americans were to have access to quality and affordable telecommunications services.

Under the laissez-faire Telecommunications Act of 1996, also known as the Communications Decency Act, Vice President Al Gore's "information superhighway" (that is, the internet) blossomed.[4] Within the Telecommunications Act, Title V – codified as Section 230 in Title 47 of the U.S. Code – guaranteed a wild west for online content because it provided immunity to online platforms for user-generated content. This meant that Facebook, Google+, and Twitter were intermediaries rather than publishers, thereby not liable for content on their platforms.

Earlier media companies carefully controlled the content they carried and took responsibility for it. They simply put it out there – on the newsstands, on the airwaves – where anyone could pick it up, and everyone got the same thing. This is a communications model that the Constitution, libel and privacy law, and liberal political theory all presuppose.

Global social media turned this model on its head. Platforms do not generate their own content and take no legal responsibility for the content users choose to post. But they are intensively involved in determining who sees what, they manipulate this distribution with an eye only to their bottom lines, and they are heedless of the political or social consequences of doing so. They then use the personal data they harvest to profit still further, with little regard for the political or social consequences of their business model. In doing so, they are massively disruptive in ways that our existing legal system and our contemporary political ideas are currently ill-equipped to challenge. As this short historical review illuminates, today's tech companies are *not* like earlier media companies. Above all, they are entities the framers never contemplated, making political interventions the framers never could have imagined.

While attention was focused elsewhere, large technology companies thus became the key overseers of what was now a virtual national public square. Madison's axiom in Federalist 10 – that over such a vast territory, with both federalism and the separation of powers in place, factions would naturally cancel each other out – was basically overturned. Public gatekeepers were replaced with private ones. The national public square was effectively privatized.

Part of the reason this state of affairs has been allowed to continue is a function of the staggering relative wealth that tech titans have accumulated through accelerating innovation, which further distorts their outsized political power. The richest human on the 2023 Forbes 400 list was Elon Musk, owner of SpaceX, Tesla, and X (formerly Twitter). The second richest, Jeff Bezos, founded Amazon and owns *The Washington Post*. Third is Larry Ellison, chairman and cofounder of the software company Oracle. Fifth and seventh, respectively, Larry Page and Sergey Brin, are controlling shareholders of Alphabet Inc., which includes Google and YouTube. Sixth and ninth, Bill Gates cofounded and Steve Ballmer served as longtime CEO of Microsoft, whose massive investment in OpenAI spawned ChatGPT, which took the world by storm in a staggeringly short period of time.[5] Eighth is Mark Zuckerberg, cofounder of Facebook and majority shareholder of Meta Platforms. All of these men are super empowered, but as leaders of tech companies, they have more power at their disposal than just cash : their systems power government.

Likewise, the expertise that resides there delivers disproportionate power to Silicon Valley. This is best understood from three vantage points. First, the Big Five (Alphabet, Amazon, Apple, Facebook, Microsoft) control the platforms and infrastructure of daily business *and* government. Second, the power of Big Tech is concentrated, whereas government power is diffuse due to both federalism and the degree to which government functions have themselves been privatized. Finally, even with the Biden administration's CHIPS Act, Big Tech has both the computing power and is the lead actor in funding research and development, which means Silicon Valley has the talent and government does not, relatively speaking.

To place these patterns in larger historical context, none of what we are seeing is on its face surprising. Censorship has been the norm rather than the exception throughout human history, from the time of the book-burning of the Qin dynasty in 213–212 BCE through the ritualized destruction of books in the Roman Empire to the recasting of history under Stalin and Hitler to today's cancel culture. Even in the United States, the robust protection of the First Amendment is a blip on the screen of American political history. Yet while the Constitution's First Amendment protects citizens against government encroachments on their freedom of expression, it is mute on the question of protection from corporate censorship. Big Tech's power to shape the bounds of permissible discourse in the public square on a global scale is therefore wholly unprecedented and understudied. The problem is that Big Tech is a new kind of entity that currently escapes responsibility for the content it propagates, and it manipulates how that content is disseminated in less than transparent ways. The combination is dangerous for democratic sustainability.

A good place to begin, to wrap one's head around this, is to start with what has changed. Today's corporations, unlike their imperialist predecessors, are *not* national enterprises. They are multinational in scope. The East India Company, in contrast, was an extension of the British state. American social media companies operate globally, transcending national borders and moderating content in an increasing number of languages. The global team depends on third-party private contractors to do the heavy lifting in excising hate crimes and incitement to violence from the platforms. Since the companies prioritize growth above oversight, and stability is a necessary condition for commerce, dissenting voices in authoritarian regimes are often suppressed.[6] To cite just one example, the American company Zoom terminated the accounts of China-based activists who created a Tiananmen Square commemorative account in 2020. Zoom responded to its critics by insisting that it was only following local Chinese law.[7] Big Tech's misadventures in China provide many more such examples of bowing to government/Party requests for censorship.

The content moderation challenge is only further complicated by the advent of ChatGPT and other flavors of generative artificial intelligence (AI) – the sort that produces art, music, prose, and poetry in a particular style based on users' prompts and training data for the model, including creative work made by humans, often without the artists' consent. It generates information and also hallucinates misinformation without flagging the difference between the two. Generative AI requires massive computing power and enormous data sets, and guess who has exclusive access to both? The power of large multinational technology companies is set to grow exponentially vis-à-vis government in the age of AI. Add in Moore's law (which predicts that the number of transistors on a microprocessor chip will double every two years and has largely held since it was first invoked by Gordon

Moore, the cofounder of Intel in 1965), as well as recent breakthroughs in quantum computing, and it becomes clear that computing power in the hands of Big Tech is poised for continuous exponential growth, impossible for our human minds to fathom fully. We are on the brink of a wholly new and unanticipated world.

In May 2023, the stakes were raised still further when the U.S. surgeon general sounded a national alarm on a causal connection between social media usage and child/teen mental health problems.[8] Of course, since the creation and use of the first stone tools, technological change has influenced society. Humans have agency and can respond to our own creations. The difference with generative AI is that nobody knows, not even AI developers, how or why each model arrives at its outputs. Meaningful language simply emerges from a veritable black box.

To be sure, we all own technology that exceeds our understanding. But large language models are different in kind. For example, you may drive a car safely and not know how to repair it when it breaks down, but there is someone who does. With generative AI, the tool's very *creators* don't know how or why it generates its particular results. That is why its own inventors have simultaneously called for its regulation.[9] The worries regarding black box AI vary wildly, from AI researcher Eliezer Yudkowsky's repeated assertations that "we are all going to die" to the milder warning of Sam Altman, founder of Open AI (the creator of ChatGPT), who told members of Congress that "if this technology goes wrong, it can go quite wrong."[10]

What does this have to do with free speech? In short, everything. All the old problems with social media remain, and we have now added generative AI to that dangerous brew. The ad-driven social media Moloch, with all its democracy-compromising and free speech–mystifying elements, remains. And to that we have now added the possibilities of automated disinformation that can spread virally, as well as automated lobbying and persuasion, both of which combine to increase exponentially the power gap between the haves and the have-nots, the elites and the masses. Privacy and equality before the law cannot be luxury goods in a rights-based democracy. Put another way, if politics is the art of persuasion, and the Big Tech firms have a monopoly on turbo-charged machine-powered manipulation, then what oxygen is going to remain for the rest of us? The widening knowledge gap between the powerful and the powerless would seem to render democracy itself untenable.

Over twenty years ago, in his pathbreaking book *Code and Other Laws of Cyberspace*, legal scholar Larry Lessig pointed out that technological innovation was outstripping our legal and regulatory frameworks; in his memorable words, code is law. When code functions as law, a shift in power from the public to private sectors is its natural auxiliary. Innovation has always driven changes in state and society, but the velocity of that change in our new postepistemic era is unprecedented. The Telecommunications Act of 1996, which was designed to complete the breakup of Ma Bell so Washington could encourage innovation and free market competition in

telecommunications, is the very same law, slightly revised, that governs social media today. Yet in the past twenty-seven years, telecommunications have transformed dramatically and are now global in scope. Big Tech's deplatforming of an American president only highlighted the extent to which technological change continues to outpace existing laws and regulatory apparatuses.

Tech giants can rise and fall without government intervention. A case in point is the current state of IBM. Recall that at the time of Licklider's writing, IBM was a monolithic giant, akin to what Google, Apple, and Microsoft are today. Yet it lost its throne through market dynamics rather than government intervention.

But giants can also be shaped by government intervention. This was the case with the antitrust suit against Microsoft in the 1990s. Technically, Microsoft lost, but it did not take the nosedive that IBM did on its own. Thus, antitrust may not bring about the intended consequences, but rolling back enabling legislation may be another matter. Which brings us to Section 230.

Section 230 is the foundation of the ad-based business model that drives Facebook and drove Twitter (now X, which is presently in disarray). Section 230 also enables electoral interference and contentious discussions about free speech and who is and who is not granted a platform. It does not deal with antitrust issues but rather with who has the responsibility for content posted online. Section 230 was adopted for three main reasons, some of which are in retrospect rather ironic. First, there was the desire to promote free expression online by protecting platforms from liability for user-generated content. Platforms could then host a variety of viewpoints without fear of being held responsible. The general idea was to let a thousand flowers bloom – and what could possibly go wrong? Second, Section 230 sought to protect minors from obscene content online. This gave platforms carte blanch to moderate objectionable content without government involvement. Perhaps most important, Section 230 was designed to encourage internet innovations, which it did in spades. Companies from Twitter to Facebook to Amazon to eBay all owe their success to Section 230 protection.

To summarize, Section 230 was an effort to promote free speech *and* enable content moderation. This also meant that when things did not go as anticipated, government had limited intervention options, even in case of emergency. Perhaps the time has come to reconsider its value. In the next sections, I describe two case studies that both illuminate the contours of the problem and allow us to imagine what the implications might be for free speech if Section 230 were to be repealed.

What has been perhaps most striking about the public debate over generative AI is the emerging consensus that this technology is a force that needs supervision. In part, this is nothing new. Tech titans have repeat-

edly expressed apprehension about the lack of leadership from Washington on establishing clear rules of the game. Mark Zuckerberg was perhaps a trendsetter in this regard when he deployed targeted advertising on Friday, April 30, 2021, in the Daily 202, a *Washington Post* newsletter for Washington insiders, trumpeting Facebook's support for updating the Telecommunications Act of 1996 on its twenty-fifth anniversary.

Five days later, on Wednesday, May 5, Facebook's Oversight Board announced its verdict on the January suspension of Donald Trump's account. Facebook's actions had been justified under the specific circumstances, but their decision-making processes were insufficiently transparent. Indeed, rules spelling out when a public figure's account could be shut down did not exist. The Oversight Board gave Facebook six months to publish rules governing their actions, since "'Indefinite' suspensions are not described in the company's content policies."[11]

On June 4, 2021, Facebook announced that it would ban Donald Trump from its platform for two years and would reinstate him "only if the risk to public safety has receded." What was not apparent at the time was that this decree was intended as a repudiation of the Oversight Board's ruling that what the company needed was transparent rules that applied to all parties equally.

What exactly is the Facebook Oversight Board (now the Meta Oversight Board)? It, too, was an unprecedented creation, whose current status is unclear.

Facebook's Global Oversight Board on content moderation was announced in September 2019 and is funded by an independent trust. The forty-member board was devised after months of public consultation with experts and institutions around the world. In terms of design, it is something wholly new. It is a paragovernmental organization with no governmental or legal representation that floats above individual countries yet renders judgments with local ramifications. Its composition circumvents nation-states entirely; it is not the European Union, nor the United States, nor the World Trade Organization. It looks like a court, but Facebook is not a country. It also doesn't aspire to serve law in any way, either domestic or international. It exists as a body of ultimate appeal, and in that sense resembles something old: the private government of the monarch's court. Yet Zuckerberg insists Facebook will abide by its decisions, which is not how kings and queens typically behave.[12]

The six-month deadline came and went in November 2021, and Facebook did not deliver the transparent rules that its Oversight Board had demanded. The media seemingly did not notice. Trump remained deplatformed. Perpetually distracted, the public did not push Zuckerberg to abide by the oversight body he himself had brought into being. Zuckerberg seized the opportunity to change the narrative, and on October 28, 2021, Facebook was rebranded as Meta, a moniker meant simultaneously to distract and to demonstrate that Zuck was betting on the Metaverse to be his company's future.[13] At the time of this writing, despite pledging he would

abide by the Oversight Board's decisions, Facebook has yet to deliver on the May 2021 demand for clear rules that would justify deplatforming Donald Trump.

Perhaps in part because the public has proven to be so disengaged from these issues, the chapter on the role of social media in fanning the flames of the January 6 insurrection was omitted from the Final Report of the House Select Committee on January 6. Whatever the reason, the complete segment and the depositions on which it was based were leaked to *The Washington Post*. Together, they provide a remarkable indictment of the self-interested behavior of Big Tech in the run up to January 6.[14]

The Committee's analysis showed that the January 6 insurrectionists were consumers, not creators, of political disinformation on social media. In total, the Committee identified over seventeen hundred Facebook groups that contained at least one defendant in a January 6 prosecution.[15] What went wrong at Facebook, according to the Committee?

> First, the company's organizational structure subordinates integrity teams to the policy team, which oversees both content policy and public policy – a clash of incentives that compromises decision-making on integrity issues in ways that may be unique to Facebook or are at least unusual among its peers. Second, the company feared allegations of bias from right-wing politicians, and for years the desire to avoid political reprisals has shaped Facebook policy choices in ways which reverberate across the political and media landscape.[16]

This fear of being accused of political bias against the right produced extraordinary events and had significant costs. For example, the Committee reports that Zuckerberg even had private telephone conversations with President Trump regarding his online behavior, requesting that Trump dial down his rhetoric, with the president then responding favorably via tweet. "Facebook's tolerance of increasingly radical speech and hyper-partisan media may have accelerated polarization and extremism in the United States," concludes the report.[17]

Facebook's Break The Glass (BTG) emergency response after the January 6 insurrection was more impressive. BTG was in place until January 29. Yet the next month, just weeks after the Capitol siege, Facebook's Growth Team "urgently" requested the rollback of all BTG emergency measures due to their negative impact on membership expansion. It is inescapable to avoid concluding that Facebook's content moderation policy remains hostage to its bottom line rather than to a clear set of rules to govern users' online behavior.

Yet that is only a small fraction of the problem. What the leaked Facebook files demonstrate is that the version of Facebook we have in the United States is, ironically, Meta's best face. The documents show that Facebook is aware that its platform is being used to foment hatred in the Middle East, to

advance the interests of violent cartels in Mexico, to instigate ethnic cleansing in Ethiopia, to promote extremist anti-Muslim rhetoric in India, and to foster sex trafficking in Dubai. And the company is doing very little about it. As Facebook is the gateway to the internet for many citizens in the Global South, the Facebook files are a topic of international concern.[18] Frances Haugen is not Meta's first whistleblower, nor will she be its last.[19]

In the end, Facebook never produced the new content moderation rules that could have retroactively justified deplatforming an elected U.S. president. Instead, it restored Donald Trump's account on February 9, 2023, again without providing justification.[20] It did so even though Trump's posts on his current platform Truth Social continue to be his standard incendiary fare. The Valentine's Day story in *The New York Times* reporting the return of the former president to Facebook garnered just 125 comments.[21]

As the case of President Trump and his allies' online behavior illustrates, social media platforms are vulnerable to hacking (defined as "an activity allowed by the system that subverts the goal or intent of the system").[22] Facebook faced down another variety of hack on March 15, 2019, when its platform was hijacked to spread hate and terrorize fellow humans in ways that had previously been difficult to imagine. A shooter used a head-mounted camera to livestream a mass shooting that occurred at two mosques in Christchurch, New Zealand. The footage quickly spread across the internet, despite frantic efforts by Facebook and others to remove the video. It was reuploaded and shared countless times, racking up millions of views worldwide.

The Christchurch mass murder broadcast was an early warning signal of the structural weaknesses of existing content moderation policy, the ones that the president and his team exploited. Once the horse had left the barn, it proved impossible to rein in. The incident highlights the incendiary capacity of social media platforms for distributing extremist content on a massive scale, and raised serious concerns about the inadequacies of real-time content moderation that have only grown exponentially since Meta's open-source gated release of its variant of generative AI (LLaMA or Large Language Model Meta AI) to trusted users.[23] It took just four days for the model and its weights to be uploaded to the anonymous imaging and messaging website 4Chan, giving anyone in the world access to a powerful large language model that can be customized and run on a laptop.

In the ChatGPT era, a new set of questions should command our attention. What responsibilities does Big Tech have in combating harmful online content, and what could government do to assist them? Because of the First Amendment, it has never been the business of government to censor expression. Yet on social media, extremism generates views and thereby revenue, raising challenging new questions about hate speech and incitement to violence. These issues met their embodiment in Donald J. Trump.

Donald Trump's misuse of Twitter to spread his trademark excess led journalists to argue that he had violated Twitter's terms of service as far back as 2017. As one article in GQ put it, "threatening to nuke someone is a 'violent threat,' no?"[24] Calls for removing Donald Trump's account were valid at the time – had he not also been president of the United States. But Trump's magnetic capability to draw other users into his orbit was good for company growth, and so the violations went unpunished until after the calamity of January 6, 2021.

One particularly clever Twitter user conducted an experiment in which they tweeted Trump's tweets verbatim from a separate account to see if the content would get their account suspended. It did, while Trump tweeted on.[25] Trump piled outrage upon outrage until Twitter first suspended his account for twelve hours on the day of the Capitol siege, and then suspended it permanently on January 8, 2021. At the time, President Trump had eighty-eight million followers.

