Free Speech - Press releases

Informational background

Transcript of a TV program on the sanctity of the first amendment in the US and the debates it raises

Free to State: The New Free Speech
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MS. SELLERS: Good morning and welcome to Washington Post Live. I'm Frances Stead Sellers, a senior writer at The Washington Post.
It gives me great pleasure today to welcome the president of Columbia University, Lee Bollinger. President Bollinger, welcome to Washington Post Live.

MR. BOLLINGER: Thank you very much.

MS. SELLERS: We're delighted to have you.
So, President Bollinger, you are an expert on the First Amendment, one of the nation's foremost scholars, and also, you've written extensively on freedom of the press. I'd like to start by stepping back and looking at the unique nature of America's speech laws. The country's possibly the most permissive of hate speech of any Western democracy. How did we get here?

MR. BOLLINGER: So that's a fascinating question. I think one has to start with the fact that even though the Bill of Rights, and the First Amendment, as the first one of those, was really part of the Constitution from the 18th century, there was no Supreme Court case interpreting those words in the First Amendment until 1919. So, from 1919 until today, which is obviously a century, the Supreme Court and lower courts have built up a body of jurisprudence that is remarkable. I mean, it's the most elaborate exploration of what freedom of speech and freedom of the press mean in any country.
And the degree, as you point out, the protection that has been afforded to speech in the United States, really since the last half century, is the strongest, most protective system that has ever been set up by a society.

MS. SELLERS: Do you believe this expansive reading of the First Amendment is appropriate today or are your views evolving in the Internet age?

MR. BOLLINGER: So, I think one always has to reflect on that. I think one does have to be prepared to evolve as facts change and our understandings of the needs of society change. But I'm largely of the view that what has been developed by the Supreme Court since that 1950s, 1960s period is right. I think that was a profound achievement. The body of doctrine that we have from that period has stood the country really well, has been a model for the rest of the world, and on the whole, I think is really stunningly important.

MS. SELLERS: So just briefly tell me what precipitated previous controversies or debates around the First Amendment, and how are those tensions similar to the ones we see arising today, on college campuses and newspapers and, of course, online?
MR. BOLLINGER: So, you know, there's not a year that goes by that there are not new free speech controversies, and that has been true, of course, for centuries. If you go back to the origins of the Supreme Court jurisprudence, which I said began in 1919, they came out of controversies about America's involvement in World War I, out of controversies around ideologies of communism and socialism, about issues of labor. And you have, in that period, many, many people arrested, prosecuted, imprisoned, including a candidate for president of the United States, Eugene Debs, because of opposition that they expressed towards these various national policies.
The other period that is really notable in this regard is the 1950s, and, of course, the McCarthy era. And there the arrest prosecution treatment of people who were deemed to be communist or communist sympathizers was another point of enormous controversy, and a low point in the development and history of the First Amendment.
The 1960s brought this incredible flourishing of thinking and imagination applied to how to deal with these sorts of issues of extremist speech, of libel and defamation, and so on, and that, of course, was the civil rights era, which had a profound effect on the development of the First Amendment, antiwar movements, and so on.
So that continues today, and, of course, all the issues that we have surrounding the policies, the election, voting, issues of racism and so on in the society, generate really profound First Amendment, free speech, free press questions.

MS. SELLERS: I'm interested in these periods of time where you talk about when these issues came up, and, of course, some going back to the 1930s or a little bit later with communism and the arrival of fascism, also coordinated with the arrival of radio and television and how much the extent of a new medium allowed these debates to arise. What's your thought on that?

MR. BOLLINGER: So, this is again the really profound and highly interesting area. It has been the case, I think, that any new major technology of communication unsettles people. People fear that it will lead to manipulation of public opinion, manipulation of behavior disinformation, spread of seditious ideas. People are wary of new technologies of communication. It is also the case that they may well make life much more difficult, and so there are good reasons to be concerned about them.
In the 1920s, radio was introduced into America, and it was legislation in 1927, followed by, of course, the major '34 Communications Act that took that new technology of communication, broadcasting, which eventually incorporated both television and cable, and put them in a different kind of regime of regulation and a different doctrinal structure of the First Amendment.
By the late 1960s, early '70s, we had a quite--a differential treatment is what I've called it, of these two, of print media and the broadcast media. Print media have been totally free of government regulation, protected in that. Radio and TV and cable have been subject to public relation--licensing system, some degree of content regulation like the fairness doctrine or equal time provision, and that has remained, more or less, in place up to today. The Internet is, of course, the new major development in a new technology of communication and we're still trying to figure out how that fits into this jurisprudence and our public discussion of ideas.

MS. SELLERS: I'm going to ask you more about that in a minute, but first I'd like to take you back to a 2019 talk you made in which you referred to President Trump's comments following Charlottesville, that there were very fine people on both sides. And I'm going to read your words. You used that as an example of departing from norms and said, "In order for us to protect extremist hate speech we have to agree basically that's horrible."
How do we set the moral compass today in such a partisan world? Where is that center that you seem to be reaching for in the speech?