Twitter founder Jack Dorsey was quite worried – and rightfully so – that the ban of a standing U.S. president would have a chilling effect on freedom of expression. In a lengthy tweetstorm of his own, Dorsey expressed that he took no pride in shutting down the president's account. Wearing a pandemic beard that made him look like a blue-eyed Rasputin, he described his decision as a "failure" to create a service that could sustain healthy conversations and promote civic discourse.[26]

The House Select Committee's embargoed report on social media sheds light on the factors influencing the decision to at long last pull the trigger and deplatform the president. Put simply, they were largely fear-driven, rather than rules-driven. After the January 6 attacks, chatter on Twitter suggested that Trump's tweets were inciting further violence by those who felt they had missed out on the D.C. action. The FBI was warning that plans were underway for a coordinated armed attack against state capitols on January 17. After hearing this, Twitter's Site Integrity squad recommended Trump's permanent suspension.[27]

The content moderation roller coaster that Twitter was riding with President Trump never sat well with Twitter employees, who saw the inconsistency and bias enabling the already powerful and giving them a louder voice on the platform. Anika Collier Navaroli was a member of Twitter's policy team that designed Twitter's content moderation rules. Navaroli was educated at the University of Florida, where she developed a keen interest in media law and technology. She earned a master's degree in journalism at Columbia University and received her law degree from the University of North Carolina. Her Columbia master's thesis was titled "The Revolution Will Be Tweeted."[28]

Navaroli began working at Twitter in 2019. On January 6, 2021, she was the most senior member of the U.S. Safety Policy Team. The team was responsible both for writing the external policy (the Twitter rules that the public can see) and the internal policy that determines how those rules should apply (the Twitter rules that the public cannot see).[29] Twitter's coded incitement policy, which sought to

flag dog whistles, was a direct response to Trump's message to the Proud Boys in the first presidential debate to "stand back and stand by." The coded incitement policy was devised "to prevent Donald Trump or someone in a similar situation, from tweeting 'stand back and stand by' to a White supremacist group on the platform."[30] When Trump said in 2020 that "when the looting starts, the shooting starts," with his followers tweeting that message, Navaroli's team brought this to the attention of Twitter's leadership as a clear violation of Twitter's internal rules and as part of a pattern of coded incitement crying out for a policy response. Leadership's response was to place a warning message on Trump's tweet. No other action was taken.

When all was said and done, the senior leadership was unconvinced that a coded incitement policy was even necessary in the first place. Indeed, the safety team had never been authorized to use the policy to delete content. The result? Coded incitement was not part of the team's toolbox in the time between the elections and January 6.[31] Navaroli's testimony to the House Select Committee on January 6 revealed that Twitter did not have any sort of data-driven content moderation engine in place at the time – although it could have. All the content moderation was being done through user reports and internal discussion on the policy team, with Navaroli personally monitoring Trump's tweets. In short, the platform very much erred on the side of laissez-faire content moderation and enforcement of its own rules. Navaroli said she often referred to Twitter as being held together by "Google docs and doc tape."[32]

For years, Twitter had dismissed calls to suspend Trump's account. The president's tweets were deemed too newsworthy to take down. But on January 6, Navaroli told the Committee she was suddenly ordered to "stop the insurrection" *and* to find a reason to suspend Donald Trump's account.[33] She had been warning for months about what was brewing, but only after the storming of the Capitol did her superiors give her the green light to find reasons to suspend the president.[34] Flabbergasted, according to her deposition, Navaroli told her supervisors, "I would like to express my frustration with you because I told you this was going to happen . . . now it is happening, and you are asking me to clean it up. . . . He's not doing anything differently than he's already done."[35]

Navaroli told the Committee that if Trump had been "any other user on Twitter . . . he would have been personally suspended a very long time ago." Navaroli testified, "Twitter bears the responsibility for being the main platform and service through which Donald Trump's rhetoric and incitement to violence was not only posted but was amplified in ways that stoked flames and created a megaphone like we have never seen before within communications history."

In response, Twitter executives argued that Navaroli's testimony had failed to mention the significant steps that *had* been taken to curtail hateful content on the platform.[36] Navaroli left Twitter in March 2021 because she "could no longer be

complicit" in what she saw to be "a company and a product that was wantonly allowing violence to occur."[37] Thus, Twitter followed Facebook and Google's YouTube in suspending Trump's account after the January 6 insurrection. Twitter's ban was "permanent" until Elon Musk, Twitter's new owner, said it wasn't.

After Musk's takeover and Trump's reinstatement, Yoel Roth was promoted to lead Twitter's (now X's) AI Trust and Safety team. Roth had been in the content moderation business since he joined Twitter in 2015, but he had not "pressed the button" on the decision to deplatform the president. As he told the podcast *This American Life* in April 2023, after assuming the role of Twitter's head of AI Trust and Safety, he wrote down the red lines that he would not cross in his new job: "I will not break the law. I will not lie for him [Elon Musk]. I will not undermine the integrity of an election. . . . I will not take arbitrary or unilateral content-moderation action."[38] As Roth put it, if you find yourself in a job where you have to make a list like this, "your job is insane."[39]

For a time, Roth's conversations with Musk suggested he would be reasonable about online moderation. But that quickly proved not to be the case, with Musk favoring no moderation whatsoever. Roth wound up resigning when Musk wanted him to implement his Twitter Blue revenue enhancement scheme, in which users would pay $8 a month for certification as a legitimate source (among other visibility-increasing benefits), when this verification badge had previously been bestowed for free on accounts to help users distinguish between reliable and unreliable sources, between truth and falsehood. The idea that free speech belongs to those of means, and everyone else should not have the same megaphone – the underlying message of Twitter Blue being that democratic legitimacy is a product, not an aspirational ideal – is obviously at odds with a functioning democracy comprising equal citizens.[40]

After Roth's resignation, Musk led an online doxing campaign that ultimately forced Roth and his family to leave their home. Musk's release of "The Twitter Files," a collection of inhouse emails and Slack messages, that Musk claimed revealed "bias" against President Trump, suggested that Roth was Musk's enemy number one, even though Roth had played no role in making the call to deplatform the president.[41]

What do we see from reviewing these two cases? When the Section 230 ecosystem met Donald Trump, Mark Zuckerberg, and Elon Musk, the results were not pretty. Companies had content moderation rules, but some speakers were privileged over others, especially those who were growth and revenue generators. To be sure, since Donald Trump was president of the United States, the threshold for libel against him should be and was much higher. But when a president uses a private platform as his shield to incite insurrection and terrorize his opponents, he cannot be above the law without the political system sliding into oligarchy. No citizen in a democracy should be above the law if we are to

preserve the fragile consensus on democratic norms and values on which the republic and the Constitution depend. In what is perhaps good news, Musk's erratic actions have not yielded profits. As of early 2024, Twitter's value is less than one-third of what it was when Musk purchased it.[42]

Writing in 1979, Licklider highlighted the opportunity, which again exists in 2024, "for the government to regain public trust by sponsoring research and development in unambiguously prosocial technology."[43] He contended that the "broadest and most obvious conclusion about the future interaction of computers and government is that it will depend critically upon how far computer technology advances . . . and upon how much initiative government takes in shaping the socioeconomic system and the culture."[44] How might this best be done?

One clear takeaway from the material covered here is that our current virtual public square is not one in which all voices have an equal volume. Because of the repeal of net neutrality, the reality that we have allowed privacy and Fourth-Amendment protections to become luxury goods, and the entire orientation of the ad-driven social media business model to maximize revenue at the expense of individual rights and even democracy itself, tinkering at the margins will not get us closer to parity in whose voices are heard. This is especially so with generative AI already in the hands of malicious actors.

The editors of this *Dædalus* issue, Lee C. Bollinger and Geoffrey R. Stone convened a special commission and published an excellent volume in 2022 that examined issues of the First Amendment and social media, just before the launch of ChatGPT. Their five core premises were that 1) the results of the platforms' recommender systems, which replicate and amplify speech, should be considered distinct from the content of speech and therefore subject to lesser First-Amendment protections; 2) technology is constantly evolving, so any static regulatory framework will quickly become obsolete; 3) self-regulation alone is insufficient; 4) promoting user privacy and transparency on platforms, while advisable, will not by themselves address social media's harmful consequences; and 5) solutions must be global in scope.[45] The commission concluded that doing away with Section 230 would be a cure worse than the disease, privileging large platforms. Instead, they recommended reforming Section 230 by making its liability shield contingent on participation in a self-regulatory agency overseen by a new federal agency that would together notify platforms of hateful content and punish those who do not comply. This solution mirrors the European Union's limited liability approach to content moderation. We can't stop all harmful content at the source, but we can insist that it immediately be removed before it spreads virally.[46]

What a difference the last year has made. The age of generative AI and automated disinformation makes what was a reasonable and thoughtful recommen-

dation one year ago no longer adequate a year later. The stakes have increased dramatically, and the velocity of change coupled with the proliferation of open-source capabilities will produce an avalanche that is impossible for any new federal agency to oversee. We are poised at the brink of a world where it is increasingly difficult, even with excellent technical fixes like watermarking, for ordinary citizens to be able to distinguish truth from falsehood. The worry is that people will no longer know what is true, and will therefore believe everything and nothing. "If everybody always lies to you," Hannah Arendt warned, "the consequence is not that you believe the lies, but rather that nobody believes anything any longer."[47] I wonder whether the commission members would accept my more radical proposal were they writing today.

A wakeup call for the entire social media ecosystem would be to repeal Section 230 and concurrently build a new public internet, one in which Web 3.0 decentralized autonomous organizations (DAOs) might flourish, citizens would own their personal data, and the ad-driven business model would be transcended, thereby enabling a new and hopefully more constructive and democracy-compatible alternative free internet to come into being.[48] Repealing Section 230 would disrupt the existing ecosystem, clearing a pathway for a democracy-sustaining internet to put down roots.

Critics of Section 230 repeal have made good arguments as to how this might destroy social media as we presently know it.[49] From the picture that emerges in these pages, would this be such a bad thing? If social media produces groupthink, standing as a serious impediment to humans thinking for themselves and deliberating together as equal citizens, the key to combating its deleterious effects would be to let the First Amendment govern, hold platforms responsible for the hatred and incitement to violence that they foster, and just generally slow things down so that people have time and space to recover their capacity to think for themselves.

Repealing Section 230 sounds like radical action, rife with unintended consequences, but it is important to ask: for whom? Meta would take a big hit, but Meta's Threads is a decentralized social media protocol with data portability built for the Web's next iteration, as is Twitter founder Jack Dorsey's BlueSky. Would the world be irreparably damaged without Facebook? Yes, the social media platform has its benefits, and older people especially find meaningful interactions there, but should such benefits trump democratic sustainability? It would be easy enough to build a new and improved ad-free platform with opt-in recommendations on a new internet and garner the same rewards. Change is always taxing, but the costs of Section 230 now outweigh the benefits. It should be retired to address the pathologies it now enables and unleash internet innovation.

Some argue that such a move would favor large platforms over smaller ones, since they have the means to deploy an elaborate content moderation system while smaller startups do not. With generative AI as a content moderation as-

sistant, is this really still the case? One could argue that the smaller enterprises would have an easier time moderating their platforms than the global colossi that presently rule cyberspace. And for those worried that companies would err on the side of censorship to avoid penalty, I would point to the case studies of content moderation rehearsed above as evidence that there would be plenty of room for legal action against private companies for breach of contract if their censorship were politically motivated. Perhaps the result would be many frivolous lawsuits, but is that worse than allowing companies to knowingly endanger the lives of teenagers? And for those concerned that the marginalized, the unusual, or the queer would lose their spaces for finding others like them and all the life-affirming meaning that represents, surely there are better ways for that to happen than on large free-for-all platforms where trolls harass anyone who steps outside the lines of social conformity with America's two present polarities.

Instead of allowing Section 230 to give Big Tech carte blanche, why not mandate content moderation oversight by constituent assemblies that are representative of all Americans, not just the wealthiest?[50] In preparing this essay, I asked GPT4 to strongman the argument against repealing Section 230, wanting to be sure there were no good arguments I had overlooked. We had a thought-provoking extended exchange, but in the end, GPT4 revealed its strong bias for the status quo, which is wholly understandable, because it is a model trained on the past (its cutoff date for training data is September 2021), with all of history's biases and misconceptions part of its learning experience. To give you a flavor of GPT4's arguments:

> The interests of online platforms and respect for human dignity are not mutually exclusive, and a balanced approach to internet regulation should seek to uphold both. Moreover, many believe that online platforms should take more responsibility for ensuring their services respect human dignity and foster a healthy online environment . . . while there could potentially be benefits to repealing Section 230 and shifting more power over online content to governments, there are also significant risks and challenges to consider. It's a complex issue that requires careful consideration and debate.

Translation: allow online platforms to continue to self-regulate, which is the standard argument of the legions of lobbyists for Big Tech, whose voluminous texts the large language model powering GPT4's pronouncements has ingested. If we have learned anything, it is that this is a recipe for disaster. The makers of generative AI are themselves acknowledging this is the case. Limited to knowledge of the past alone and deprived of the human capacity for imagination and transgressive frontier thinking, GPT4's defense of Section 230 fell flat. We humans can do better.

More generally, government needs to take action to level the playing field for human participation in our virtual public square, a realm where bots should have

no place. Repealing Section 230 would move us in that direction. As cryptographer Bruce Schneier and data scientist Nathan Sanders have argued, "the best way to fight an AI that can lobby for monied interests is to help the little guy lobby for theirs."[51]

In the end, the First Amendment remains a stroke of genius, but it needs additional guardrails for the information age. Section 230 succeeded in encouraging innovation in human communication, but it has outlived its purpose. Fortunately, bipartisan legislation to sunset Section 230 as of December 31, 2025, was introduced in the House in May 2024.[52] The cosponsors of the legislation, Republican Congressional Representative for Washington Cathy Rogers and Democrat Congressional Representative for New Jersey Frank Pallone, deserve our unwavering support and gratitude for their courage to join forces for the sake of our children in challenging times.

Repealing Section 230 would move the United States in the right direction, and with it the entire free world. Taiwan's former digital minister at-large Audrey Tang has perhaps put it best:

> When we see "internet of things," let's make it an internet of beings.
> When we see "virtual reality," let's make it a shared reality.
> When we see "machine learning," let's make it collaborative learning.
> When we see "user experience," let's make it about human experience.
> When we hear "the singularity is near," let us remember: the plurality is here.[53]

The First Amendment originates in the interests of plurality. We honor it by restoring the balance of power between Big Tech and the disempowered.

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ENDNOTES

[1] "Hobson's choice" refers to a situation in which there is an illusion of choice, but only one option is offered.

[2] J. C. R. Licklider and Robert W. Taylor, "The Computer as a Communication Device," *Science and Technology* 76 (2) (1968): 1–3.

[3] See J. C. R. Licklider, "Computers and Government," in *The Computer Age: A Twenty-Year View*, ed. Michael L. Dertouzos and Joel Moses (Cambridge, Mass.: The MIT Press, 1979), 87–126. Thank you, Glen Weyl, for bringing this piece to my attention.

[4] Though the phrase "information superhighway" is frequently associated with Gore, due to a speech he gave in Buenos Aires in 1994 that brought it into the popular lexicon, many used it before him, dating back to the 1960s and 1970s.

[5] Michael Scherer and Sarah Ellison, "How a Billionaires Boys' Club Came to Dominate the Public Square," *The Washington Post*, May 1, 2022, https://www.washingtonpost.com/politics/2022/05/01/billionaires-politics.

[6] Jillian C. York, *Silicon Values: The Future of Free Speech Under Surveillance Capitalism* (London: Verso Books, 2021), 129–130.

[7] Aynne Kokas, *Trafficking Data: How China Is Winning the Battle for Digital Sovereignty* (Oxford: Oxford University Press, 2022).

[8] Matt Richtel, Catherine Pearson, and Michael Levenson, "Surgeon General Warns that Social Media May Harm Children and Adolescents," *The New York Times*, May 23, 2023, https://www.nytimes.com/2023/05/23/well/family/social-media-mental-health-surgeon-general.html.

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[12] See Steven Levy, "Why Mark Zuckerberg's Oversight Board May Kill His Political Ad Policy," *Wired*, January 28, 2020, https://www.wired.com/story/facebook-oversight-board-bylaws; and Jeff Horwitz, "Facebook Forms Independent Board to Oversee Content Decisions," *The Wall Street Journal*, September 17, 2019, https://www.wsj.com/articles/facebook-forms-independent-board-to-oversee-content-decisions-11568752897. Zuckerberg has said that the Oversight Board is intended to protect free expression, since he is "not always going to be here." See Tony Romm, "Zuckerberg: Standing for Voice and Free Expression," *The Washington Post*, October 17, 2019, https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression.

[13] According to psychologist Jeremy Bailenson, Facebook owns all the data generated by Oculus (Meta's virtual reality headset) users, including camera views of the surrounding room that are necessary to render realistic virtual movements. Oculus runs on a computer in the headset, so all that private data belongs to Zuckerberg. Facebook put $40 billion into virtual reality research in 2022 alone. Author interview with Jeremy Bailenson and Brian Beems in Bailenson's Stanford lab on June 9, 2022; and several off-the-record conversations by the author with current Facebook Oversight Board members. See also Afia Asantewaa Asare-Kyei, Evelyn Aswad, Endy Bayuni, et al., "Oversight Board Demands More Transparency from Facebook," Oversight Board, October 21, 2021, https://www.oversightboard.com/news/215139350722703-oversight-board-demands-more-transparency-from-facebook.

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[17] Ibid., 65.

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The Free Speech Clause as a Deregulatory Tool

Alexander Tsesis

The U.S. Supreme Court increasingly leverages a rigid interpretation of the Free Speech Clause to strike regulations that address campaign financing, health care warnings, tax disclosures, collective bargaining agreements, and consumer protections. History has become little more than a slogan that the majority periodically invokes but seldom accurately evaluates. That lack of nuance augments the justices' authority to articulate absolutist-sounding rules to the detriment of legislatures' exercise of traditional governmental functions. Jurists would do better to rely on a more proportionate and less categorical approach to decide whether laws impose direct or peripheral burdens on communications. The level of safeguards enjoyed by expressions should be gauged by their value to political self-determination, personal development, or informational contribution. The degree of protections that speech enjoys should be balanced against countervailing government interests, alternatives available to speakers, fit between law and public ends, and relevant history.