MR. BOLLINGER: Well, I was making a point there, which I'll get to in a second. But I think you reach that moral compass by people speaking out and articulating a moral compass. And we do it through enactment of laws and we do it through constitutional adjudication. I mean, there are countless ways in which we are constantly setting the moral-ethical standards of the society.
The point I was making then is this. As you said, and I repeated at the beginning of the discussion, the United States has, since the 1960s, for the last half century, given more protection to speech--extremist speech, hate speech--than any other society. It is a very complicated issue. But the result of Supreme Court adjudication has been clear. Neo-Nazi speech, Klan speech, et cetera, all these have resulted in cases, and the Supreme Court has developed the doctrine that these ideas, as odious as they are, are nevertheless protected until the point where they incite imminent lawless action. That's the kind of test that has been devised. So, we have to live with these ideas. We have to counter them. We must speak about them. We must use our speech to counteract the evil effects of these ideas. The entire system of extreme protection for speech in the society depends upon both the courts and public leaders, especially, condemning the ideas as, at the same time, they are being protected. So, if you look at all the Supreme Court cases that deal with extremist speech, they include very explicit rejection of the ideas. Once it happens that there is condemnation of these ideas, the critical condition for that level of protection begins to change, because the worst thing that can happen is that we end up looking and feeling and being a society in which people think we are neutral towards really bad and potentially evil ideas.
So in one sense it was, of course, problematic and terrible in the context in which this happened, just to have that seeming approval, but it also plays into a deeper structural sort of understanding that we've arrived at in the United States about how to think about protectionist speech and at the time how to maintain a moral compass, as you said.

MS. SELLERS: So, I have a question, struggling with this online where the notion of countering bad speech with good speech can be very hard, because online one can become caught up in a reinforcing area of speech and you don't see that counterbalance. How do we manage with that today? How do you counter what I'm talking about?

MR. BOLLINGER: Right. So, I think, you know, that is one of the great questions of our time. If one agrees with the approach that we've taken over the past 50 years, as I do, and I've written about this and various rationales for why this makes good sense, constitutionally and legally and just as a matter of social life, if you agree with that you then have to face the question, have the circumstances changed in material ways with respect to that speech and the dangers that that speech now poses, because of the introduction of these new technologies--the social media platforms and the Internet generally.

I think the jury is still out on that question. I mean, that will become, over the next decade, something that we will all have to face, including the Supreme Court of the United States.
If you have a society in which those really, really dangerous ideas have spread really broadly within the society and are aided in that by the type of means of communication that are available to them, you do have a different context than you did in the 1960s, when the Supreme Court decided that a small group of the Klan, that met and was put on television, really did not justify the government coming in and censoring the speech. Well, if the scope of these really bad ideas is much greater if the density of these ideas in a society, much deeper, you may perhaps have a need for a different result. But that is an open question and it remains to be seen.

MS. SELLERS: So, the jurisprudence isn't settled but you've written about the danger of unregulated social media platforms. Earlier on you talked about the different regulatory standards for newspapers than for broadcast mediums. Where do you see social media fitting in? An entirely new regime or somewhere in between the others? How does it work, practically?

MR. BOLLINGER: So, I'm wrestling with this, as I think every First Amendment scholar and every citizen must. My good friend and colleague, whom I've written with, Jeff Stone at the University of Chicago Law School, and I are just beginning to think about a volume that might try to address this in deep and practical ways.
I mean, I do think, I start with the idea that we've seen this before, as I indicated. It's not an entirely new problem. The new technology of broadcasting was feared for the same reasons, that is the risk of the spread of dangerous and really pernicious ideas and beliefs, required some kind of public intervention, and the fear that the monopolization of public discourse by these new companies in the broadcast arena required some degree of protection of people receiving all different forms of ideas. That's another issue that has come up, of course, with respect to social media platforms, that not only is there a risk of the spread of dangerous ideas and bad ideas but also the risk of really great censorship that these private companies can exercise because of their incredible control over the public discussion, public ideas.
So, we've seen this before. We've set up a system to deal with this. It has worked, I think, reasonably well. It was certainly upheld by the Supreme Court. I've written a lot about this. I think it was justified and right to do what the court said, to have a system for the print media and a different one for the broadcast media.
My sense and my inclination is that we're going to have to figure out something along these lines for this new state of affairs, but I'm not certain yet exactly what that will look like.

MS. SELLERS: So how do you respond directly to those who argue that Facebook or another company should have total control over their content? What's your response at this point? Is it wait and see, or --

MR. BOLLINGER: Well, there are a lot of people doing extensive work on this question. That is, what are the consequences for public discussion, of public issues especially, as a result of the ways in which we communicate and the ways in which these technologies are organized, and what is the upshot? I think scholarship is our first requirement, our first condition, that is, what do we actually know? It's very easy to take single anecdotes and examples and to extrapolate from that what should be a result. We really want to be extremely careful about this.

I mean, one of the things the First Amendment has been conditioned on is a belief that government intervention into the arena of speech is highly dangerous and should only be permitted under very careful circumstances.
So, we need scholarship, we need to know what we're facing, and then we need to figure out how counteract it. I mean, we do have a tension. We have private companies that are designed to make money, and that's what, of course, private enterprise is all about. Public discussion of public issues is not solely a matter of profit-making institutions. And, I mean, in the print media you know that, of course, profit-making, but on the other hand there's an ethos, a culture, about how to discuss public issues that is longstanding and extremely important. Will we develop that in the context of the media, social media platforms? It remains to be seen.

MS. SELLERS: I can't resist asking the journalist question, but does scholarship move quickly enough in this era of instant communication?

MR. BOLLINGER: Yeah, it's a good question. It could be that we suffer enormous consequences too late. But there again, one has to make a judgment, and I think one of the things that the First Amendment and the jurisprudence and the case law and the writings about it teach us is that government regulation of speech really should be the last resort, and only when we're really, really clear that this is required in order to save us from worst consequences should we allow intervention.
And I'm happy to say that there is an extensive body of scholarship now looking at these questions and publishing about them.

MS. SELLERS: So, we've got a vastly increased number of information gatekeepers but also groups like Wikileaks, which publish information that could be deemed dangerous to the government. How do you think we should manage them in this era?

MR. BOLLINGER: So again, Jeff Stone and I have just completed a book on this subject, "Pentagon Papers." It will come out in the spring. And here again, we developed, in the 1970s, this extraordinary approach to how to balance the government's interest, completely reasonable, and being able to operate with some degree of secrecy, and the interest of the public in knowing what the government is doing. We all know that the government overclassifies, is overly secret, and we do need to have some countervailing interest of the public in knowing what's going on served.
Well, the system was the government can operate in secret, that people can leak information to the press, and they can be punished for that. But the press has total freedom, basically, to publish the information and to make the judgments about what should be published and what should be kept secret. That system of Pentagon Papers I think most people would say, and I certainly would say, has served us very well.
Now, again, we have the new technologies of communication and we have different actors, much greater material, classified information can be released on a computer. I mean, Daniel Ellsberg was 7,000 pages, but Edward Snowden was millions, hundreds of thousands of pages. And we have players like Wikileaks, as you say, that are not The Washington Post, not The New York Times, do not have the interests of the United States at heart, have an underlying belief in disclosure way beyond, I think, what is reasonable. And now the question is, should the Pentagon Papers regime be revised in light of these new circumstances? Is

the threat to government interest in secrecy now just at real risk because of the introduction of these new players? That's a profound First Amendment question as well.

MS. SELLERS: So, I want to circle back to our discussion about social media platforms and Trump's desire to repeal Section 230. For those viewers who don't know what that is, is a 1990s law that gives liability protection to companies that post third-party matter on their sites.
Talk to us about Trump's request to repeal this, what it means.

MR. BOLLINGER: Well, as you know, as Don Graham and I wrote a week or so ago on this issue. President Trump, in apparent anger at Twitter for having fact-checked and labeling a tweet as misleading, potentially misleading, announced that in sort of punishment for this Twitter would be subject to attack, as other social media platforms would as well, by changing the law to take away the protection they have against being sued for speech that they publish, which is extremely important to them, and some other things, which I won't go into.
The main point here is that whatever one thinks about the underlying laws of Section 230 and other policies, it is simply inconsistent with the First Amendment and the constitutional development of the past century and beyond, for the government to try to punish speakers--and that includes the press or social media platforms at the moment--because of the content of what it is that these speakers have communicated. That is a deeply, deeply troubling motivation. I mean, we should all be concerned that the law would be turned and twisted and changed, not because of the balance of interests but because of a desire to punish speakers for what they say and the content. And so that really needed to be highlighted for the seriousness of what was involved there.

MS. SELLERS: So, you told me you teach a large 101 class on the First Amendment. I'm curious about how student views have changed. You obviously didn't grow up in the era of the Internet; they did. How have your classes changed as you've taught this class over the years? How have the views changed?

MR. BOLLINGER: Well, I think that students today are--I think they are aware, just like we are, and what you said earlier is an indication of the breadth of this, aware of the concerns that the ways in which public discussion and public issues are being conducted today is deeply concerning, maybe even alarming, and maybe even requiring some degree of public intervention. So, I think that they are receptive. They certainly see the problems, and I think, as any reasonable person should be, receptive to thinking through what should be the system for this new world.
I think there's also a--you know, the problems of hate speech and what we talked about earlier, extremist speech, if you look back over the past 100 years, the Supreme Court has taken diametrically opposed views on this. So, there's a case from the early 1950s where group libel, as it was called, racist speech in that case, against African Americans, the majority of the Supreme Court said regulating that kind of speech is just fine. But it was in the late 1960s that that decision was not overruled but implicitly overruled and a different approach was taken.
How to think about the limits of protection for speech at these edges, where this particularly bad speech takes place, is something that is, you know, extremely difficult. Lots of different

concerns and something to struggle with over and over again. So, I am very attuned, I think, to students feeling that that is something that they want to struggle with too.

MS. SELLERS: I have probably only a minute left but I do have one question I'd like to ask you briefly, and I'm afraid it's a big-ish question. But you're the president of a huge university, a private university. How do you decide who appears on your campus? What are the issues and how are those decisions made? And I apologize for a big question in a short moment, but just give me an idea of the issues at play there?

MR. BOLLINGER: So, I think, you know, you're not a partisan institution. I mean, the universities take no position on trade policy, but you do want to be a center for discussing things. I mean, people do serious work on this and there are practical consequences, and universities should be a place in which all ideas are discussed.
So, we really try, I think, across the institution, to get an array of different views and debates and so on, on public issues. But I'd have to say, I mean, scholarly work is driven by other kinds of concerns--how to add new knowledge, the disciplines, and how to think through things, discover new ideas. So, there are two different parts of a university--the scholarship, the research, the teaching, and then the center, the forum for public debate, and on that we try to be as balanced and comprehensive as we possibly can.

MS. SELLERS: President Bollinger, many thanks for joining me this morning. That was fascinating.

MR. BOLLINGER: Thank you very much, Frances.

MS. SELLERS: I'll be back in a few minutes with two legal experts on online discourse, Mary Ann Franks from the University of Miami Law School and Daphne Keller from Stanford. Join us again soon. Thank you.