The language of the Free Speech Clause is not self-definitional. Almost all human activities involve communications; even criminality can be infused with expressiveness, but that does not mean that conspiracy, assault, and hate crimes are protected by the First Amendment. The Supreme Court of the United States is tasked with explaining the scope of its coverage. In recent years, the Court has taken a decidedly libertarian approach to laws that impose even nominal restrictions on communications.

That approach has proven strategically beneficial to special interests who challenge laws meant to secure labor rights, to restrict corporate expenditures on political campaigns, to prevent protestors from standing too close to the entrances of clinics where abortions are performed, and to compel the posting of health notices. The Court's reasoning has become increasingly formalist, adopting judicial categories of interpretation to strike legislation without giving adequate consideration to countervailing government interests.

The Supreme Court's free speech jurisprudence has relied increasingly on a categorical understanding of free speech that purports to have historical pedigree. Close examination, however, reveals absolutist statements and historical inaccu-

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racies. A series of recent cases have strictly construed the Free Speech Clause to strike various regulations. The predominant framework of analysis strengthens the Court's hand at the expense of legislative initiative. As the power of the judiciary has waxed, the ability of legislators to pass laws responsive to constituents' demands has waned. The Court's rigid free speech doctrine creates a model of governance that is "incapable of responding to new conditions and challenges."[1]

Judicial formalism lacks transparency, which is essential to litigation and appeal. This essay argues for greater judicial clarity in balancing competing interests and in evaluating surrounding circumstances. It proposes an analytical approach for courts to undertake when assessing First Amendment challenges to traditional government functions. Rather than dismissing lawmakers' concerns, the Court should evaluate whether a law interferes with self-expression, civic participation, or factual assessment. A balance is needed for courts to reflect on speech concerns, how well the law fits with regulatory aims, and alternatives for communication.

Before explaining under what circumstances the Supreme Court invokes the First Amendment to strike regulations, a few words are in order about baseline principles. At its core, the constitutional protection of speech reflects the individual right to express ideas, participate in politics, and gather information. The First Amendment restrains government from imposing autocratic orthodoxy. It secures the marketplace of ideas as an open forum for exchanging ideas that make their way into politics, private life, and education. The flow of information, unencumbered by onerous regulations, is critical to everything from vigorous engagement in federal and local politics to the recitation of poetry.

Determining what communications the First Amendment covers cannot be gleaned from the text alone. Its written terms only prevent Congress from meddling in free expression, but that cannot be its full meaning. Representative democracy could not survive were the executive and judicial branches allowed to censor speakers indiscriminately. Moreover, the prohibition against Congress "abridging the freedom of speech" says nothing of other modes of protected communications that include artistic symbolism, meaningful gestures, expositive gesticulations, and guttural sounds.

Neither do the views of the Bill of Rights' framers provide enough information to construct more than a prohibition against restraints prior to publications, parliamentary privileges, or procedural fairness. However, the historic lens does not suffice to evaluate laws dealing with modern communication tools such as broadcast television, the internet, telephone, or even sound equipment.

Almost all human activities that are subject to laws involve some implicit or explicit communications.[2] The judiciary serves as a bulwark against policies that infringe on the Bill of Rights or Due Process Clause. It determines when speech-protective rules arise and what human activities are outside the range of subjects

that benefit from constitutional status. Speech that enjoys the greatest constitutional safeguards concerns personal, associational, and social matters.

The Court's early forays into free speech appertained to cases in which defendants were charged with inciting opposition to America's role in the First World War and to the administration of conscription. On the whole, during the early decades of the twentieth century, the Court upheld convictions of persons who decried U.S. foreign policy or attempted to interfere with the draft. In those years, judicial opinions tended to be deferential to legislative efforts against the perceived spread of communism. A consensus among American courts and scholars has long recognized that early-twentieth-century cases wrongly upheld government prosecution of nonviolent members of subversive organizations.

The Warren Court altered free speech doctrine in favor of underdogs and politically disfavored groups. For instance, the Supreme Court held that a vague and selectively enforced state law could not prevent the National Association for the Advancement of Colored People (NAACP) from soliciting clients to its civil rights legal practice.[3] The Court began to rely on a developing standard of review, which came to be known as *strict scrutiny*, requiring the prosecution to prove that there was a compelling government reason for suppressing politically disfavored speech and that the law was narrowly tailored to that end.

Other cases in the 1960s likewise relied on the strict scrutiny test to strike down laws that required NAACP branches to divulge membership lists and that demanded public employees to reveal their membership in expressive organizations. The use of this rigorous test to review regulations limited the power of government to intrude on political representation and dissent. During the same period, the Court also expanded the relevance of the First Amendment to prevent politically motivated efforts to censor speakers, for instance, requiring public officials who sue for defamation to prove that the challenged false statements were motived by actual malice. That rule assured parties engaged in vigorous political debate that they would not be subject to litigation for inadvertently making mistakes. As historian Morton Horwitz pointed out, at the close of the Warren Court in 1969, the typical beneficiary of the Court's readings of First Amendment doctrine was "a member of some weak, dissident, and unpopular political or cultural minority." The First Amendment was then understood to be a preferred right that required any statute that imposed restrictions on expression to be narrowly drawn in order to be the least restrictive available method to achieve a compelling public objective.[4]

So, too, in the first years of the Burger Court, a variety of cases continued to weigh litigants' speech interests against various social, military, safety, and educational concerns, although balancing sometimes proved to be ad hoc in its application. The Supreme Court's most rigorous review was reserved for political speech. Moreover, the Court determined that the First Amendment prevents government

from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content."[5] Yet the Burger Court, just as its predecessor, articulated no overarching doctrine to determine whether a law with only an incidental effect on speech, such as a prohibition against destroying a military draft card, or one that restricts unprotected expression, such as obscenity, falls outside the coverage of the First Amendment.

Despite this similarity, legal scholar Thomas Emerson goes too far in saying that the Burger Court made "little change in the position" taken by the Warren Court as to the role of free expression in national life.[6] By the mid-1970s, special interest groups opportunistically invoked strict scrutiny to challenge ordinary regulations. The First Amendment then became an effective tool for challenging legal restrictions on political expenditures that were meant to prevent corruption and the appearance of corruption. Reliance on the First Amendment as a deregulatory instrument has reached new heights under the Roberts Court. The recent pattern of invoking the Free Speech Clause in opinions that expand judicial authority, Justice Kagan has said, resembles "black-robed rulers overriding citizens' choices."[7]

At its core, the First Amendment prevents government from imposing punishments on persons because of their abstract or concrete ideas. By mandating official neutrality, the Constitution prevents the imposition of any secular creed on private persons. Its roots are planted in anti-autocratic statecraft born of a revolution against British monarchy. The First Amendment prevents government actors from censoring discussions about ideas, topics, and perspectives. Those principles preserve autonomy, political self-determination, and science. Difference exists, as writes First Amendment scholar Geoffrey Stone, between the suppression of political perspectives and the neutral enforcement of "legitimate governmental interests" that do not implicate "first amendment interests." That dichotomy assures that sensible regulatory responses are subject to "content-neutral balancing" rather than the most rigorous judicial review.[8]

In recent years, however, the Roberts Court has not followed such a fine distinction. It has expanded the array of regulations subject to the content-neutral, strict scrutiny standard of review. Corporate litigants increasingly invoke the First Amendment in lawsuits that seek to strike legislation that so much as brushes up against expression, such as pricing notifications on credit card sales.[9]

Several opinions form a corpus of First Amendment jurisprudence that consistently adopts distinctly deregulatory interpretations. Those holdings typically rely on strict construction of the Free Speech Clause and often lack sufficient nuance to differentiate protected speech from reasonable regulations on workplace harassment, consumer disclosure, and medical patient privacy. Some justices wish to broaden the reach of the First Amendment still further, scarcely distinguishing commercial advertisements from scientific knowledge, pricing noti-

fications from philosophic propositions, and signage ordinances from political debates. In its benighted hands, the Supreme Court recently struck down states' laws that required pregnancy crisis centers to disclose public health information and charitable organizations to identify their top donors.[10]

The current Court has taken it in hand to invalidate economic, safety, and health regulations. These decisions have augmented judicial authority while thwarting states' capabilities to exercise traditional powers. The danger is one of selective decision-making, what legal theorist Pierre Schlag points out incentivizes activist judges to prepackage "justifications for particular outcomes."[11] Lack of contextualization, Justice Stephen Breyer rightly noted in a dissenting opinion, "threatens significant judicial interference with widely accepted regulatory activity."[12] Litigants have strategically taken to attacking ordinary regulations by relying on an increasingly expansive definition of what qualifies for First Amendment protection.

Justice Antonin Scalia set a pattern for strict categorical formalism with his reasoning in *R.A.V. v. St. Paul*, which found unconstitutional a vaguely drafted cross-burning ordinance. More important than that specific holding was Scalia's use of the strict scrutiny standard for all content and viewpoint regulation, except for certain categories of low-value speech. The list of unprotected expressions, Scalia claimed, already existed when the Bill of Rights was ratified in 1791.[13]

Upon examination, however, his claim to the mantle of history and tradition turns out to be spurious. Current historical categories, as the late legal scholar and advocate Steven Shiffrin pointed out, "are entirely different than at the time of the framing; indeed their most recent definitions have been refined in a line of cases beginning in the late 1960s."[14] Similarly, legal scholar Toni Massaro questions the possibility of compiling any definitive enumeration of historical or traditional exceptions to free speech protections.[15] The Court ignored criticism and self-assuredly plowed on with a doctrine of its creation.[16] Even on his originalist terms, Scalia's claim is demonstrably false. Among the categories he listed, two – obscenity and "fighting words" – were judicial constructs of the mid-twentieth century, not categories that existed at the founding of the nation.[17] In the words of Justice Amy Coney Barrett, "tradition is not an end in itself. . . . Relying exclusively on history and tradition may seem like a way of avoiding judge-made tests. But a rule rendering tradition dispositive is itself a judge-made test."[18]

Chief Justice John Roberts, the author of the majority opinion in *United States v. Stevens*, reiterated Scalia's historically groundless claim that all legitimate content-based restrictions of speech were fixed in 1791. As Scalia before him, Roberts made no effort to review any primary or secondary sources to substantiate this historical conjecture. The strict scrutiny test again proved of vital importance for striking a law. The Court rejected the Animal Crush Videos Act out of hand, giving virtually no consideration to Congress's intended reasons for enforcing the law to prosecute commercial trade in videos of animal torture.[19]

To add further force to his vacuously originalist claim, the following year Justice Scalia again relied on it in *Brown v. Entertainment Merchants*. He adopted strict scrutiny to reject the State of California's policy of requiring children to get parental permission before buying or renting violent video games. Outside a few forms of speech that had been unprotected from the founding – Scalia listed obscenity, incitement, and fighting words – no regulation was likely to survive rigorous judicial scrutiny. Without reference to any primary source, historical treatise, monograph, article, or even pamphlet, Scalia grandiloquently pronounced that the First Amendment reflected the "judgment [of] the American people," dating back to the year of its drafting.[20]

Other cases likewise picked up on Scalia's originalist conjecture. Contrary to the Court's claims, though, obscenity was a doctrine established in 1973, the current incitement test set in 1969, and "fighting words" was a concept that entered First Amendment jurisprudence in 1942.[21] These remain highly contested doctrines that emerged during the twentieth century through Supreme Court opinions rather than the framers' constitutional vision.

When coupled with the strict scrutiny test for content neutrality, the Court's historical inaccuracy about the early republic bolsters the judicial branch's ability to find laws not to be grounded in a compelling government interest nor narrowly tailored enough to meet five justices' notions of fit.

In addition to historically suspect assertions, the Roberts Court also adopted wooden definitions tinged with absolutist-sounding rhetoric. In *Reed v. Town of Gilbert*, Justice Thomas, writing for the majority, held that all facially content-based regulations should be subject to strict scrutiny.[22] His judicial reasoning is as oversimplified as it is opaque. Taken to its logical conclusion, *Reed*'s absolutist rhetoric could place in constitutional jeopardy content-based regulations on copyright, securities transaction, and consumer protections that heretofore have raised no First Amendment concerns.

Other regulations on expressive content that may become subject to heightened scrutiny are also unrelated to the nation's founding. They include regulations on the labeling of refrigerators, air conditioners, water heaters, and toilets; "Rx only" prescription drugs; alcoholic beverages that may lead to birth defects when consumed by pregnant women; warnings of hazardous substances; markings on commercial vehicles; pharmaceutical products; tobacco cartons; bank titles; and Federal Deposit Insurance Corporation notifications. Hence, any presumption that content regulation automatically triggers strict scrutiny or historical review distorts precedent and puts into doubt the constitutionality of a wide swath of ordinary laws.

The *Reed* Court's absolutism was neither consistent with history nor doctrine. The Court would have done better to find the signage ordinance at issue to have been disproportionately burdensome on the spread of information, such as direc-

tions pointing to church services. What is needed is a more contextual approach that requires judges to consider both the importance of the asserted speech rights and the fit of public policy to reasonable policies. Rather than hard and fast rules, judicially created categories should be "rules of thumb."[23]As things stand, the Court has created formulaic categories that oversimplify the meaning of the First Amendment and grant the judiciary excessive authority to thwart legislative policy. Moreover, review of whether and to what extent laws impact free speech rights would be more in keeping with older precedents that established that the First Amendment is tied to ideas, politics, and information, not to laws that peripherally involve communications.

Opportunistic reliance on the First Amendment to challenge legislation extends well beyond commercial regulations. The Supreme Court continues to invoke it to thwart federal and state efforts to limit corruption and the appearance of corruption from the enormous money flowing into political campaigns.[24] The Court's recurrent equation of money with speech and protection of an unlimited amount of expenditures provided Donald Trump with 20 percent of his financing for a successful run for presidential office in 2016.[25] The Court's refusal to defer to laws that limit money in bloated election campaigns prevents lawmakers from enforcing statutes designed to level the playing field of election campaigns. As a result, plutocratic wealth (personal and corporate) has flooded into American politics.

Even accepting the need to scrutinize closely laws that limit campaign contributions and expenditures, compelling legislative interests exist for regulating government administration of elections. As professor of civil liberties Burt Neuborne points out, "Fostering equal political participation is a sufficiently compelling interest to justify some regulation of campaign spending."[26] The Court's holdings, to the contrary, restrain election reforms under a First Amendment doctrine that views money as speech itself, not simply as facilitating speech.

Neither does judicial deregulation end with natural people. The Court's libertarian streak affects the most critical aspects of representative democracy. The majority in *Citizens United v. Federal Election Commission* concluded that corporations, even though they are artificial persons who can neither be candidates for public office nor vote in elections, have a First Amendment right to expend general treasury funds in support of political candidates who are more likely to favor their businesses' bottom lines.[27] The holding relied on strict scrutiny. The majority's insubstantial understanding of history may explain why it protected corporations to a degree unfathomable to the framers.[28]

The strict scrutiny test has come to be a tool for asserting judicial authority over legislative and administrative policy. The adoption of strict scrutiny often describes no more than the judicial conclusion that a regulation is invalid.[29] The increasing use of the Free Speech Clause to strike regulations extends beyond matters of political self-deliberation to speech that proposes commercial exchange.

Returning to the issue of commercial speech, in the mid-1970s, the Court swerved away from its earlier stance that the First Amendment does not cover "purely commercial speech" and recognized truthful commercial speech to be protected under the Free Speech Clause. From the inception of the doctrine, though, Justice William Rehnquist disagreed with the decision to augment judicial authority to strike advertising regulations, which he would have left outside the purview of the Constitution. Against his continued dissent, in 1980, the Court defined a test to review legal and nonmisleading commercial speech matters. The test requires government to demonstrate that the law in question directly advances a substantial government interest without being unnecessarily extensive in scope.[30]

The Court's rationale for finding that commercial speech enjoys at least limited First Amendment value has been tied ever since its nascence to the rationale that advertisement informs ordinary people through the marketplace of ideas. In more recent cases, however, the majority has shifted the focus of free speech analysis from consumer concerns to those of businesses. Justice Breyer, like Rehnquist before him, regarded the deregulatory direction in the commercial speech area to be as retrogressive as the misguided period during the early twentieth century when the Court regularly struck down health and welfare regulations.[31]

In the recent *Expressions Hair Design v. Schneiderman* case, the Court found that a New York law that regulated surcharges on products raised a First Amendment claim. Merchants asserted that the law forbade them from choosing how to communicate charges. The Court found that the statute was unconstitutional, even though the law was content and viewpoint neutral. The State's legislative aim was to preserve consumer choice. Merchants were neither censored nor were they required to accept some orthodox government perspective. The State statute expurgated no information; neither did it suppress dissent, deliberation, or free thought; nor did it impose state orthodoxy. Rather than treat it as a neutral economic or pricing regulation designed to help customers select their method of payment, the Court found the law interfered with merchants' speech.[32]

The pattern of commercial law deregulation under the auspice of the Free Speech Clause extends far beyond *Expressions Hair Design*. The Court's encroachment on traditional legislative authority is also evident in *Sorrell v. IMS Health, Inc.*, in which the majority found a state privacy protection on confidential medical information to violate the First Amendment. A Vermont law forbade pharmacies to sell prescriber information. Pharmaceutical companies purchased those records from data brokers and used them strategically to influence physicians with a history of prescribing low-cost or generic prescriptions.[33] Pharmaceutical data vendors and pharmaceutical manufacturers filed suit on First Amendment grounds to challenge the States' Prescription Confidentiality Law.

The State statute prevented commercial vendors from profiting from the resale of medical histories to pharmaceutical manufacturers. The *Sorrell* majority labeled

the corporate marketing strategy to be a form of "speech" that warranted heightened scrutiny. However, it gave no serious weight to prescribers' and patients' interests in anonymity. Free speech became a categorical norm to the Court compared to which privacy apparently did not even warrant substantive consideration.