[Video plays]

MR. GILL: Good morning, everyone. I'm delighted to include in today's conversation a short discussion with Suzanne Nossel, the CEO of PEN America. PEN America is a global leader in the fight for human rights and free expression, and Suzanne recently authored the book "Dare to Speak: Defending Free Speech for All."
Suzanne, I want to ask you a question that really picks up where the last conversation left off, which is some of the generational change that we're seeing in views about free expression. And one of the things we've seen at Knight Foundation in surveys that we've conducted, as you know, that's perhaps not disconcerting but certainly feels new to us, is when we've asked college students, in particular, whether they think the First Amendment protects people like them, on the surface level you see unanimity.
But when you start to look at the intensity of that belief, students who strongly agree with that sentiment, you see differences by race and also by gender. So White students are twice as likely as students of color to say that they feel the First Amendment protects people like them, and a majority of men, 55 percent, are likely to strongly agree with that sentiment, but only 39 percent of women are likely to strongly agree with that sentiment. So, I just wanted to start by asking kind of what you make of this finding.

MS. NOSSEL: Yeah. Look, I think it's great that Knight is doing this research and honing in on these disparities. I think you're seeing something real. Overall, young people support the idea of free speech and the First Amendment but opinions do differ. And I think what we're seeing there is the differential impact of speech on particular groups, which is something I address in some detail in "Dare to Speak: Defending Free Speech for All."
In a diverse society that is grappling with this lingering, pervasive legacy of inequities, the fact is that students from vulnerable groups, whether it's women or students of color, are just more exposed when it comes to noxious speech, and they are hit harder when they are on the receiving end of that. If you spend your whole life hearing slurs, stereotypes being directed at you or people who look like you, it's not surprising you'd be more alert to the downsides of free speech and more open to the idea that some people need and deserve protection from those most noxious sentiments that free speech does indeed protect.
So, in the book I talk about the concept of conscientiousness and duty of care. So, elements of voluntary restraint in the use of speech so that we can create a marketplace for speech that doesn't lead people to sort of pull the circuit breaker and call for government intervention to suppress speech in the name of inclusion or equality. I think if we can be more effective in addressing underlying feelings of marginalization that are behind those numbers then the willingness to tolerate offense is going to increase.

MR. GILL: What do you think, though--I mean, Lee Bollinger referred to that too, right, that you have to have strong protection for speech paired with an ethos. And I think some of those communities that now have access to universities, have access to public fora say, yeah, easy for you to say, you know, what we need is an ethos, what we need is restraint. I'm the one on the receiving end.
What are some of the specific techniques or practices that you document in the book that you think could help make that real for people?

MS. NOSSEL: Sure. I mean, counter-speech, so that when there is an incident that happens people feel like they have the support of leadership, whether it's at a university or a political leadership. You know, this has been a real problem, because we've seen this kind of subordinating, hateful speech from the highest levels of government. And when that happens there's a sense, you know, hateful speech has been uncorked through our society. It's kind of coursing through our streets. We need to do something about it, and that intensifies the calls to ban and punish speech.
So, it's leadership. I think it's also education. A lot of these young people don't know a lot about how free speech works, how it interplays with their concerns for equity and inclusion. So, we do a lot of work, and one of the major purposes of writing my book was to try to expand this idea of how these core principles fit together.
I thought one of the most striking things in your survey was that among the rising generation they are equally committed, in equal numbers, with seemingly comparable intensity, to the goals of equality and inclusion and to the protection of free speech. So, the question really becomes, how can these ideals fit together? And I sort of set up all these principles, 20 principles, in the book for how to use free speech in ways that don't trample over concerns of equity and inclusion.

MR. GILL: So just a last question, maybe as a segue to the next segment. We will hear from two great scholars thinking a lot about technology. What role do you see for technology in

this conversation or what role do you see for the dominant platforms in which a lot of digital speech is occurring?

MS. NOSSEL: Look, I think they have a central role, and we're seeing them become more aggressive in policing speech and they are doing it because of pressure from their users, from advertisers increasingly, from legislators. I think we're going to see some form of regulatory action very likely over the next year or so. And I think the key is that we include, in whatever we do, fail-safes to ensure that those measures aren't overbroad when it comes to free speech, that they don't target particular marginalized groups, which is something that we've seen happen in other jurisdictions when they get more assertive in policing online speech.
So there's a lot to be careful and watch out for, but I think it's inevitable that this weaponization of free speech online, whether it's through online harassment, the spread of disinformation which is a major focus for us at PEN America, or just pure vitriol has gotten out of hand and the platforms have to get better control over that but in ways that are transparent and respectful of free speech precepts.

MR. GILL: Well I'd encourage folks to check out the book. It's "Dare to Speak: Defending Free Speech for All." Suzanne, great to talk to you as always, and we'll hand it back to The Washington Post.

MS. NOSSEL: Thanks so much, Sam.

[Video plays]

MS. SELLERS: Welcome back to Washington Post Live. I'm Frances Stead Sellers. I'm glad to welcome now two experts, legal experts, in online content regulation. Mary Anne Franks is from the University of Miami and she works on cybersecurity issues, cyber civil liberty issues. Daphne Keller is from Stanford's Cyber Policy Center, and she was formerly the assistant general counsel at Google.
Mary Anne and Daphne, welcome to you both.

MS. FRANKS: Thank you.

MS. KELLER: Thanks.

MS. SELLERS: Delighted to have you. I'm looking forward to an interesting conversation with you both.
So, I'd like to one of the conversations close to the end of my conversation with President Bollinger, on Section 230. Mary Anne, perhaps you can start by taking us back, explaining that 1990s law, and why the president objects to it so strongly.