Moreover, as several legal scholars, including Martin Redish and Julie Cohen, have pointed out, the *Sorrell* Court indicated a future willingness to level the free speech value of commercial speech and any other content-based communications, be it political or artistic.[34] This again touches on the approach taken in *Reed* of subjecting all content-based regulation to strict scrutiny.

Scholar and activist Shoshana Zuboff characterizes the Court's deregulatory approach as "flying the banner of 'private property' and 'freedom of contract,' much as surveillance capitalists march under the flag of freedom of speech." The approach taken risks the "conflation of industry regulation with 'tyranny' and 'authoritarianism.'"[35] As during the *Lochner* era, the *Sorrell* Court relied on freedom of contract – entered upon by pharmacies that mine data and corporate pharmaceutical purchasers of the information – to undermine consumer regulation. *Sorrell* weaved deregulatory analysis into a doctrine that lacks interpretive shading and stifles legislative initiative at a time of exponentially increasing commercial exchange in digital data. The Court has added confusion to an already turbid field of law by asserting, in cases such as *R.A.V.* and *Reed*, that strict scrutiny applies to all laws that target communicative content except a few judicially created "low-value" categories. The Court's absolutist-sounding doctrine creates a litigation environment that is rife for exploitation by corporations challenging economic regulations and politicians interested in deregulating campaign expenditures and contributions.

Opportunistic litigants recognize the flexibility of a doctrine that, while it claims to be formal, in practice empowers judges to reject government interests in health care and collective bargaining. Relying on overly simplified categories does not suffice to contextualize challenges to regulations that affect speech. The Court's approach fails to explain why a variety of content-specific laws remain constitutional, ranging from confidential medical recordkeeping to a complex array of disclosure statements concerning securities transactions. Neither does the Court's determinative historical method, which purports to have its roots at the nation's founding, articulate a usable standard.

The meaning of free speech to ordinary people living in 1791 is relevant but unlikely to help us resolve modern questions about communications over the internet, electronic balloting, or broadcasting. We've already seen that Supreme Court claims that free speech formalism is tied to the nation's founding are suspect.

Historical evidence does not bear out the Court's claim that the categorical rule of First Amendment construction has ancient pedigree. The founding gener-

ation's record was mixed. It contained lofty statements about natural rights, but also a record of political censorship. At the time of the Revolution, free speech had a narrower meaning than it enjoys today. Neither were the founders' sentiments on the subject consistent, clear, or pertinent to every case and controversy challenging a law on First Amendment grounds. Modern dilemmas about the regulation of expressive content arising from AI, social media, public education, corporate disclosure statements, and telemarking require judges to rely on contemporary contexts, not the sensibilities of men who had not an inkling about those topics when they proposed and ratified the First Amendment.

History alone cannot resolve contemporary free speech issues. Many scholars, for instance, believe the framers understood freedom of the press to mean nothing other than the liberty to publish without prior restraint.[36] Punishment after publication was permitted. Others think of free speech at the founding in broader terms. They turn to Thomas Jefferson's and James Madison's opposition to the infamous Sedition Act of 1798 to draw the inference that the framers opposed political censorship.

In truth, the record is mixed at best. There was certainly a tradition, dating prior to the Revolution, that regarded speech to be a natural right. Colonists were born of a tradition that considered public debate about matters of politics and criticism of rulers to be among the most important privileges of citizenship. The Third Marquess of Huntly, for example, regarded political dissent to be an ancestral right that predated the first English Civil War. The right to speech protected Englishmen's ability to express opinions without prior penalty for engaging ideological opponents with thrusts and parries. A Federalist jurist and the first chief justice of the Supreme Court, John Jay, asserted that citizens are free to "think and speak our Sentiments."[37]

The same ideal of open debate for representative governance informed state guarantees of free speech. In 1776, the same year that the Second Continental Congress adopted the Declaration of Independence, the Pennsylvania Constitution recognized that "the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." The reference to the people's sovereign place atop government indicated that ordinary citizens enjoyed a similar privilege of voicing their views about matters of public concerns as did legislators expostulating arguments in the heat of debate.[38]

Even before adoption of the First Amendment into the Constitution, several states secured the people's right to express "sentiments" through expressive channels, especially via the press, and to thereby engage in the controversial deliberations about American democracy.[39] A rare point of agreement between American Revolutionaries and British Loyalists was a sentiment voiced by the Loyalist Samuel Stearn in a column that appeared in the *Philadelphia Magazine* in 1791. "That

the *freedom of speech*, and the *liberty* of the *press*, are the natural rights of every man, providing he doth not *injury himself* nor *others* by his *conversation* or *publications*."[40] The early history of the Republic indicates widespread recognition that representative democracy cannot function without people enjoying the security to articulate views orally, in print, or pictorially.[41]

That principled conviction, however, did not halt Federalists from adopting the Sedition Act in order to suppress Republican opposition to President John Adams's administration. The Court's recent claim that the framers believed all manner of political speech to be protected outside of a few categories existing in 1791 is belied by Congress's enactment of a law just seven years later to stifle political debate. The Sedition Act criminalized "false, scandalous and malicious writing or writings against the government of the United States." Ever since Jefferson's presidency, when he pardoned fellow Republicans who had been convicted under the Act, that law has been understood to have been a mistake of historic magnitude. The passage of the statute, its subsequent enforcement by the Adams administration, and its later repudiation led the Supreme Court in 1964 to conclude that "the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[42]

The differing strands of thought about free speech at the time of the nation's founding render the framers at best inconclusive guides, not the determinate scions that Justice Scalia envisioned in *R.A.V.*[43] As we have seen, the Roberts Court has repeated and compounded that erroneous rendition of history.

Many questions about the meaning of free speech come down to context and determinations of the value of speech for personal, associational, and informational purposes. The most stringent protections are reserved for communications with "serious literary, artistic, political, or scientific value."[44] That affirmative statement is matched by its negative formulation: some utterances play "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[45] History is a starting point of interpretation, but its mischaracterization has become an instrument of deregulation.

The Roberts Court's approach to free speech restrictions purports to recognize only historical exceptions to the otherwise absolutist-sounding rule against content-based regulations. Its interpretive rhetoric claims an ancient pedigree dating back to 1791. Upon closer examination, however, the list of categories is not grounded in core principles of the First Amendment, but a patchwork of doctrines that define low-value speech, such as incitement and obscenity.

What strict formalism lacks by way of judicial rigor it makes up for with overgeneralizations and underexamined conclusions. The Court invokes it to strike a wide variety of ordinary laws without closely reviewing whether the regulated

communications advance any of the values commonly associated with free speech. The Court's dismissiveness of ordinary legislative priorities continues along a path that Horwitz characterizes as "a Lochnerization of the First Amendment."[46]

When a regulation under review abridges autonomous, deliberative, and informative communications, content neutrality is indeed at the core of First Amendment inquiry. But knee-jerk adoption of the most rigorous review for economic disclosure requirements and for commercial regulations encroaches on legislative authority. Rather than simple categories, free speech adjudication of these and other ordinary regulations should be decided within the context of speakers' interests, government policy, fit of the law to the regulatory objective, and availability of alternative communicative channels. A rigorously balanced judgment renders transparent a judge's reasoning. Ideals that anchor the First Amendment should ground standards of scrutiny, not formalistic assertions of judicial authority or unexamined claims purporting historical clarity where the record is at best ambiguous.

Proportionate analysis of policies need not be ad hoc. Rather, it can be reflective of the constitutional values of self-expression in the framework of deliberative democracy, economic liberty, and social order. The personal will to speak is not absolute, but subject to limited policies that do not enforce government orthodoxy or censorship. Laws against horizontal collusion, other restraints of trade or commerce, and employment discrimination are examples of legitimate regulations not subject to heightened judicial review that pose no harm to free speech rights, even though they limit expressive content. All three are reasonable regulations, even though they are not found among the Court's lists of low-value categories. Restricting supply, fixing prices, or exchanging and acting on insider information are unprotected forms of communications, as are words that create a hostile work environment based on sex, religion, or nationality. Regulations in these areas as well as those on commercial advertising are infused with legislative purposes that a formalist doctrine, even one buttressed by wooden historical claims, cannot adequately represent.

Speech is inevitably variegated and diverse; content and viewpoint are indefinitely malleable. Flexibility is necessary for adjudication. Adjudicators must balance principled conflicts between and among public and private interests. Justice Aharon Barak points out that the rules of proportionality must reflect on "the complexity of human life, which is full of contradicting values and rights."[47] Justice Breyer memorably put it in the context of the U.S. Constitution: "The First Amendment is not the Tax Code."[48] The Court's categorical formalism relies on strict scrutiny to fatally strike government policies, even when there remain ample alternative channels for communication. The complexity of discerning and articulating relevant speech concerns and countervailing government purposes is not thereby eviscerated but strategically disguised.

Cases with political, economic, and social implications require a balance of constitutional concerns. For example, in cases like *Sorrell*, free speech and privacy issues should be understood as two weighty constitutional interests. The strict scrutiny test in free speech law should not be a bludgeon for judicial activism. Rather, judicial reasoning should be consistent with the First Amendment's core values of personal, political, and educational autonomy. Judicial opinions that categorically thwart social policy will likely be viewed by the public with distrust and uncertainty.

The appropriate role of courts is to determine, decide, compare, analogize, and distinguish the values of free speech and the priorities of challenged regulations. Static tests that are categorical in their approaches are unlikely to provide the context necessary to describe the values at stake in litigation that challenges laws that directly or indirectly affect speech. A formalistic approach leads to result-oriented decisions rather than rationales grounded in First Amendment values of personal speech, self-government, and informational acquisition. Categorical doctrines rely on absolute-sounding tests. We have seen that judicially enumerated categories are neither historical nor particularly effective in providing focused reasoning for adjudicating modern-day claims filtered through an ancient text.

The Roberts Court has taken the First Amendment in a deregulatory direction on matters ranging from campaign financing, collective bargaining, health care information, and charitable disclosure. Opinions too often rely on frameworks that favor corporate interests, wealthy donors, anti-abortion activists, and libertarian causes.[49] Such politically charged judicial decisions increase the difficulty of passing laws pursuant to traditional government functions.

AUTHOR'S NOTE

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ENDNOTES

[1] See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2226 (2020) (Elena Kagan, concurring and dissenting in part, asserting that the unitary theory of executive power "commits the Nation to a static version of governance, incapable of responding to new conditions and challenges").

[2] *United States v. United Foods, Inc.*, 533 U.S. 405, 424 (2001) ("Nearly every human action that the law affects, and virtually all governmental activity, involves speech").

[3] *NAACP v. Button*, 371 U.S. 415 (1963).

[4] *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964) (holding that a showing of actual malice is required in defamation cases brought by public figures about public matters); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that the "intentional lie . . . '[is] no essential part of any exposition of ideas,"' quoting *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572 [1942]); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–761 (1985) (plurality opinion, finding that in those defamation cases involving private parties and private matters, the First Amendment does not require proof of a speaker's actual malice); Morton J. Horwitz, "The Constitution of Change: Legal Fundamentality Without Fundamentalism," *Harvard Law Review* 107 (1) (1993): 30, 109; and *Presidents Council District 25 v. Community School Board No. 25*, 409 U.S. 998, 1000 (1972) (William O. Douglas, dissenting).

[5] *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[6] Thomas I. Emerson, "First Amendment Doctrine and the Burger Court," *California Law Review* 68 (3) (1980): 422.

[7] *Janus v. American Federation of State, County, and Municipal Employees, Council 31, et al.*, 138 S. Ct. 2448, 2502 (2018) (Elena Kagan, dissenting).

[8] Geoffrey R. Stone, "Content Regulation and the First Amendment," *William & Mary Law Review* 25 (2) (1983): 189, 193.

[9] *Expressions Hair Designs v. Schneiderman*, 581 U.S. 37 (2017) (holding unconstitutional a state disclosure requirement on credit card sales).

[10] *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); and *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021).

[11] Pierre J. Schlag, "An Attack on Categorical Approaches to Freedom of Speech," *UCLA Law Review* 30 (1983): 671.

[12] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 590 (2011) (Stephen Breyer, dissenting).

[13] *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382–383 (1992).

[14] Steven H. Shiffrin, "The Dark Side of the First Amendment," *UCLA Law Review* 61 (5) (2014): 1480, 1490.

[15] Toni M. Massaro, "Tread on Me!" *University of Pennsylvania Journal of Constitutional Law* 17 (2) (2014): 365, 400.

[16] Rather than being a static set, low value categories of speech are composed of those utterances with "no essential part of any exposition of ideas" that are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*,

315 U.S. 568, 572 (1942). That statement of judicial review is a form of "reasoned judgement" in which courts engage, especially where there is another constitutional right, such as privacy, in addition to expression at stake in the litigation. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (plurality opinion), overruled on other grounds by *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (discussing the judicial role in interpreting personal autonomy); and *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (same).

[17] *R.A.V. v. City of Saint Paul, Minnesota*, 505 U.S. 383.

[18] *Vidal v. Elster*, 602 U.S. 286, 323–334 (2024) (Amy Coney Barrett, concurring). History and tradition are often mentioned in passing and without elaboration, as in a case decided in 2022 that upheld the speech and free exercise right of a coach to pray at a public-school event. *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022); and Alexander Tsesis, "Establishment of Religion in Schools," *Stanford Law Review* 76 (forthcoming 2024) (critiquing history and tradition test).

[19] *United States v. Stevens*, 559 U.S. 460, 467, 468 (2010) (affirming the Court of Appeals' reliance on strict scrutiny review).

[20] *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790–791 (2011) ("Without persuasive evidence that a novel restriction on content is part of a long [if heretofore unrecognized] tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the Government outweigh the costs'").

[21] *Miller v. California*, 413 U.S. 15 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); and *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

[22] *Reed v. Town of Gilbert*, 576 U.S. at 156 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech"). See also *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 457 (2015) (relying on strict scrutiny analysis to uphold a content-based limitation on judicial candidate speech).

[23] *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Stephen Breyer, concurring in part and dissenting in part).

[24] *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (holding that statutory limits on a candidate's use of personal funds for independent expenditures or a campaign's overall expenditures are "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate"); and *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) (finding that a federal aggregate limit on candidate contributions and other contributions to party committees violated the First Amendment).

[25] Open Secrets, 2016 Presidential Race, "Donald Trump (R): Winner," https://www.opensecrets.org/pres16/candidate?id=n00023864 (accessed July 8, 2024).

[26] Burt Neuborne, "*Buckley*'s Analytical Flaws," *Journal of Law and Policy* 6 (1) (1997): 111, 117.

[27] *Citizens United v. Federal Election Commission*, 558 U.S. 310, 349–351 (2010).

[28] Ibid., 425–432 (John Paul Stevens, concurring and dissenting in part, contrasting narrow references to corporations at the nation's founding from contemporary general incorporations statutes). But see also ibid., 386–387 (Antonin Scalia, concurring).

[29] See Peter J. Rubin, "Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw," *University of Pennsylvania Law Review* 149 (1) (2000): 1, 3–4 ("Strict scrutiny has become something of a talisman. While some commentators score debating points by identifying those rare cases in which governmental actions have survived it, most have concluded that a judicial determination to apply 'strict scrutiny' is little more than a way to describe the conclusion that a particular governmental action is invalid").

[30] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (overturning *Valentine v. Chrestensen*, 316 U.S. 52 [1942]); ibid., 783–784, 787 (1976) (William Rehnquist, dissenting); and *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980).

[31] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 585 (2011) (Stephen Breyer, dissenting), quoting *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 557, 589 (William Rehnquist, dissenting). The reference to the early twentieth century alludes to jurisprudence named after a case that is representative of an era during which the Supreme Court regularly struck economic and health care regulations based on libertarian reasoning. *Lochner v. New York*, 198 U.S. 45 (1905). See also *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 260 (1978) ("The Due Process Clause . . . during the heyday of substantive due process largely supplanted the Contract Clause in importance and operated as a potent limitation on government's ability to interfere with economic expectations").

[32] *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 ("In regulating the communication of prices rather than prices themselves, § 518 regulates speech"). Before *Reed*, content-neutrality referred to a doctrine that prohibited government from favoring some statement and being hostile to others. Justice Stevens for the Court wrote that "absolute neutrality by the government" is required in respect to content. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 67 (1976). Whether a regulation on speech is neutral is determined by whether "the government has adopted" it "because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[33] *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). The Court discounted out of hand the state's extensive legislative record that demonstrated that "if prescriber-identifying information were available . . . then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives." Ibid., 576. See also ibid., 597 (Stephen Breyer, dissenting) ("Vermont compiled a substantial legislative record to corroborate this line of reasoning").

[34] Martin H. Redish and Kyle Voils, "False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle," *William & Mary Bill of Rights Journal* 25 (3) (2017): 765, 776; and Julie E. Cohen, "The Zombie First Amendment," *William & Mary Law Review* 56 (4) (2015): 1119, 1121.

[35] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (New York: Public Affairs, 2019), 106–107.

[36] Compare Leonard W. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Cambridge, Mass.: Harvard University Press, 1960), 68, with David M. Rabban, "The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History," *Stanford Law Review* 37 (3) (1985): 795, 799. William Blackstone in his famous *Commentaries* argued that while an official could not place prior restraints on publication, they could punish speech after its publication to preserve "peace and good order, of government and religion, the only solid foundations of civil liberty." William

Blackstone, *Commentaries on the Laws of England*, ed. William G. Hammond (San Francisco: Bancroft-Whitney Co., 1890 [1778]), 189–190 (emphasis added).