MS. FRANKS: Well, the first part is a little bit more complicated than the second. So, the first part is in 1996 the Internet is a fairly new medium, and the story, at least the perceived story, is that the concern was that if you regulated this industry too much that you would end up choking this really wonderful new opportunity for people to communicate and to truly enforce the principles of free speech. And so, this law was, at least, again, according to the conventional narrative, passed as a way of saying let's kind of have a hands-off approach to

these platforms. Let them have their own sort of abilities to assess for themselves what kind of content should be promoted on their platforms, and see what happens.
And you could say, of course, that really what was going on in 1996 was either this, either a kind of moment where government officials were really very prescient to know that the Internet was going to be so important, and took the right steps to ensuring that government regulation wouldn't interfere with it, or you could say that this was another example of the government recognizing there were powerful commercial and other interests at stake in the Internet and that providing this extremely broad shield was going to do what those kinds of protections tend to always do, which is to protect the most powerful and to really excuse people from the negative consequences of their actions.
But regardless of how we think it was originally intended, what we've got today is a law that has been really interpreted to make sure that these companies have no incentive to deal with the negative consequences of their patterns of behavior, other than perhaps public pressure, which can be powerful if we have a functioning society, but otherwise not really facing any kind of negative pressures, at least in the legal sense, for the kinds of conduct and information and communication that happens on these platforms.
And then you get to President Trump, who is opposed to Section 230, as you might expect not because he's principled or because he cares about either free speech or about communications generally, or principles generally, but is upset because he thinks that the social media companies aren't properly deferential to him. So he is taking the position that Section 230 is not making it as good for him as he would like it to be, in terms of being able to promote whatever kinds of information or disinformation he wants to promote, no matter who he wants to harass, or how much he wants to lie, or how much he wants to spread really deadly, deadly misinformation and disinformation. He wants the ability, essentially, to commandeer these social media platforms and have them become basically propaganda outlets and no more. And so, it's--

MS. SELLERS: I'd like to turn to Daphne on that one and ask about the implications of the president's executive order for free speech, and whether you believe that conservative voices are being tamped down unfairly.

MS. KELLER: Sure. Well, that second question is pretty hard to answer. You know, there is no meaningful data out there suggesting that the conservative bias narrative is true and that conservatives are being disproportionately silenced. On the other hand, there's just not very good data at all.
And so, it's not particularly surprising that lots and lots of groups across the political spectrum think that they are being uniquely penalized. You hear complaints from Black Lives Matter, for example, suggesting that maybe African American speakers are being disproportionately penalized. So, this this concern that sort of the gatekeepers of our most important discussions might be putting the thumb on the scales in a way we don't like, isn't really unique to conservatives.
But what is unique to conservations right now is political power. And so, we see things like President Trump's executive order in June, and following up on that the draft legislation proposed by the Justice Department just a couple of weeks ago, and similar legislation proposed by legislators, including Lindsey Graham. And, you know, what that legislation would do--and here I very much agree with Mary Anne's description--is effectively sort of try to dictate new speech policies to platforms, telling them what content, what user speech they

can take down without worrying about liability, and what speech they might want to leave up for fear of risking liability.
The complicated thing, though, is that a lot of this speech is what you might call "lawful but awful." It's speech that many, many people disapprove of on moral grounds or on policy grounds--disinformation about medical issue or about elections, hate speech, things that Congress can't regulate because of the First Amendment, or at least because of the First Amendment as interpreted by courts now--but that many people want taken down by platforms. And so, in this "lawful but awful" category, right now platforms have extremely broad discretion to take down whatever they decide violates their policies and not face lawsuits from the people whose content they took down. That's part of CDA 230.
What would change under the proposals from the Justice Department and Senator Graham is that there is sort of an enumerated list of government-approved reasons for taking down lawful but awful speech. Platforms can safely take down pornography. They can safely take down advocacy of terrorism or, you know, barely legal harassment. But what's conspicuously missing from that list is things like white nationalism, hate speech, organizing the Charlottesville rally, electoral disinformation. Those are things that platforms can safely take down now, but if these proposals pass, they would not be safe taking those things down and they would face new lawsuits.

MS. SELLERS: So just to go back to Mary Anne on that point, I think you've written that in fact-checking Trump's tweets that Twitter was exercising its own First Amendment rights as a sort of counter-speech. Can you elaborate on that a little bit for me?

MS. FRANKS: Certainly. This is one of the things that tends to get lost sometimes in these conversations about social media platforms is that they are private companies that have their own powers of the First Amendment to speak. And particularly when a social media platform decides to add its own warnings, or when it wants to promote statements that say this is disinformation or provide its own resources to say here is better speech, that is sort of a classic example of counter-speech. If you want to try to speak back to bad speech, one of the classic ways that's been recognized by the First Amendment doctrine that we have is to speak back. And as a private actor, Twitter has that power, as their own First Amendment protected liberty, to speak back.
And so, the particular irony of the complaints being made about Twitter finally, very belatedly, taking some very modest steps against rampant disinformation or other harmful content, is that the criticism of them for doing that is basically criticism of free speech itself.

MS. SELLERS: Daphne, you referred a few minutes ago to some of the legislative proposals out there. Just briefly give me a sense of the breadth of those proposals, and I'm not asking you to have a crystal ball but what do you foresee happening? What would you predict at this point?

MS. KELLER: Ask me again in a month, or maybe two months.

MS. SELLERS: Good answer.

MS. KELLER: You know, the outcome of this election is really determinative of so many things. It's certainly determinative of directions in this space. You know, both President Trump and former Vice President Biden have said that they want to repeal CDA 230. I think

that when Biden says that it is a proxy for something much more nuanced, and when President Trump says that, maybe it isn't.
But, you know, as of now there, I think, 17 bills that have been introduced over the past year--I tweeted a list of them yesterday so you can find the list if you're interested--from both sides of the aisle, often seeking conflicting outcomes. You know, a Democratic proposal is often seeking to make platforms take down more content. Republican proposals often seeking to make them take down less content. Many of them are sort of political theater and don't have much future, but some of them have some traction, including a law called the EARN IT Act, which sounds really good. It is targeting very serious problems with child sexual abuse material, but is doing so by introducing a set of rules that are very, very poorly thought through. So that, unfortunately, is one that has relatively more traction.
There is one bipartisan bill from Senators Schatz and Thune that's probably the most nuanced attempt to actually get into the operational questions of how do platforms take down content and what rules do we want to set so that they take down the right content rather than just taking down any content that somebody alleges is illegal. Because a big problem that we know crops up in notice-and-takedown systems, which is what we would have absent CDA 230, is that they are abused. People send in false allegations to try to silence the speech of people they disagree with or try to cut down traffic to commercial competitors.
There are really outrageous examples, like the government of Ecuador using bogus copyright complaints to silence critical journalism and take down videos of police brutality. We know that there's a big problem with platforms erring on the side of taking down important and lawful speech if there aren't sort of procedural rules in the law to try to correct for that.
And I think we should be looking for, to the extent that there is CDA 230 change, we should be looking for proposals that do pay attention to those operational details, and don't just say, okay, we're eliminating CDA 230 entirely. It's a free for all. Or everybody be reasonable, or everybody don't be negligent, and impose sort of fuzzy standards that don't tell platforms what to do.

MS. SELLERS: Mary Anne, in terms of self-regulation, Facebook now has its "Supreme Court" of content. It's an international group. Tell me whether you think that's a good thing, how you think it's working. Is this the way ahead?

MS. FRANKS: I think it's a very telling thing, that what you have on the part of Facebook is, first of all, the adoption of this kind of quasi legal body, this quasi legal language, which is part of why, arguably, we've gotten into this mess to begin with, the fact that Facebook thinks of itself as a kind of legislative body or thinks of itself as a quasi-legal institution when, in fact, it is not. So, I think that that's not helpful in the sense that it kind of contributes to this idea that Facebook is that kind of entity.
But it's also ironic that, of course, what Facebook is doing here is appointing its own boards for oversight, and that tells you a lot. It doesn't mean they can't do good work. It doesn't mean that they're not going to get some very valuable information from some very deeply sensitive and nuanced thinkers, but it's not at all a response to what is actually happening when it comes to the deep problems with this industry. And that is to say what you really need is some kind of objective measure of what is going on in these platforms and what's going wrong. So, while it's, in some ways, a good sign that you see that Facebook and other companies are acknowledging that they have problems and that they need to have experts

in the room, this is kind of a backwards approach. That's the kind of thinking they should have been doing before these platforms were rolled out, before they add features like live streaming, before they allow people to communicate instantaneously without any way of dealing with the aftermath.
So, all of this, I'd say, is really too little, too late. It may make for some less bad practices in the future but it's not going to stem the tide of--it's really just not going to get us out of the information dystopia that we're in right now.

MS. SELLERS: That very phrase, "too little, too late" takes me back to Daphne. I had a question for you about news yesterday that Facebook is stepping up efforts to clamp down on QAnon. Is that too little, too late, or do you see it as a promising step?

MS. KELLER: A little bit of each. You know, I think Facebook has made a lot of missteps. At the same time, I have some sympathy for them. They are in a situation where no matter what they do with very politically contentious speech, about 50 percent of very powerful people in Washington will get angry with them.
And so that puts them in a situation where there's one question about what's the right thing to do, and, you know, many of us have strong opinions about that, and another question about what will be the real-world regulatory consequences of what they do? And we know from Trump's executive order that sometimes the real-world consequences of not doing what powerful people in government want you to do can be very real. You know, it can be a directive for the Justice Department to try to promote new legislation against you. It can be a directive, as in that order for the federal government to look into maybe not running any ads with you anymore because it disapproves of your editorial policy.
And so, I think a larger problem that we should be thinking about here is not just what should platforms be doing as an ethnical matter, but how should government be using its power? Like is it appropriate for government actors to effectively try to strong-arm platforms to adopting particular editorial policies that are the government's preference but that override, as Mary Anne was saying, the First Amendment rights of the platforms themselves to set their own editorial policies.

MS. SELLERS: Mary Anne, you're an expert on cyber civil liberties. You've done work on cyber bullying, harassment, revenge porn. So, should Section 230 be used as a way of reining in this sort of content?