[37] George Bishop, *Mene Tekel, or The Council of the Officers of the Army against The Declaration &c. of the Army* (London: Tho. Brewster, the Three Bibles, 1659), 30. Personal conscience was identified with a free mind. Ibid., 31. Pennsylvania General Assembly, House of Representatives, *Votes and Proceedings of the House of Representatives of the Province of Pennsylvania, Met at Philadelphia, on Tuesday the Fourteenth of October, anno Dom. 1729* (Philadelphia: B. Franklin, 1730), 4; *The Votes and Proceedings of the General Assembly of the Province of New-Jersey Held at Amboy on Thursday the fourth of April 1745* (Philadelphia: William Bradford, 1745), 22; *A Letter to the Freeholders, and Qualified Voters, Relating to the Ensuing Election* (Boston: Rogers and Fowle, 1749), 8; *An Appeal to the World; or A Vindication of the Town of Boston, from many False and Malicious Aspersions* (Boston: Edes and Gill, 1769), 18; George Gordon Huntly, *The Character of a True Subject, Or the Loyall Fidelity of the Thrice Honourable Lord, The Lord Marquesse Huntley Expressed in This His Speech in the Time of His Imprisonment, By the Covenanters of Scotland, Anno 1640* (London: E. Griffin, 1640); Henry Hexham, *A tongue-combat lately happening betvveene tvvo English souldiers in the Tilt-boat of Grauesend* (London: Holland, 1623); and "Draft of John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia" (before April 22, 1793), in *Documentary History of the Supreme Court of the United States, 1789–1800*, ed. Maeva Marcus and James R. Perry (New York: Columbia University Press, 1985), 359, 364.

[38] Pennsylvania Constitution of 1776, Article XII; *Votes and Proceedings of the Senate of the State of New-York, at Their First Session, Held at Kingston, in Ulster County, Commencing September 9th, 1777* (Kingston, New York: John Holt, 1777), 35; and *Votes and Proceedings of the General Assembly of the State of New-Jersey. At a session Begun at Trenton on the 28th day of October, 1777* (Trenton: Matthias Day, 1777), 67.

[39] *Acts and laws of the State of Vermont, in America,* Art. 14, 4.

[40] Samuel Stearns, *American Oracle* (New York: Hodge and Campbell, Berry and Rogers, and T. Allen, 1791), 613 (republishing articles from the *Philadelphia Magazine*).

[41] "Liberty of Speech and of the Press (Grand Jury Charge)," in *No. 25, Reports of Cases in the County Courts of the Fifth Circuit, and in the High Court of Errors & Appeals, of the State of Pennsylvania. And Charges to Grand Juries of Those County Courts*, ed. Alexander Addison (Philadelphia: John Colerick, 1800), 272.

[42] *New York Times Co. v. Sullivan*, 254, 276.

[43] Lucas A. Powe Jr., *The Fourth Estate and The Constitution: Freedom Of The Press In America* (Berkeley: University of California Press, 1991), 50.

[44] The Court articulated these values of expression in the context of the seminal obscenity case *Miller v. California*, 413 U.S. 15, 24 (1973).

[45] *Chaplinsky v. State of New Hampshire*, 568, 572.

[46] Morton Horwitz, "Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism," *Harvard Law Review* 107 (1993): 110.

[47] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 153.

[48] *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (Stephen Breyer, concurring); and *Iancu v. Brunetti*, 139 S. Ct. 2294, 2304 (2019) (Stephen Breyer, concurring).

[49] *McCutcheon v. FEC*, 572 U.S. 185 (2014) (holding the Bipartisan Campaign Reform Act's cumulative aggregation limit to be unconstitutional); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (finding a state's matching campaign scheme to be unconstitutional); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, et al. 2448 (holding that a state violated the First Amendment rights of nonunion members by requiring them to pay public-sector union dues for collective bargaining purposes); *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (striking law on First Amendment grounds that was meant to prevent unlicensed pregnancy crisis centers from misleading pregnant clients who sought prenatal advice); *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (holding facially unconstitutional a California statute that required tax-exempt charities to report the identities and addresses of their major donors); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (finding unconstitutional a federal restriction on corporate campaign financing); and *McCullen v. Coakley*, 573 U.S. 464 (2014) (finding a law protecting women's access to reproductive services to be unconstitutional).

The Future of Government Pressure on Social Media Platforms

Eugene Volokh

As vast social media platforms undertake more content policing, the U.S. government has unsurprisingly tried to urge them to police things the way it prefers. This is likely to continue and, indeed, expand. What First Amendment constraints are there on such government pressure? This essay offers some tentative thoughts: 1) Some court of appeals cases have drawn lines distinguishing permissible attempts by government to persuade intermediaries to remove their users' or business partners' materials from impermissible government coercion. 2) The Supreme Court's employer free speech cases may also inform our understanding of what counts as subtle coercion. 3) Courts considering other constitutional rights, especially the Fourth Amendment, have concluded that even noncoercive government persuasion may sometimes constitute impermissible evasion of the constitutional mandate. 4) A recent appellate decision (which the Supreme Court vacated on procedural grounds) suggests a potential distinction between ad hoc and systematic attempts to persuade platforms to remove content, though whether that line is ultimately either sensible or administrable is an open question.

Throughout the mid-twentieth century, many commentators sharply criticized the perceived oligarchy of mass communications. "Freedom of the press," journalist A. J. Liebling famously said in 1960, "is guaranteed only to those who own one."[1] For a while in the early 2000s, thanks to the "cheap speech" made possible by the internet, everyone seemed to own a printing press capable of producing and distributing thousands (sometimes millions) of copies of one's electronic leaflets.[2] Many thought that the future of free speech was therefore one with broad freedom for speakers.

But now, we see it was too good to be true – for certain values of the variable "good." It turns out that, today, we're just borrowing printing presses: Facebook's, X's (formerly Twitter), YouTube's. Even those of us who have our own blogs rely on hosting services such as WordPress, GoDaddy, and the like. And while most of the time these services are happy to let us use them, some of the time they say *no*. This platform interest in restricting speech has surged in the last ten years, and it seems likely to grow further.

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What to do about this is one of the main free speech questions likely to occupy courts and legislatures in at least the near future. It arises in various contexts. For instance, are state laws that ban viewpoint discrimination by private platforms wise and consistent with the First Amendment, Section 230 of Title 47 of the U.S. Code (which gives internet service providers and platforms certain immunities from state regulation), and the Dormant Commerce Clause (which limits state authority to regulate interstate transactions)?[3] What should we think about calls for greater "responsibility" on the part of platforms and other intermediaries?[4] And, especially important, when may the government encourage or pressure social media platforms and other intermediaries to restrict speech on their property?[5]

We can expect greater and more organized government pressure of this sort. Some of the most important future free speech debates will be about whether courts and legislatures should step in to stop such pressure. The social media revolution has turned social media platforms into tremendously powerful political actors, capable of swaying close elections. But it has also made them relatively susceptible to pressure from foreign and domestic governments, advocacy groups, large commercial entities, and collaborations between these forces (for instance, when advocacy groups encourage both government action and advertiser boycotts).

It's difficult for the government to control debate in thousands of newspapers or on millions of user sites, whether it tries to exert control through the threat of regulation, through the threat of congressional investigation or condemnation, or just through noncoercive attempts at persuasion. And even were it an easier task, controlling each publisher would yield only limited benefits to the government.

Some publishers may also resist regulation out of conviction – especially because it is their own speech the government is trying to control – or a business interest in continuing to cover what their competitors have stopped covering. Publishers also often have a tradition of adversarial relations with the government, so when the government asks them to remove content (or not publish it in the first place) such requests are viewed skeptically by default.

But social media platforms are more tempting targets than traditional print publishers, and they and their heirs will likely continue to be so. From the mid-2010s until today, social media entities have been persuaded to implement a range of restrictions on supposed "hate speech," on supposed "misinformation" about medicine or elections, and even for a time on allegations that COVID-19 leaked from a Chinese government lab. Some of that persuasion (or perhaps pressure) has come from the U.S. federal government. The Supreme Court recently heard a case involving such government action, *Murthy v. Missouri* (2024), but dismissed it on procedural grounds.[6]

Such government action may have substantial costs and benefits. I don't know with any confidence what, if anything, ought to be done about it. But I want to lay out some observations that I hope might help others to explore the matter.

Say the government urges various intermediaries – whether today's social media platforms or, as was the case in the recent past, bookstores, billboards, or payment processors – to stop carrying certain speech. In this context, the government isn't prosecuting them or suing them, just talking to them. Is such urging constitutional?

Generally speaking, courts of appeals have said "yes, that's fine," so long as the government speech merely aims to persuade the intermediaries, not to coerce by threat of prosecution, lawsuits, denial of benefits, or various other forms of retaliation. Here are some leading appellate cases so holding, which are both useful indicators of how some lower courts view such state intervention and interesting test cases for thinking about how things ought to be.

First, in 1980, a New York City official sent a letter urging department stores not to carry "a board game titled 'Public Assistance – Why Bother Working for a Living.'" The letter said the game "does a grave injustice to taxpayers and welfare clients alike," and closes with, "Your cooperation in keeping this game off the shelves of your stores would be a genuine public service." Not unconstitutional, said the Second Circuit in *Hammerhead Enterprises, Inc. v. Brezenoff* (1983):

> [T]he record indicates that Brezenoff's request to New York department stores to refrain from carrying Public Assistance was nothing more than a well-reasoned and sincere entreaty in support of his own political perspective. . . . Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. . . . [But] appellants cannot establish that this case involves either of these troubling situations.[7]

Note, though, that Brezenoff was the administrator of New York City's Human Resources Administration, with no enforcement authority against the department stores. How might the matter have looked had he been the sheriff or the head of some civil enforcement agency?

Not long after, the U.S. Attorney General's Commission on Pornography sent letters to various corporations (such as 7-Eleven) urging them not to sell pornographic magazines:

> The Attorney General's Commission on Pornography has held six hearings across the United States during the past seven months on issues related to pornography. During the hearing in Los Angeles, in October 1985, the Commission received testimony alleging that your company is involved in the sale or distribution of pornography. The Commission has determined that it would be appropriate to allow your company an opportunity to respond to the allegations prior to drafting its final report section on identified distributors.

> You will find a copy of the relevant testimony enclosed herewith. Please review the allegations and advise the Commission on or before March 3, 1986, if you disagree with the statements enclosed. Failure to respond will necessarily be accepted as an indication of no objection.
>
> Please call Ms. Genny McSweeney, Attorney, at (202) 724-7837 if you have any questions. Thank you for your assistance.

Not unconstitutional, said the D.C. Circuit in *Penthouse International, Ltd. v. Meese* (1991):

> [T]he Advisory Commission had no . . . tie to prosecutorial power nor authority to censor publications. The letter it sent contained no threat to prosecute, nor intimation of intent to proscribe the distribution of the publications. . . .
>
> We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.[8]

Third, in the late 1990s, a New York state legislator and a New York congressman accused X-Men Security – a security organization connected to the Nation of Islam – of various conspiracies, "asked government agencies to conduct investigations into its operations, questioned X-Men's eligibility for an award of a contract supported by public funds, and advocated that X-Men not be retained." X-Men lost certain security contracts as a result. Also not unconstitutional, ruled the Second Circuit in *X-Men Security, Inc. v. Pataki* (1999):

> [J]ust as the First Amendment protects a legislator's right to communicate with administrative officials to provide assistance in securing a publicly funded contract, so too does it protect the legislator's right to state publicly his criticism of the granting of such a contract to a given entity and to urge to the administrators that such an award would contravene public policy. We see no basis on which X-Men could properly be found to have a constitutional right to prevent the legislators from exercising their own rights to speak.[9]

This, though, is not a uniform view. As will be noted below, the Fifth Circuit in *Missouri v. Biden* (2023) held that sometimes the government may violate the First Amendment by "substantially encourag[ing]" certain private parties to restrict speech, even in the absence of coercion.

On the other hand, where courts find that government speech implicitly threatened retaliation, rather than simply exhorting or encouraging third parties to block speech, they have generally found the government's speech to be unconstitutional. The long-standing Supreme Court precedent addressing that issue is *Bantam Books, Inc. v. Sullivan* (1963), in which a state commission threatened to prosecute stores that sold books it deemed pornographic, including books that were protected by the First Amendment.[10] Likewise, in *National Rifle Association v. Vullo* (2024), the Court held that the NRA could sue New York financial regulators for allegedly coercing banks and insurance companies "to cut their ties with the NRA in order to stifle the NRA's gun-promotion advocacy."[11] And lower court cases have similarly found that there could be impermissible coercion even absent express threat of prosecution or regulatory action. Here are four such instances:

First, the mayor and a trustee of a New York town sent a letter to a newspaper demanding to learn more about who was involved in an advertisement that criticized local officials. Potentially unconstitutional, the Second Circuit held in *Rattner v. Netburn* (1991). Rattner, a businessman in the Village of Pleasantville, took out the critical ad in the *Pleasantville Gazette*, which was published by the Pleasantville Chamber of Commerce. Netburn, an elected member of the Village Board of Trustees, responded by writing a letter to the Chamber condemning the ad and asking questions about it. That was potentially an unconstitutional threat, the court held:

> [The Netburn] letter stated that the recent *Gazette* "raises significant questions and concerns about the objectivity and trust which we are looking for from our business friends," and it asked "[w]ho wrote" the questions and requested "a list of those members who supported the inclusion of this 'article.'" Further, the record includes evidence that, when questioned about the letter, Netburn also stated that he had made a list of the local businesses at which he regularly shopped. . . .
>
> [And] a threat was perceived and its impact was demonstrable. Several Chamber directors testified at their depositions that they viewed the letter as reminiscent of McCarthyism, threatening them with boycott or discriminatory enforcement of Village regulations if they permitted the publication of additional statements by Rattner; the Chamber member who had been "in charge of" the *Gazette* testified that following receipt of the Netburn letter, he had actually lost business and had been harassed by the Village.
>
> Further, the Netburn letter caused the Chamber to cease publication of the *Gazette*; and it advised Rattner of this decision while concealing from him the fact that another issue would be forthcoming, in order to avoid having to publish in that issue material for which he had already paid. Thus, the fact that Netburn's letter and statement

> "were not followed up with unannounced visits by police personnel" should hardly have been deemed dispositive since the Chamber immediately capitulated to what may reasonably be viewed as an implicit threat.[12]

Second, the president of the Borough of Staten Island sent a letter to a billboard company urging it to take down an antihomosexuality billboard. The letter closed with:

> Both you and the sponsor of this message should be aware that many members of the Staten Island community, myself included, find this message unnecessarily confrontational and offensive. As Borough President of Staten Island, I want to inform you that this message conveys an atmosphere of intolerance which is not welcome in our Borough.
>
> P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them. I call on you as a responsible member of the business community to please contact Daniel L. Master, my legal counsel and Chair of my Anti-Bias Task Force . . . to discuss further the issues I have raised in this letter.

Potentially unconstitutional, the Second Circuit held in *Okwedy v. Molinari* (2003):

> [A] jury could find that Molinari's letter contained an implicit threat of retaliation if PNE failed to accede to Molinari's requests. In his letter, Molinari invoked his official authority as "Borough President of Staten Island" and pointed out that he was aware that "P.N.E. Media owns a number of billboards on Staten Island and derives substantial economic benefits from them." He then "call[ed] on" PNE to contact Daniel L. Master, whom he identified as his "legal counsel and Chair of my Anti-Bias Task Force."
>
> Based on this letter, PNE could reasonably have believed that Molinari intended to use his official power to retaliate against it if it did not respond positively to his entreaties. Even though Molinari lacked direct regulatory control over billboards, PNE could reasonably have feared that Molinari would use whatever authority he does have, as Borough President, to interfere with the "substantial economic benefits" PNE derived from its billboards in Staten Island.[13]

Third, the Sheriff of Cook County in Illinois sent letters to Mastercard and Visa saying, "As the Sheriff of Cook County, a father and a caring citizen, I write to request that your institution immediately cease and desist from allowing your credit cards to be used to place ads on websites like Backpage.com [which hosted ads for sex-related services]." Potentially unconstitutional, the Seventh Circuit held in *Backpage.com, LLC v. Dart* (2015). The court went through the Sheriff's letter in detail and concluded:

> And here's the kicker: "Within the next week, please provide me with contact information for an individual within your organization that I can work with [harass, pester] on this issue." The "I" is Sheriff Dart, not private citizen Dart – the letter was signed by "Thomas Dart, Cook County Sheriff."
>
> And the letter was not merely an expression of Sheriff Dart's opinion. It was designed to compel the credit card companies to act by inserting Dart into the discussion; he'll be chatting them up.
>
> Further insight into the purpose and likely effect of such a letter is provided by a strategy memo written by a member of the sheriff's staff in advance of the letter. The memo suggested approaching the credit card companies (whether by phone, mail, email, or a visit in person) with threats in the form of "reminders" of "their own potential liability for allowing suspected illegal transactions to continue to take place" and their potential susceptibility to "money laundering prosecutions . . . and/or hefty fines." Allusion to that "susceptibility" was the culminating and most ominous threat in the letter.[14]

In our fourth and most prominent instance, the Biden administration attempted to persuade social media platforms to block or remove posts on various topics, including "the COVID-19 lab-leak theory, pandemic lockdowns, vaccine side-effects, election fraud, and the Hunter Biden laptop story." The Fifth Circuit held in *Missouri v. Biden* (2023) that some of the government's actions were likely unconstitutionally coercive:

> On multiple occasions, the officials coerced the platforms into direct action via urgent, uncompromising demands to moderate content. . . . And, more importantly, the officials threatened – both expressly and implicitly – to retaliate against inaction. Officials threw out the prospect of legal reforms and enforcement actions while subtly insinuating it would be in the platforms' best interests to comply. As one official put it, "removing bad information" is "one of the easy, low-bar things you guys [can] do to make people like me" – that is, White House officials – "think you're taking action." . . . When the officials' demands were not met, the platforms received promises of legal regime changes, enforcement actions, and other unspoken threats. That was likely coercive. . . .
>
> [M]any of the officials' asks were "phrased virtually as orders," like requests to remove content "ASAP" or "immediately." The threatening "tone" of the officials' commands, as well as of their "overall interaction" with the platforms, is made all the more evident when we consider the persistent nature of their messages. . . . [T]here is [also] plenty of evidence – both direct and circumstantial, considering the platforms' contemporaneous actions – that the platforms were influenced by the officials' demands. . . .