MS. FRANKS: Well, at the moment what Section 230 is doing, you know, in the worst instance, is it's actually encouraging this kind of content, and that is something that I think we're not grappling with. So, it isn't just a question of should we repeal, how should we repeal it, it's I think we have yet, really, in a broad sense, understood and confronted the fact that the reason why these things exist in the form that they do is because for 20 years this industry has essentially had a blank check. So, there's no problem that we could really point to today, whether it's revenge porn or harassment or medical misinformation, that can't be attributed in some ways to these tech platforms themselves and their irresponsibly when they were rolling out their services and their platforms.
So, to the extent that Section 230 is continuing that status quo, and importantly here, I think, to keep in mind, is that this a status quo that is devasting for free speech. We can't separate these things. When people have to worry that they are going to be attacked online, that their

private information is going to be posted publicly, or that they're going to get death threats, or that they're going to become a target by an online mob, they can't speak freely.
So, there's no way to separate out these issues from the question of preserving free speech. We always have to think about free speech in terms of who is getting to speak, and if what you have, whether it's through government channels or through private channels, if all that you're really getting is domination by the same forces that have always dominated the channels of communication, we haven't achieved anything good in terms of our free speech principles.
So, can Section 230 do something about that? Yes, because right now it's serving as the excuse that a lot of these companies have to not do anything. If there isn't any kind of legal responsibility--and I'm overstating it slightly. There's some, but if there's not much legal liability, if there's very little chance that any of these companies ever have to take responsibility for the kinds of harm that are being facilitated on their platforms and services, we have to ask ourselves what possibly incentive they have to do anything about it, other than bad P.R.
So, I think that the question here has to be how can we modify Section 230 to make it what it was allegedly supposed to be in 1996. There's a part of the title of Section 230 that calls it the "good Samaritan section," which, if you think about what that means in any other context, a good Samaritan is someone who doesn't have a duty of care, who decides that they're going to try to help, regardless, and if they do try to help then they're not going to be sued for their efforts.
We should make Section 230 into a proper good Samaritan law, which would mean, first of all, that it can't apply to platforms that do have a duty of care, at least not to allow for people to be threatened and harassed and have their lives ruined on these platforms and services, and make it so that that immunity attaches to that idea, that if you don't have a duty of care and you are gratuitously doing good, or attempting to do good for someone, to try to prevent or address injury, then you shouldn't be on the hook for any kind of litigation that comes out of that. And apart from that they shouldn't be protected.

MS. SELLERS: Thank you. Daphne--

MS. KELLER: I'd like to jump in on that.

MS. SELLERS: I was going to ask you to address that from a company point of view, since you've been assistant general counsel for Google. So, if you could address that issue. We haven't got many minutes left, but please do take it up, Daphne.

MS. KELLER: Well, I certainly can't represent the company point of view. I left Google in 2015. But I think many people would characterize the way CDA 230 works quite differently. It was explicitly designed as a law to encourage and enable platforms to go beyond what the law requires and to have moderation policies for all of this lawful-but-awful speech that we're concerned with now.
And so, the freedom that platforms have to enforce policies against hate speech and against disinformation is directly rooted in CDA 230. This was Congress' intention. They wanted to ensure that platforms would be able to do this.
And so, I think as we think about is it possible to change CDA 230 in a way that improves incentives, the question is whether we risk taking away the incentives the law gives them now and the freedom that the law gives them now to go out and do the moderation that we

are seeing. I have yet to see a concrete proposal that would enable and encourage platform content moderation without risking exposing them to liability for undertaking that very moderation, and essentially running into what's called the moderator's dilemma, where because the platform is carrying out due diligence, because it is acting more like an editor, because it is engaging more with user content, courts decide that it faces liability, for whatever unlawful content gets accidentally left up.
And so, while I think at a high level it may sound appealing to say, well, you should have to do good things to maintain the immunity, in practice it's very hard to define a system that would actually achieve that more than CDA 230 already does.

MS. SELLERS: I'm going to finish with a very different question that you both need to answer very quickly. That is, if you could magically create a regulatory system, what would it look like? And again, a couple of sentences from each of you. That's all we've got time for. [Overlapping speakers]

MS. FRANKS: I would just say--

MS. KELLER: Go ahead.

MS. FRANKS: I would just say that it's not that hard to do. What we need to do is treat the tech industry essentially like other industries are treated, which is to say you have to absorb the consequences of your negative actions. So, if you are acting with deliberate indifference towards injurious conduct or content then you can be sued. It's not a bad thing for a company to worry about being used. That's how we get big companies, that are multibillion-dollar companies to care about the harm that they are causing to people. That harm is going to happen. That injury is happening right now. We are seeing the consequences of this every single day. And until we actually have a regulatory system that it tells these powerful companies, you have to take some responsibility for that, we're not going to achieve anything close to a functioning democracy or free speech principles.

MS. SELLERS: Mary Anne, thank you. And Daphne?

MS. KELLER: I would want to see a lot more transparency with companies disclosing more about what they are doing and when they are making mistakes, taking down the wrong content, taking down content in ways that have disparate impact, potentially, based on race, gender, considerations like that. And I would want to see a lot bigger role for courts. I think it is a problem if we open up new liability and then just pitch it to companies and say, "Here, you decide what to do, and you don't even have to tell us what it is, and you're going to do it in the face of fear of liability."
So, if we did want to make any changes it would be essential for there to be a role for courts in saying this is what's illegal and this is not what's illegal, and for companies' obligations to stem from real judicial determinations, not from whatever they decide in the back room.

MS. SELLERS: Mary Anne Franks, Daphne Keller, thank you very much for joining Washington Post Live today.