> [And] the speaker [had] "authority over the recipient." . . . [The White House] enforces the laws of our country, and – as the head of the executive branch – directs an army of federal agencies that create, modify, and enforce federal regulations. . . . At the very least, as agents of the executive branch, the officials' powers track somewhere closer to those of the commission in *Bantam Books* – they were legislatively given the power to "investigate violations and recommend prosecutions."
>
> [T]he officials made express threats and, at the very least, leaned into the inherent authority of the President's office. . . . But, beyond express threats, there was *always* an "unspoken 'or else.'" . . . [W]hen the platforms faltered, the officials warned them that they were "[i]nternally . . . considering our options on what to do," their "concern[s] [were] shared at the highest (and I mean highest) levels of the [White House]," and the "President has long been concerned about the power of large social media platforms."[15]

The Supreme Court reversed the Fifth Circuit's decision on procedural grounds, so that decision is no longer binding precedent.[16] The Court's opinion also cast doubt on the factual findings that the Fifth Circuit relied on.[17] Nonetheless, the Fifth Circuit's analysis may remain persuasive to some judges in future cases.

Of course the coercion/persuasion line is often hazy. One concern about government persuasion of intermediaries is that when the government *asks*, people who are subject to regulation by the government may hear this as *demanding*. As it happens, this concern has arisen in at least one other First Amendment context, and the reasoning in that context might be applicable here as well.

That context is labor law. Since the 1940s – early in the Court's modern First Amendment jurisprudence – the Court has recognized that "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guarantee" but not when "to this persuasion other things are added which bring about coercion, or give it that character."[18] In *NLRB v. Gissel Packing Co.* (1969), the Court made clear that the employer's power over employees should be considered in deciding whether the speech is likely to coerce:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. . . . [A]ny balancing of [the employer's and employee's] rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.[19]

Similar logic, I think, may apply when high-level executive officials, or those who speak for them, address intermediaries who are regulated by those officials or the officials' appointees:

> [A]ny balancing of [government speakers' and intermediaries'] rights must take into account the economic dependence of the [intermediaries] on their [regulators], and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

This analogy would still leave government officials able to make requests in certain ways, just as employers remain able to speak in certain ways to employees about the possible consequences of unionization. But the officials would have to be more careful to make clear that the request carries no threat of retaliation.

There might, however, be arguments that even genuine government persuasion – when there is no coercive threat – aimed at getting social media platforms to remove speech might violate the First Amendment. I'm not sure whether those arguments are ultimately right or wrong, but let me offer a sketch of them.

To begin, let's consider the Fourth Amendment. Say you rummage through a roommate's papers, find evidence that he's committing a crime, and send it to the police. Because you're a private actor, you haven't violated the Fourth Amendment. (Whether you committed some tort or crime is a separate question.)[20] Because they didn't perform the search, the police haven't violated the Fourth Amendment either, and the evidence from this "private search" can be used against the roommate.

But if the police *ask* you to rummage through the roommate's papers, that rummaging may constitute a search governed by the Fourth Amendment. "[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request," then the search would be subject to the constitutional constraints applicable to government searches.[21] "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."[22]

Indeed, in *Skinner v. Railway Labor Executives' Association* (1989), the Supreme Court held that drug tests of railway employees that were authorized but not required by federal regulations were subject to Fourth Amendment scrutiny:

> The Government has removed all legal barriers to the testing authorized by Subpart D, and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment.[23]

Considering the extensive regulation of railroads by the government, the railway companies might have felt special pressure to view the government's "encouragement" and "endorsement" as a command. Yet the Court did not rely on the theory that the government had indeed coerced the railroads to perform the tests. It appeared to be enough that it "encourage[d], endorse[d], and participat[ed]" in the tests. The same may apply to social media platforms, especially (but perhaps not only) in a political environment where there is talk of possible regulation, such as through antitrust law or by modifying Section 230 immunity.[24]

Likewise, "In the Fifth Amendment context, courts have held that the government might violate a defendant's rights by coercing *or encouraging* a private party to extract a confession from a criminal defendant."[25] More broadly, the Supreme Court held in *Blum v. Yaretsky* (1982), a Due Process Clause case, that "a State normally can be held responsible for a private decision only when it has exercised coercive power *or has provided such significant encouragement*, either overt or covert, that the choice must in law be deemed to be that of the State."[26] And in *Norwood v. Harrison* (1973), an Equal Protection Clause case, the Court viewed it as "axiomatic that a state may not *induce, encourage or promote* private persons to accomplish what it is constitutionally forbidden to accomplish."[27]

The inducement, encouragement, and promotion in *Norwood* involved the provision of tangible benefits (textbooks lent by the state to both public and racially segregated private schools) and not just verbal encouragement. By itself, the line in *Norwood* thus may not carry much weight. However, the Fourth Amendment cases in which government-encouraged or government-requested private searches became subject to the Fourth Amendment did involve just verbal encouragement.

Though these precedents provide some room for restricting government attempts to persuade platforms to remove speech, and not just attempts at coercion, do such restrictions make sense? After all, government officials have a strong interest in conveying their views, including their views about what speech is harmful and should not be published. It may be that they lack a First Amendment right to do so in their official capacities.[28] But there may still be real value to public discourse, and to their listeners, in their being able to do so.

For instance, national security officials might sometimes tell a news outlet, "Look, we can't force you to do anything, but if you run this story it will lead to deaths of intelligence sources/damage to national security. Could you not run the story, or fuzz over some details, or delay it?" The news outlet might find that to be valuable information. Reporters and editors might want to avoid causing deaths or harming national security, especially if the bulk of the story can still be reported with a bit of delay or slight modification.

Nor is this just some sort of national security exception to a broad presumption that requests not to speak are unconstitutional. Law enforcement officials might

reasonably and permissibly tell a newspaper or broadcaster, "If you run this story right now, you'll tip off the criminals we're investigating/jeopardize witnesses. Don't you want us to fight crime effectively?" The newspaper might say yes or no, assuming there's no context to make the statement coercive. I'm skeptical that this request would violate the First Amendment.

Or say that a newspaper is about to run an op-ed that alleges governmental misconduct. A government official learns of this – perhaps the editors call him to get his side of the story – and says, "That's nonsense, and here's the evidence to prove that." Or he says, "The allegations are so slanted as to be deceptive or unfair; here's the context that shows it." And then adds, "Please don't run such an unfair story; it would be bad for us if you did, but it would also be bad for your reputation, when the truth comes out, and it would be bad for your readers, who would be misled."

That is a call for an intermediary (the newspaper) to block the publication of a third-party item (the op-ed). However, it is unlikely to be unconstitutional. Indeed, the newspaper may be quite pleased to learn the full story and thereby avoid publishing an op-ed that would make the newspaper look bad.

Perhaps, though, one difference might be between occasional one-off conversations and systematic programs. To be sure, when it comes to coercive threats aimed at suppressing speech, both the ad hoc and systematic demands are unconstitutional.[29] Likewise, the cases involving government encouragement of searches by private parties find even ad hoc demands unconstitutional.[30]

But if courts do conclude that ad hoc requests to remove or block speech are constitutional, perhaps some line should still be drawn between those requests and systematic encouragement of such removing or blocking. This appears to be what the Fifth Circuit concluded in *Missouri v. Biden*, when it found that the government's speech was impermissible "significant encouragement" of speech restriction by platforms, even apart from the coercion argument:

> The officials had consistent and consequential interaction with the platforms and constantly monitored their moderation activities. In doing so, they repeatedly communicated their concerns, thoughts, and desires to the platforms. The platforms responded with cooperation – they invited the officials to meetings, roundups, and policy discussions. And, more importantly, they complied with the officials' requests, including making changes to their policies. . . .
>
> When the platforms' policies were not performing to the officials' liking, they pressed for more, persistently asking what "interventions" were being taken, "how much content [was] being demoted," and why certain posts were not being removed. Eventually, the officials pressed for outright change to the platforms' moderation policies. . . . Beyond that, they relentlessly asked the platforms to remove content, even giving reasons as to

> why such content should be taken down. They also followed up to ensure compliance and, when met with a response, asked how the internal decision was made. . . .
>
> Consequently, it is apparent that the officials exercised meaningful control – via changes to the platforms' independent processes – over the platforms' moderation decisions. By pushing changes to the platforms' policies through their expansive relationship with and informal oversight over the platforms, the officials imparted a lasting influence on the platforms' moderation decisions without the need for any further input. In doing so, the officials ensured that any moderation decisions were not made in accordance with independent judgments guided by independent standards. Instead, they were encouraged by the officials' imposed standards.
>
> In sum, we find that the White House officials, in conjunction with the Surgeon General's office, coerced and significantly encouraged the platforms to moderate content. As a result, the platforms' actions "must in law be deemed to be that of the State."[31]

Indeed, when it came to requests for removal made by the Centers for Disease Control and Prevention, the Fifth Circuit concluded that the requests were not coercive, but still constituted unconstitutional significant encouragement:

> [T]he CDC was entangled in the platforms' decision-making processes. The CDC's relationship with the platforms began by defining – in "Be On the Lookout" meetings – what was (and was not) "misinformation" for the platforms. Specifically, CDC officials issued "advisories" to the platforms warning them about misinformation "hot topics" to be wary of. From there, CDC officials instructed the platforms to label disfavored posts with "contextual information," and asked for "amplification" of approved content. That led to CDC officials becoming intimately involved in the various platforms' day-to-day moderation decisions. For example, they communicated about how a platform's "moderation team" reached a certain decision, how it was "approach[ing] adding labels" to particular content, and how it was deploying manpower. Consequently, the CDC garnered an extensive relationship with the platforms.
>
> From that relationship, the CDC, through authoritative guidance, directed changes to the platforms' moderation policies. . . . [The platforms] adopted rule changes meant to implement the CDC's guidance. . . . Thus, the resulting content moderation, "while not compelled by the state, was so significantly encouraged, both overtly and covertly" by CDC officials that those decisions "must in law be deemed to be that of the state."[32]

As noted above, the Supreme Court reversed this Fifth Circuit decision on procedural grounds and cast some doubt on the factual findings on which the Fifth Circuit relied.[33] But the Fifth Circuit's legal analysis as to substantial encouragement and systematic entanglement may remain persuasive to lower courts.

Of course, distinguishing "consistent and consequential interaction" from mere occasional interaction – such as the examples of constitutionally permissible requests given above – can be difficult. Still, constitutional law does sometimes draw such distinctions between occasional action and systemic action. One analogy, though distant, might be how the law sometimes treats administrative searches.

Courts have upheld various kinds of searches – even ones that lack a warrant, probable cause, or both – on the grounds that they are targeted at specific public safety concerns rather than at broad law enforcement. Airport searches of luggage, aimed at detecting weapons, are one example, as the Ninth Circuit discussed in detail in *United States v. $124,570 U.S. Currency* (1989).[34]

Now say that Transportation Security Administration agents, U.S. government employees following their normal duty to search for weapons, spot a suspicious amount of cash or drugs. They then alert the police who use this information as part of the probable cause needed to justify a search. That is constitutional.[35] TSA agents are free to "report information pertaining to criminal activity, as would any citizen."[36]

So far, so good. But say that the Drug Enforcement Administration comes up with a systematic program to encourage TSA agents to search not just for weapons, the rationale that led airport searches to be upheld in the first place, but also for drugs or cash. The Ninth Circuit held that this would be going too far:

> We see the matter as materially different where the communication [about the drugs or money that the TSA agent found] is undertaken pursuant to an established relationship, fostered by official policy, even more so where the communication is nurtured by payment of monetary rewards.[37]

Even if ad hoc reporting by TSA agents to the police of things other than weapons is permissible under the Fourth Amendment, a system set up to encourage such reporting is not. "The line we draw is a fine one but, we believe, one that has constitutional significance."[38]

Or consider sobriety checkpoints. The Court has upheld them as permissible administrative seizures because they are aimed at protecting safety on the very roads that are being temporarily blocked.[39] Yet the Court has held that the government may not set up drug trafficking checkpoints aimed at finding drug dealers.[40] The difference in these cases, the Court held, stems from the "difference in the Fourth Amendment significance of highway safety interests and the general interest in crime control."[41]

Now, if officers conducting sobriety checkpoints happen to see evidence of crime in plain sight – blood on the seat, an illegally carried gun, or, for that matter, drugs – they are free to keep detaining the driver and search further, based on this newly discovered probable cause.[42] But say that the checkpoint is set up precisely

for this purpose, as a systematic way of searching for drugs or for other contraband. That would trigger additional Fourth Amendment scrutiny: ad hoc observation of evidence of crime, in the course of a valid administrative seizure (valid because the seizure is part of a drunk driving checkpoint, rather than a drug checkpoint or a general law enforcement checkpoint), may become unconstitutional if it happens in the course of a systematic program of search for evidence of crime.[43]

I should stress again that these analogies are imperfect. Among other differences, they involve the Fourth Amendment and not the First, and concern attempts to systematically encourage certain action by government employees and not by private parties. But my point here is that they offer some support for the view that even if some actions are not subject to constitutional scrutiny when done on a one-off basis, they may become unconstitutional when done systematically. In the Fourth Amendment context, systematizing permissible ad hoc searches into "an established relationship, fostered by official policy" increases the threat of undue government intrusion on privacy, enough to change the Fourth Amendment analysis. Perhaps systematizing permissible ad hoc requests not to publish something into a similar official established relationship may likewise increase the threat of undue government interference with public debate to the point that First Amendment scrutiny would be required.

Perhaps. Maybe judicial line drawing here is so difficult that any result ought to be implemented by Congress rather than by courts. I'm not sure what the right ultimate result ought to be. Still, the analogies may be useful for thinking through the question.

These questions also expose one interesting feature of state laws that restrict the ability of social media platforms to act as intermediaries controlling user speech.[44] Texas and Florida have passed two such statutes, and other states may do the same; the Supreme Court held that they unconstitutionally interfered with the platforms' ability to choose what goes in their "curated feeds" (such as Facebook's news feed), but didn't resolve whether the statutes might limit platforms' ability to deplatform users or remove individual user posts.[45]

The laws are generally billed as attempts to protect users from undue viewpoint discrimination by platforms, and they are often criticized as unduly restricting the rights of these platforms. Yet it's worth noting that, by stripping platforms of the power to yield to government encouragement or subtle coercion, the laws also functionally strip federal and state executive branches of power from engaging in such encouragement or coercion.

If the U.S. government had federal statutory authority to order platforms to remove certain posts, then state laws would be preempted by that hypothetical federal statute. But if the federal government claims that it is not ordering platforms

to do something but is merely asking the platforms to exercise their own powers instead, then state law can indeed stymie such federal requests by forbidding platforms from exercising their powers in that way.[46]

Of course, one can argue that the laws throw the baby out with the bathwater. Even if one thinks that government encouragement of private platforms' speech restrictions is generally improper, one can conclude that these platforms' own decisions to restrict speech are just fine – indeed, that such voluntary private decisions are constitutionally protected exercises of editorial discretion, and possibly great contributions to the public good. Yet, in weighing the costs and benefits of these laws, one possible benefit is that they end up limiting government power to control public debate in the process of limiting platform power.[47]

The internet has democratized speech, restricted the power of one set of intermediaries (traditional media), and empowered a new set (social media platforms). In the process, it has made the latter tempting targets for government persuasion and pressure. The future of government efforts to restrict online speech will likely continue to include a great deal of both persuasion and pressure. What the law should say about such government action is an increasingly important topic of debate.

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ENDNOTES

[1] A. J. Liebling, *The Press* (New York: Ballantine Books, 1975), 32.

[2] For a mostly optimistic discussion of cheap speech that also notes "a possible dark side," see Eugene Volokh, "Cheap Speech and What It Will Do," *The Yale Law Journal* 104 (7) (1995): 1805–1850. At the time, it, like this volume, was a work of futurism. For a review of the article as futurism, see Matt Novak, "These Predictions from 1995 Got a Lot Right in Strangely Wrong Ways," Paleofuture, June 26, 2014, https://paleofuture.com/blog/2014/6/26/these-predictions-from-1995-got-a-lot-right-in-strangely-wrong-ways. Novak states, for example, "In 1995 Eugene Volokh wrote . . . an incredi-

bly prescient meditation on the future of media and technology. But it has just enough weird anachronisms to remind us that nobody can predict the future with absolute certainty. Think of it as the uncanny valley of old futurism–so incredibly close to the future that actually arrived, but just inaccurate enough that it gives you a weird feeling in the pit of your stomach."

[3] See Jack M. Balkin, "How to Regulate (and Not Regulate) Social Media," *Journal of Free Speech Law* 1 (1) (2021): 71–96; Ashutosh Bhagwat, "Do Platforms Have Editorial Rights?" *Journal of Free Speech Law* 1 (1) (2021): 97–138; Eric Goldman and Jess Miers, "Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules," *Journal of Free Speech Law* 1 (1) (2021): 191–226; Mark A. Lemley, "The Contradictions of Platform Regulation," *Journal of Free Speech Law* 1 (1) (2021): 303–336; Eugene Volokh, "Treating Social Media Platforms Like Common Carriers?" *Journal of Free Speech Law* 1 (1) (2021): 377–462; Adam Candeub and Eugene Volokh, "Interpreting 47 U.S.C. § 230(c)(2)," *Journal of Free Speech Law* 1 (1) (2021): 175–190; and Jack Goldsmith and Eugene Volokh, "State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation," *Texas Law Review* 101 (5) (2023): 1083–1125. For an earlier and broader perspective on statutes that aim to increase people's free speech rights (though perhaps at the expense of other private entities), see Genevieve Lakier, "The Non–First Amendment Law of Freedom of Speech," *Harvard Law Review* 134 (7) (2021): 2299–2381.

[4] See Eugene Volokh, "The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power," *Journal of Free Speech Law* 3 (1) (2023): 197–216.

[5] The leading work on the subject is Derek E. Bambauer, "Against Jawboning," *Minnesota Law Review* 100 (1) (2015): 51–126. For a notable new article on the subject, see Philip Hamburger, "Courting Censorship," *Journal of Free Speech Law* 4 (1) (2024): 195–298.

[6] 603 U.S. ___, 144 S. Ct. 1972 (2024).

[7] 707 F.2d 33, 34, 37, 38–39 (2d Cir. 1983).

[8] 939 F.2d 1011, 1013, 1015–1016 (D.C. Cir. 1991).

[9] 196 F.3d 56, 68, 70 (2d Cir. 1999).

[10] 372 U.S. 58 (1963).

[11] 602 U.S. 175, 197 (2024). Note that I was one of the NRA's lawyers in this case.

[12] 930 F.2d 204, 209–210 (2d Cir. 1991).

[13] 333 F.3d 339, 341, 342, 344 (2d Cir. 2003).

[14] 807 F.3d 229, 231–32 (7th Cir. 2015). The bracketed words, "harass, pester," were added by the court, presumably as an indication of how the court interpreted "work with." See Complaint Exh. B at 7, *Backpage.com, LLC v. Dart*, No. 1:15-cv-06340 (N.D. Ill. July 21, 2015).

[15] 83 F.4th 350, 382 (5th Cir. 2023).

[16] 603 U.S. ___, 144 S. Ct. 1972 (2024).

[17] Ibid., n.4.

[18] *Thomas v. Collins*, 323 U.S. 516, 537 (1945) (treating the matter as having been settled by *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 [1941]); *Virginia Electric & Power*, 314 U.S. at 477 ("The employer in this case is as free now as ever to take any side it may choose

on this controversial issue. But, certainly, conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act").

[19] 395 U.S. 575, 617 (1969).

[20] See *United States v. Phillips*, 32 F.4th 865, 867 (9th Cir. 2022); and *Burdeau v. McDowell*, 256 U.S. 465, 475–476 (1921).

[21] *State v. Tucker*, 330 Or. 85, 90 (2000) (applying the Oregon Constitution's Fourth Amendment analog; police request to tow truck driver to search items in car being towed), followed by *State v. Lien*, 364 Or. 750, 778 (2019) (police request to trash company to pick up a person's trash in a particular way that would facilitate its being searched). See also *United States v. Gregory*, 497 F. Supp. 3d 243 (E.D. Ky. 2020) (similar fact pattern to *Lien*).

[22] *George v. Edholm*, 752 F.3d 1206, 1215 (9th Cir. 2014) (police request to doctor to do a rectal search). See also *United States v. Ziegler*, 474 F.3d 1184, 1190 (9th Cir. 2007) (police request to employer to search employee's work computer); and *United States v. Rosenow*, 50 F.4th 715, 733 (9th Cir. 2022) (recognizing that, even when a private party's search would normally be entirely legal, the government's "encouragement" of such a search may constitute "state action").

[23] *Skinner v. Railway Labor Executives Association*, 489 U.S. 602, 615–616 (1989).

[24] See *Murthy v. Missouri*, 603 U.S. ___, 144 S. Ct. 1972 (2024) (Samuel Alito, dissenting) (reasoning that "internet platforms, although rich and powerful, are at the same time far more vulnerable to Government pressure than other news sources" because "[t]hey are critically dependent on the protection provided by § 230 of the Communications Decency Act of 1996," which Congress might threaten to withdraw; "[t]hey are vulnerable to antitrust actions"; and, "because their substantial overseas operations may be subjected to tough regulation in the European Union and other foreign jurisdictions, they rely on the Federal Government's diplomatic efforts to protect their interests").

[25] *United States v. Folad*, 877 F.3d 250, 253 (6th Cir. 2017) (emphasis added). See also *United States v. Garlock*, 19 F.3d 441, 443–444 (8th Cir. 1994).

[26] 457 U.S. 991, 1004 (1982). See also *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986) (emphasis added).

[27] 413 U.S. 455, 465 (1973) (emphasis added).

[28] *Compare Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (concluding that government officials generally don't have First Amendment rights when exercising their official duties); and David Fagundes, "State Actors as First Amendment Speakers," *Northwestern University Law Review* 100 (4) (2006): 1637–1688 (discussing uncertainty about when state officials may have First Amendment rights vis-à-vis the federal government).

[29] See Fagundes, "State Actors as First Amendment Speakers," Part II.B.

[30] See ibid., Part IV.A.

[31] 83 F.4th 350, 387 (5th Cir. 2023).

[32] Ibid., 390.

[33] See 603 U.S. ___, 144 S. Ct. 1972 (2024).

[34] 873 F.2d 1240, 1244–1245 (9th Cir. 1989).

[35] See ibid., 1247 n.7 (approvingly describing *United States v. Canada*, 527 F.2d 1374, 1376, 1378–1379 [9th Cir. 1975]).

[36] Ibid.

[37] Ibid.

[38] Ibid.

[39] *Michigan v. Sitz*, 496 U.S. 444 (1990).

[40] *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

[41] Ibid., 40.

[42] See *Texas v. Brown*, 460 U.S. 730, 744 (1983) (plurality opinion); ibid., 746 (Lewis F. Powell Jr., concurring in the judgment); and *People v. Edwards*, 101 A.D.3d 1643, 1644 (2012).

[43] I borrow this from *United States v. Soyland*, 3 F.3d 1312, 1317 (9th Cir. 1993).

[44] Volokh, "Cheap Speech and What It Will Do."

[45] *Moody v. Netchoice, LLC*, 603 U.S. ___, 144 S. Ct. 2383 (2024).

[46] By way of analogy, say that a state law bans private employers from firing employees for their political speech, as many state laws do. See Eugene Volokh, "Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation," *Texas Review of Law & Politics* 16 (295) (2012): 295–336. Then if a federal official urges a company in that state to fire someone for that person's political views, the company will be forbidden from doing so, and any pressure the federal official seeks to exert will thus be ineffective.

[47] Compare Ian Samuel, "The New Writs of Assistance," *Fordham Law Review* 86 (6) (2018): 2873–2924 (similarly arguing that network service providers should be limited in their ability to gather information about users, because of the concern that the government will co-opt those providers into part of the government's own surveillance system).

Should We Trust the Censor?

Keith E. Whittington

Central to the American tradition of expanding protections for controversial speech is a robust distrust of potential censors to make reasonable judgments about what speech should be suppressed. But the arguments for a more restrictive approach to speech often implicitly or explicitly evince much greater trust in the likely decision-makers who will be entrusted with the authority to suppress speech. Whether restricting Communist speech, antiwar speech, "hate speech," or "disinformation," the case for empowering some authority figure – such as campus administrators, technology company employees, or government officials – builds on an assumption that those authority figures will be motivated by good intentions and be endowed with good judgment to make reasonable distinctions between the speech that should be tolerated and the speech that should not. Such confidence would often seem to be misplaced.

In designing and adopting any regulatory scheme, there are two separate but important decisions to make. First, of course, we must decide on the substantive rules or standards that will govern the behavior to be regulated. This is often the most visible and contentious decision to make. Setting out the rule to be enforced is generally viewed as tantamount to setting the policy itself. But there is a second decision that must also be made, perhaps even more consequential than the first. Once we know what rule will be enforced, we must decide who will be empowered to interpret and enforce that rule. After we design the regulation, we must design the regulator. Rules are not usually self-enforcing. Someone will have to determine whether the rule has been violated and what to do in the case of violations. Those two decisions are critical to the success and significance of any regulatory scheme.

In this regard, the regulation of speech is no different than any other regulatory scheme. Changing the context of speech regulation does not change the dilemma. When we lay down a rule about what kinds of speech should be forbidden, we must also decide who will interpret and enforce that rule. Who will decide whether the rule is violated by a particular utterance and therefore whether the speech in question should be suppressed, or the speaker punished? Moreover, such issues arise whenever we seek to regulate speech. If the government wants to prohibit some speech, it will need a process of enforcing that law or adminis-

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trative regulation. If the government wants to criminalize "terroristic threats," it will need both to specify the rule against such threats and to rely on a criminal justice process for investigating and prosecuting those who make such threats. If Congress wants to exclude from federal trademark protection marks that are "scandalous" or disparaging, it will need to articulate the exception to trademark law and empower a government official to review trademark proposals and reject those that violate the rule. If the comment section of an online journal excludes some kinds of posts, the publisher will need to specify a rule explaining what content is prohibited and designate a moderator to review and delete posts that potentially offend the rule.

A great deal of theoretical argument on speech restrictions is understandably focused on the substance of potential limitations on speech. The substantive rule is where principled distinctions are drawn and where justifications for or against tolerating some types of speech can be developed. If we want to restrict speech, we need to take great care to ensure that we are restricting the right speech and for the right reasons. Constitutional doctrine and normative theory are focused on such questions as the circumstances in which false speech should be forbidden, how to distinguish obscenity from pornography, and how to distinguish fair use from copyright infringement. Most of our arguments about whether a specific kind of speech should be restricted turn on the question of whether restricting that speech would be a good idea. Does the speech in question have a high or low social value? Does the speech in question cause harms, and if so, how substantial and of what nature? Will censorship make us worse off? Should we rely on the marketplace of ideas to winnow the true from the false, or do we need the thoughtful assistance of the censor?

Those substantive debates on speech restrictions often take the implementation and enforcement of any restrictions for granted. This is understandable but a mistake. The implementation process might pass without remark simply because, at least in broad brush strokes, we think that those decisions are already fixed. If we are debating possible exceptions to the First Amendment to the U.S. Constitution, we are effectively debating how the Supreme Court ought to interpret the First Amendment, and what kinds of legal limits on speech the justices should accept. It is tempting to think that if we can just agree on the acceptable limits on speech, then the implementation of those limits would take care of itself. The details of the enforcement process might seem irrelevant to whether we think a particular type of speech should be outlawed.

I am persuaded, to some degree, by all three of the common liberal defenses of robust speech protections. Free speech is essential to the identification of the truth and the advancement of knowledge, which is particularly relevant to thinking about the scope of speech protections in an academic context.[1] The tolerance of dissent is critical to allowing democratic processes to function, which is espe-

cially important in the context of political speech. And free expression is important to respecting human dignity and autonomy, which has particular salience in the context of artistic expression.

Those arguments are important, but they are ultimately not decisive for me. At the very core of my own skepticism about speech restrictions is distrust of those who would wield the power to suppress speech. Even if I were completely convinced that some particular type of speech is of low value and generally harmful, I would be extremely reluctant to agree to a rule prohibiting that speech because I have little faith that speech restrictions would be applied in a manner that did not have serious social costs. Censors would likely be overly aggressive in enforcing speech restrictions and biased in what they judge to be intolerable speech. It is precisely in the context of controversial speech that we will find it difficult to reach uncontroversial conclusions about whether a particular example of speech is beyond the pale. As James Madison pointed out, "if angels were to govern men, neither external nor internal controls on government would be necessary"; but the great problem with "framing a government which is to be administered by men over men" is that "you must first enable the government to control the governed; and in the next place oblige it to control itself."[2] Obliging the government to control itself has been particularly challenging in the context of freedom of speech. Even if we could design the ideal speech code, we should not have much faith that it would be implemented in an ideal way.

For me, those concerns about who will watch the watchmen create a very strong presumption against any significant restriction on speech. The long struggle to expand freedom of speech has been to an important degree the result of a dawning realization that censors cannot be trusted and thus the scope of their authority had to be significantly narrowed. I have often found that those who favor more restrictions on the freedom of speech also tend to have more confidence about how those rules will be implemented. If we do not need to worry about the second problem, the problem of implementation, then it becomes easier to imagine that desirable rules might be developed. Those who have faith in administrators tend also to be more willing to endorse speech codes than I am. Even when I can agree that a given example of speech is a net loss for society, I am much more reluctant to take the further step of empowering someone to limit such speech. If I am asked whether we must tolerate the speech of Nazis, I am not overly concerned about the possibility that Nazis might have interesting or illuminating things to say, but I am quite concerned that building the machinery of censorship to suppress the speech of Nazis will prove threatening to speech that is valuable. I would share the view that it would be unfortunate if my fellow citizens found Nazis to be persuasive, but I have trouble imagining who I might trust to make determinations as to which ideas my fellow citizens should be allowed to hear and assess.

The interlinked problem of substance and procedure in designing regulatory policy is pervasive. Some general examples might clarify and emphasize the importance of thinking about process as well as substance when assessing the wisdom of a potentially regulatory initiative.

The procedural question is particularly explicit in the context of administrative law. Administrative law is concerned with the rules governing how judges ought to review the actions of administrative agencies to secure agency compliance with statutory authorizations and mandates. A legislature might set down a variety of substantive statutory regulations, whether narrowly or broadly drawn, and create an administrative agency to enforce those regulations and develop subsidiary regulations to implement the statutory directives. Creating administrative agencies with substantial policymaking authority runs the risk, however, that the agency might not do what the legislature had expected or desired. The legislature faces a principal-agent problem when delegating such discretion to administrative agents.

Appreciating that political actors struggle over bureaucratic structure as well as over regulatory policy clarifies why substance and process might seem like they are in tension with one another and why administrative decision-making is so cumbersome. As bureaucracy scholar Terry Moe has pointed out:

> Political compromise ushers the fox into the chicken coop. Opposing groups are dedicated to crippling the bureaucracy and gaining control over its decisions, and they will pressure for fragmented authority, labyrinthine procedures, mechanisms of political intervention, and other structures that subvert the bureaucracy's performance and open it up to attack. In the politics of structural choice, the inevitability of compromise means that agencies will be burdened with structures fully intended to cause their failure.[3]

The political game is not over when the substantive policy has been determined. Sophisticated political actors will also try to influence the means and procedures by which implementation decisions will be made. The second part of the political fight might be as consequential as the first. Alternatively, if you know that your political opponents will be the ones controlling how a policy is interpreted and implemented, then a sophisticated political actor will have to approach the decision about the substance of policy differently. Narrowing the scope of an agency's discretion will be quite pressing if one does not trust those who are likely to sit at the controls of the agency.

A different version of this dynamic can be seen in the U.S. Supreme Court's doctrine on administrative law. The adoption and implementation of regulations by administrative agencies, in furtherance of legislative mandates, raise a compliance issue of whether the administrative regulations are genuinely consistent with the statutory authority upon which they depend. The courts might insist that

they should make the final call on how statutes should be interpreted and whether agency actions are consistent with the statute. Alternatively, the courts might defer to the statutory interpretations made by the executive branch itself, perhaps under presidential and legislative oversight. The *Chevron* doctrine, the policy of judicial deference given to administrative actions, instructs lower courts to defer to agencies' interpretation of ambiguous statutory directives so long as those interpretations are not arbitrary or capricious.[4] Recently, the Court has become more skeptical of the executive branch, and thus less willing to defer to controversial administrative interpretations of statutes, culminating in the Court's recent decision to overrule *Chevron*.[5] A trusted agency may be given more leeway to interpret and implement substantive regulatory policies. Unlike Congress, the Court does not have the authority to alter the substantive policy embedded in the statute if it is distrustful of executive officers, but it can shift more interpretive authority from the executive to the judiciary.

A quite different example of the interaction of substantive rules and decision-making procedures can be found in the context of the impeachment power. The U.S. Constitution gives little detail about the power of impeachment, but it does specify both a substantive policy and a decision rule for implementing that policy. The substantive policy is that officers can be impeached and removed for treason, bribery, and high crimes and misdemeanors. Of course, that last category of impeachable offenses leaves a great deal of discretion in the hands of the implementing authority: in this case, Congress. But the Constitution establishes a very important decision rule. The House of Representatives can impeach an officer with a simple majority vote. The Senate, however, can only convict and remove an officer on impeachment charges with the agreement of two-thirds of the senators present. The impeachment power might operate very differently if officers could be removed on the basis of a majority vote in the House alone, even if the substantive rule regarding impeachable offenses were exactly the same. If one were worried that the House might abuse the impeachment power, the worry could be alleviated by either tightening the standards for impeachable offenses or raising the hurdle on making decisions, or both.[6]

A final example comes from a realm closer to the free speech context. Imagine a new communication technology that made it possible to produce, distribute, and exhibit to public audiences strips of film with moving pictures and sound. Such a technology might make community leaders and politicians very nervous about what the youth of America might encounter. They might think that it would be a good idea to restrict the access of minors to some content that might appear on film. To do so, they would need both to determine what substantive rule should be applied to distinguish films that could and could not be shown to children and they would need to identify someone who could screen films and categorize them as appropriate for general audiences or not in accordance with that substantive rule.

The first effort to do so involved a set of local governmental film censorship boards. That the town fathers of New York City thought a film was fit to exhibit to the public did not mean that the film would not be banned in Boston. Even if the rule on paper for banning films was the same in both cities, neither would have been content to trust the judgment of the other's censor board. Subsequently, the film industry, and the courts, convinced local governments to get out of the film censorship business and to rely instead on the motion picture industry itself to rate films and restrict access to them. What one might think would be a good rule to separate restricted from unrestricted films might depend heavily on how much one trusted the body empowered to apply the rule to specific films. Conservative parents might want a far more restrictive and clearly defined set of rules if they think the Motion Picture Association is run by a bunch of libertines; alternatively, they might turn to outside rating services, like Common Sense Media, that would more closely mirror their own preferences and social mores.

Trust engenders discretionary leeway for regulatory bodies. Substantive rules that could safely be placed in the hands of a trusted administrator would need to be reconsidered if the administrator is not trusted. Faith in authority, which often amounts to shared preferences and conviction, facilitates delegating power to those in authority. The same basic political logic operates in the realm of speech regulations.

The question of trust in authorities empowered to restrict speech is most pressing in the context of the coercive power of the state. The government is not the only institution that can restrict some forms of speech, but the government has the most sweeping power to do so and can deploy coercive force to gain compliance.

The United States is an outlier among democratic countries for both its relative lack of trust in government and its relatively libertarian policies regarding freedom of speech. That probably has particular significance relative to debates about the best approach to hate speech. Many democratic countries impose some legal restrictions on what might broadly be called hate speech. Hate speech seems like an easy target for government regulation. The costs of tolerating such speech are evident. The benefits are negligible. Why not regulate it? The rise of social media has spurred many countries to specifically restrict hateful content on digital platforms.[7] Those same countries often had criminal laws against various forms of hate speech already in place.[8] Constitutional scholars from those countries are often quite comfortable with the idea that free speech guarantees can be balanced against a desire to protect the dignity of individuals or communities and with empowering law enforcement officials with the authority to punish speech that incites hatred. From an American civil libertarian perspective, by contrast, such laws not only suppress speech that should be tolerated but also risk empowering police

and prosecutors with a discretionary authority that can be turned against some of the same groups that hate speech laws are intended to protect. Can we trust government officials – or even our fellow citizens – to know hate speech when they hear it? Where there is a broad social (or at least a relevant elite) consensus on the contours of what counts as hate speech, then regulation becomes more viable. But in global surveys, Americans say they trust the government at rates more comparable with Colombia and Slovakia than with Switzerland, Germany, and Japan.[9] It is hard to be eager to empower the government to suppress hateful speech if you fear that the government is likely to abuse that power or turn it against you.

The fate of the somewhat related "fighting words" exception to the First Amendment is telling of the difficulties in the American context. The U.S. Supreme Court has traditionally recognized a set of substantive "exceptions" to the protections of the First Amendment, such as obscenity and true threats of violence. The latter gave little protection for individuals uttering so-called fighting words. In 1942, the Court observed that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." Among those classes of speech were "insulting or 'fighting' words," which had no redeeming social value and ran contrary to a "social interest in order and morality." Such words could be forbidden because they were thought to tend "to incite an immediate breach of the peace."[10]

The "fighting words" doctrine has never been formally overruled, but after articulating the doctrine in the midst of the Second World War, the Court has steadily narrowed its scope. The blossoming of the civil liberties revolution on the Court in the mid-twentieth century shifted the judicial orientation on the proper balance between law and order on the one hand and individualistic expression on the other. Just a few years later, the majority of the Court would instead emphasize that the right to speak freely is "one of the chief distinctions that sets us apart from totalitarian regimes." Included in that right was speech that "induces a condition of unrest" and "even stirs people to anger."[11] Whether delivering racist diatribes, burning national flags, or shouting obscenities at a funeral, the justices increasingly came to think that it was the onlookers who had a responsibility to refrain from turning to violence rather than speakers who had a responsibility to refrain from stirring people to it. The person who threw the first punch breached the peace, not the one who hurled the first insult. Whatever social consensus that had once held that you could not wear a jacket emblazoned with profane slogans in a public place or yell insults at a police officer had washed away. As the country rebelled against the man in the gray flannel suit, the Court concluded "that one man's vulgarity is another's lyric."[12]

The breakdown of a once buttoned-down social consensus was accompanied by greater skepticism of government authority and the officials who might be

tasked with determining which speech had no social value or could stir people to anger. In the very case in which the Court first laid out the fighting words exception, the speech in question involved a sidewalk speaker telling a police officer that he was "a damned fascist," among other "offensive, derisive and annoying words and names."[13] Later cases before the Court similarly involved opprobrious language aimed at police officers, and not infrequently "direct conflict of testimony as to 'who said what.'"[14] Calling a police officer a "white son of a bitch," or yelling at them "you god damn motherfucking police," or saying to them "why don't you pick on somebody your own size?" could get one arrested for creating a disturbance.[15] The justices began to think it unwise to "provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them."[16] The kind of people who were repeatedly arrested for "interrupting" the police with their unwelcome language – that is, people like Raymond Hill, an advocate of the Gay Political Caucus in Houston, Texas – might have already distrusted the authorities.[17] In the turbulence of the 1960s, even federal judges came to share some of that distrust and decided that First Amendment protections needed to be stronger.

At the same time that the Court was discovering that one man's vulgarity could be another man's lyric, it was also wrestling with the scope of another exception to the First Amendment: obscenity. An American judge in the nineteenth century gave the conventional wisdom in noting, "while happily we have outlived the epoch of censors and licensors of the press, to whom the publisher must submit his material in advance, responsibility yet attaches to him when he transcends the boundary line where he outrages the common sense of decency."[18] As long as we thought we could identify a "common sense of decency" and trust government officials with enforcing it, the suppression of obscene material did not seem to cause much of a problem, and American courts were quite happy to cast those materials into the darkness beyond First Amendment protection. The Court thought it "apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance."[19] It was not intended to protect those items "utterly without redeeming social importance."[20] But how to distinguish the obscene from the merely lewd? Perhaps the courts could divine and rely upon "the average person, applying contemporary community standards."[21] Such standards proved to be slippery. Judges soon found themselves second-guessing customs officials and local prosecutors on whether works of modern literature by authors such as James Joyce, D. H. Lawrence, Henry Miller, and William S. Burroughs outraged the common sense of decency. The Supreme Court justices and their clerks found themselves crowding into the basement on "movie day" to decide which films had been properly declared obscene by local judges and juries. After watching Louis Malle's 1958 film *The Lovers*, which had led to a theater manager in Ohio being fined for exhibiting an obscene film, Justice Potter Stewart threw up his hands and

declared he could not "intelligibly" define obscenity: "But I know it when I see it, and the motion picture involved in this case is not that."[22] So long as the Court trusted judges and juries to distinguish art from "hard-core pornography," then an obscenity exception to the First Amendment could be left ill-defined and capacious. As that trust was lost, censors were put on a shorter leash.

The First Amendment itself was born out of distrust of the traditional censors. It enshrines the command that Congress shall make no law "abridging the freedom of speech, or of the press," but what does that mean? As the Court later pointed out, the "unconditional phrasing" of the constitutional text was understood by almost everyone to be more restrictive than grammar alone might suggest. Justice William O. Douglas skipped movie night at the Court since, in his view, the First Amendment laid down "its prohibition in terms absolute."[23] Few others found the First Amendment to be so easy.

James Wilson, who would later become one of our nation's first Supreme Court justices, gave one fairly conventional answer to the question of what "freedom of speech" means during the ratification debates for the U.S. Constitution. Although the First Amendment had not yet been written, and Wilson thought such an amendment was unnecessary, he found himself defending the Constitution against the charge that it would open the door to abridgments of the freedom of speech. To such an accusation, Wilson thought it important to define terms. Of course, Congress was not barred from punishing literally every type of speech for

> the idea of the liberty of the press is not carried so far as this in any country.... What is meant by the liberty of the press is, that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character, and property of the individual.[24]

The constitutional framers did not trust the system of "censors and licensors" that the British king had established to control what texts could be disseminated in his realm, but that did not mean that they did not trust anyone to identify dangerous and harmful speech. Indeed, by Wilson's reasoning, the "liberty of the press" protected in both English law and American law was the same. What had changed in the United States was the assessment of who could be trusted to respect the boundaries of the liberty of the press. The Americans did not trust executive licensors to play that role, but perhaps they could trust an independent judiciary to do so. If the true threat to free speech came from monarchs, then eliminating that threat might do most of the work that was necessary to protect freedom of speech. For good measure, judges could be insulated from control by the quasi-monarchical executive branch, and then perhaps they could be trusted to defend the people's interest in free speech. But even if that failed, there was an ultimate trustworthy body to determine whether an author "attacks the security or welfare of the government": a jury of the author's peers.

It took more experience with republican government to demonstrate that kings were not the only threat to freedom of speech. The emergence of partisanship and the passage of the Sedition Act of 1798 showed that not even judges and juries could be entrusted to distinguish protected from unprotected speech. Federalist editors preached that "it is Patriotism to write in favor of our government – it is Sedition to write against it."[25] Not all judges and juries, they thought, could be entirely trusted to uphold the authority of the government. What was needed was someone like Justice Samuel Chase, who was "a sworn enemy of free democrats" and could be counted on "to terrify democratic printers from insolently avowing opinions contrary to the ruling powers."[26] Chase did not have much faith that juries would help him in that task, and he had to instruct one federal marshal to be sure to remove "any of those creatures called democrats" from the jury pool.[27] Meanwhile, the Jeffersonians were learning that they could not trust Federalist judges and juries to uphold the liberty of the press and properly distinguish protected political opinion from unprotected seditious speech. With that declining trust came a reassessment of the wisdom of prohibiting "seditious" speech in a republic.

A century ago, philosopher Zechariah Chafee helped transform American constitutional law by hammering home the broader lesson of that experience. "The essential question," he thought, "is not, who is judge of the criminality of an utterance, but what is the test of its criminality." Lack of trust in potential censors meant that we had to adopt more robust protections for freedom of speech.

> The transference of that censorship from the judge to the jury is indeed important when the attack on the government which is prosecuted expresses a widespread popular sentiment, but the right to jury trial is of much less value in times of war or threatened disorder when the herd instinct runs strong, if the opinion of the defendant is highly objectionable to the majority of the population, or even to the particular class of men from whom and by whom the jury are drawn.[28]

There was value in shifting power to a more trustworthy authority, but unpopular speech could only be reliably protected if stringent rules were adopted to tie the hands of those in charge.

The same interplay of trust and rules arises in the context of protecting speech on college campuses. The stakes may not be as high as a sedition prosecution by the government; however, preserving a free intellectual environment in American universities is nonetheless consequential. Free inquiry stagnates if it is not adequately protected, and there are myriad pressures to curtail free inquiry in the present moment.

Those developing rules, practices, and institutions to regulate speech in the academic environment have often evinced a great deal of trust in the authorities

who would be entrusted with patrolling the boundaries of acceptable and unacceptable speech. Some degree of trust might be unavoidable if universities are to function, but the more we have faith in those who will be exercising authority, the more comfortable we tend to be with empowering them with broad discretion to evaluate speech. Let me note two quite different contexts in which this plays out.

Universities have always had codes of conduct, and those codes of conduct have often applied to speech, especially student speech. In the age of *in loco parentis*, the freedom of the students was limited, and the discretion of the dean was vast. The same cultural sea change that weakened the power of the censors in other parts of American life also loosened the grip of the dean on student speech. When the dean of students at the University of Missouri decided to expel Barbara Papish, a thirty-two-year-old graduate student and member of the Students for a Democratic Society, for distributing on campus a newspaper featuring on its cover a cartoon depicting a policeman raping the Statue of Liberty and articles containing obscenities, she made a federal case out of it. Papish had previously been put on probation for disseminating literature containing "pornographic, indecent and obscene words" while high school seniors and their parents were visiting campus in 1967. The Court made it plain that "no matter how offensive to good taste," the dean could not enforce "conventions of decency" in student publications. State universities were "not enclaves immune from the sweep of the First Amendment."[29]

The campus speech codes of the 1980s, like the campus speech codes of the 1960s, were top-down. It is hardly surprising that when college administrators get together to draft regulations restricting the speech of college students, the administrators will give themselves substantial leeway to crack down on harmful speech. Drafters of such policies often "intended that speech need only be offensive to be sanctionable."[30] When the power to make law and the power to enforce the law are united in the same hands, the lawmaker tends to trust the law enforcer to know what to do. The administrators thought the administrators would recognize offensive speech when they saw it.

More remarkably, the campus speech codes of the twenty-first century are often bottom-up rather than top-down. The current generation of students has a striking degree of trust in college authorities and consequently often seeks to invest them with substantial authority to regulate speech on campus. I have frequently found that current students are shocked to discover that students had ever bristled against the dean's authority or that university officials ever exercised their authority to suppress speech because it was offensive to good taste or embarrassing to the university. Students now assume that campus administrators will share their values and commitments and think like they do. As a consequence, students are trusting that campus administrators will suppress only the right kind of speech. The campus activists now issuing these demands might well be making a safe bet. When a majority of the student body and the campus administrators are

ideologically aligned, it is only the few dissenting students who have to worry that their speech might be ruled out as harmful.

The events of October 7th in Israel might have fundamentally altered that calculation. As the war in Gaza continued into the spring of 2024, student protests broke out on campuses across the globe, demanding their universities' disclosure of and divestment from military contracts and deals with private arms companies. Suddenly, members of the campus community found themselves divided on what kinds of political speech and political activism were tolerable. Community members who were on the same side of many political disputes were now at odds with one another, and speech regulations that had gone unnoticed began to pinch. There was evident dissensus over which examples of political rhetoric were hateful or made the campus feel unsafe. Administrators' responses to the protests have included quiet tolerance, on one end of the spectrum, and the expulsion, eviction, and violent arrest of protesters, including some faculty, on the other. Whether universities further respond by narrowing or broadening speech restrictions on campus through formal policy remains to be seen, but a new generation of students might have learned that they can no longer trust that college administrators will always see things as they do.

The speech of professors is regulated as well. At this moment, there are very serious threats to professorial speech coming from outside the university, but for now I want to call attention to how speech is regulated inside the university.[31] Of course, the professoriate has little faith in how conservative politicians would seek to regulate academic discourse. Less visibly, the professoriate relies on a more trusted authority to regulate academic discourse: themselves.

Scholarship is routinely subjected to speech regulation. Literary scholar Stanley Fish likes, provocatively, to call this "censorship."[32] One need not be so provocative to see the point. Legal scholar Robert C. Post has emphasized that "academic freedom has always been conceived as a barrier to 'the pressure in a democracy of a concentrated multitudinous public opinion.'"[33] Academic freedom does so, however, to protect the development of disciplinary knowledge. But here he would emphasize the *disciplinary*. Academic freedom is ultimately the freedom of a scholarly community to generate and discuss ideas. We allow that scholarly community to discount purported knowledge that is not regarded as consistent with disciplinary norms. As academics, we trust the discipline, not the individual scholar. That trust in the discipline is rendered concrete in the boundaries that are raised up and enforced around academic freedom. Speech that the discipline judges to be unworthy is unapologetically disfavored. Such speech is inexpert and incompetent. Academic freedom is designed to protect only the speech that the scholarly community regards as competent.

The system works well so long as scholars trust their colleagues, peers, and disciplinary communities. Just as judges looked to community norms to determine

what expression could be suppressed as obscene, universities look to disciplinary norms to determine what expression can be suppressed as irresponsible or unwise. That trust can fray. Peer-reviewed scholarly journals are one site where discipline is enforced. The purpose of peer review is to provide a disciplinary quality control of what gains the imprimatur of scholarship. However, the familiar concept of "peer-review cartels," by which a small subset of academics use the peer-review process to exclude scholarly work that might challenge their own preeminence in the field, lays bare how trust in disciplinary communities can break down. The relative authority of peer review hinges on the trustworthiness of the peers who are doing the reviewing. If the gatekeeping process is seen as abusive, scholars might develop alternative channels for disseminating their work, whether through upstart journals with more trusted editors and reviewers, non-peer-reviewed paper repositories, or non-peer-reviewed journals.

While peer-review cartels can damage scholarly careers and pervert the shape of scholarly discourse, other processes can expel professors entirely from the scholarly community. A central goal of academic freedom advocates in the United States in the early twentieth century was to free faculty hiring and promotion decisions from the control of the nonexperts. University presidents and trustees could not be trusted to be reliable gatekeepers of expert knowledge. Academic freedom could only exist if the scholarly realm inside the university was controlled by the scholars. But again, that gatekeeping function can endure and thereby protect intellectual freedom only if those exercising the gatekeeping function retain trust in their capabilities and integrity. On one front, self-governing professors must be able to demonstrate to outside stakeholders that they are acting in good faith and to the ultimate benefit of the university. Donors and politicians who become convinced that the self-governing faculty has created a cartel of its own that operates to the detriment of the university are likely to want to seize back the power over personnel.

On another front, if academic freedom and free inquiry are to thrive, then it is crucial that faculty governance not be weaponized against heterodox thinkers. One recent proposal shows how academic freedom, built on the logic of a disciplinary community, can be turned into a sword rather than a shield. Literature and media scholars Michael Bérubé and Jennifer Ruth chose the title *It's Not Free Speech* for their recent book precisely to emphasize that academic freedom is not truly an individual right. Scholars enjoy academic freedom only by the grace of their colleagues. Thus, Bérubé and Ruth suggest that universities should create "academic freedom committees," not to help ensure that professors are protected from threats to their work, but to help universities identify and expel professors who express the wrong normative commitments.[34] The thicker the commitments of a scholarly community, the less room there will be for the dissident. Free inquiry can flourish only where the gatekeepers can be trusted to allow it.

If one trusts the censors, or expects to control the censors, or expects *to be the censors*, then one is likely to have more confidence designing rules that allow for restricting speech. When contemplating a set of ideal speech restrictions, however, one should think carefully about how those rules might be applied if one's antagonists were operating the system. For me, distrust of the potential censors dictates robust free speech protections. I might trust myself to exercise good judgment about which speech ought to be suppressed, but I do not trust anyone else – and I would not advise anyone else to trust me.

ABOUT THE AUTHOR

Keith E. Whittington, a Member of the American Academy since 2012, is the David Boies Professor of Law at Yale Law School and the founding Chair of the Academic Committee of the Academic Freedom Alliance, and has served on the Presidential Commission on the Supreme Court of the United States. He is the author of *You Can't Teach That! The Battle over University Classrooms* (2024), *Repugnant Laws: Judicial Review of Acts of Congress from the Founding to the Present* (2019), *Speak Freely: Why Universities Must Defend Free Speech* (2018), *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (2007), *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999), and *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999). He is currently completing his book *The Idea of Democracy in America, from the American Revolution to the Gilded Age*.

ENDNOTES

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[15] *Gooding v. Wilson*, 405 U.S. 528 (1972); *Lewis v. New Orleans*, 415 U.S. 134 (1974); and *Houston v. Hill*, 482 U.S. 454 (1987).

[16] *Houston v. Hill*, 482 U.S. 465 (1987).

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Inside back cover: (top) Demonstrators supporting Donald Trump attempt to enter the U.S. Capitol Building to prevent the certification of the 2020 presidential election, Washington, D.C., January 6, 2021. © by Eric Lee/Bloomberg via Getty Images. *(bottom)* Facebook founder and CEO Mark Zuckerberg arrives to testify during a Senate Commerce, Science, and Transportation Committee and Senate Judiciary Committee joint hearing, April 10, 2018. © by Saul Loeb/AFP via Getty Images.


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