US Legislation on freedom of speech

First Amendment to the US Constitution

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

Communications Decency Act, 47 USC, Section 230, 1996

Sec. 230. Protection for private blocking and screening of offensive material
(a) Findings
The Congress finds the following:
(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
(b) Policy
It is the policy of the United States -
(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.
(c) Protection for "Good Samaritan" blocking and screening of offensive material
(1) Treatment of publisher or speaker
No provider or user of an interactive computer service shall be treated as the publisher or speaker of any
information provided by another information content provider. (2) Civil liability
No provider or user of an interactive computer service shall be held liable on account of -

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the
provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).
(d) Obligations of interactive computer service
A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.
(e) Effect on other laws
(1) No effect on criminal law
Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title,
chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.
(2) No effect on intellectual property law
Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property. (3) State law
Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.
(4) No effect on communications privacy law
Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.
(f) Definitions
As used in this section:
(1) Internet
The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.
(2) Interactive computer service
The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.
(3) Information content provider
The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.
(4) Access software provider
The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;
(B) pick, choose, analyze, or digest content; or
(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

Executive Order on Preventing Online Censorship
www.whitehouse.gov, May 28, 2020

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. Free speech is the bedrock of American democracy. Our Founding Fathers protected this sacred right with the First Amendment to the Constitution. The freedom to express and debate ideas is the foundation for all of our rights as a free people.

In a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators.

The growth of online platforms in recent years raises important questions about applying the ideals of the First Amendment to modern communications technology. Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square.

Twitter, Facebook, Instagram, and YouTube wield immense, if not unprecedented, power to shape the interpretation of public events; to censor, delete, or disappear information; and to control what people see or do not see.

As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy.

Online platforms are engaging in selective censorship that is harming our national discourse. Tens of thousands of Americans have reported, among other troubling behaviors, online platforms “flagging” content as inappropriate, even though it does not violate any stated terms of service; making unannounced and unexplained changes to company policies that have the effect of disfavoring certain viewpoints; and deleting content and entire accounts with no warning, no rationale, and no recourse.

Twitter now selectively decides to place a warning label on certain tweets in a manner that clearly reflects political bias. As has been reported, Twitter seems never to have placed such a label on another politician’s tweet. As recently as last week, Representative Adam

Schiff was continuing to mislead his followers by peddling the long-disproved Russian Collusion Hoax, and Twitter did not flag those tweets. Unsurprisingly, its officer in charge of so-called 'Site Integrity' has flaunted his political bias in his own tweets.

At the same time online platforms are invoking inconsistent, irrational, and groundless justifications to censor or otherwise restrict Americans' speech here at home, several online platforms are profiting from and promoting the aggression and disinformation spread by foreign governments like China. One United States company, for example, created a search engine for the Chinese Communist Party that would have blacklisted searches for "human rights," hid data unfavorable to the Chinese Communist Party, and tracked users determined appropriate for surveillance. It also established research partnerships in China that provide direct benefits to the Chinese military. Other companies have accepted advertisements paid for by the Chinese government that spread false information about China's mass imprisonment of religious minorities, thereby enabling these abuses of human rights. They have also amplified China's propaganda abroad, including by allowing Chinese government officials to use their platforms to spread misinformation regarding the origins of the COVID-19 pandemic, and to undermine pro-democracy protests in Hong Kong.

As a Nation, we must foster and protect diverse viewpoints in today's digital communications environment where all Americans can and should have a voice. We must seek transparency and accountability from online platforms, and encourage standards and tools to protect and preserve the integrity and openness of American discourse and freedom of expression.

Sec. 2. Protections Against Online Censorship. (a) It is the policy of the United States to foster clear ground rules promoting free and open debate on the internet. Prominent among the ground rules governing that debate is the immunity from liability created by section 230(c) of the Communications Decency Act (section 230(c)). 47 U.S.C. 230(c). It is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints.

Section 230(c) was designed to address early court decisions holding that, if an online platform restricted access to some content posted by others, it would thereby become a "publisher" of all the content posted on its site for purposes of torts such as defamation. As the title of section 230(c) makes clear, the provision provides limited liability "protection" to a provider of an interactive computer service (such as an online platform) that engages in "'Good Samaritan' blocking" of harmful content. In particular, the Congress sought to provide protections for online platforms that attempted to protect minors from harmful content and intended to ensure that such providers would not be discouraged from taking down harmful material. The provision was also intended to further the express vision of the Congress that the internet is a "forum for a true diversity of political discourse." 47 U.S.C. 230(a)(3). The limited protections provided by the statute should be construed with these purposes in mind.

In particular, subparagraph (c)(2) expressly addresses protections from "civil liability" and specifies that an interactive computer service provider may not be made liable "on account

of" its decision in "good faith" to restrict access to content that it considers to be "obscene, lewd, lascivious, filthy, excessively violent, harassing or otherwise objectionable." It is the policy of the United States to ensure that, to the maximum extent permissible under the law, this provision is not distorted to provide liability protection for online platforms that — far from acting in "good faith" to remove objectionable content — instead engage in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree. Section 230 was not intended to allow a handful of companies to grow into titans controlling vital avenues for our national discourse under the guise of promoting open forums for debate, and then to provide those behemoths blanket immunity when they use their power to censor content and silence viewpoints that they dislike. When an interactive computer service provider removes or restricts access to content and its actions do not meet the criteria of subparagraph (c)(2)(A), it is engaged in editorial conduct. It is the policy of the United States that such a provider should properly lose the limited liability shield of subparagraph (c)(2)(A) and be exposed to liability like any traditional editor and publisher that is not an online provider.

(b) To advance the policy described in subsection (a) of this section, all executive departments and agencies should ensure that their application of section 230(c) properly reflects the narrow purpose of the section and take all appropriate actions in this regard. In addition, within 60 days of the date of this order, the Secretary of Commerce (Secretary), in consultation with the Attorney General, and acting through the National Telecommunications and Information Administration (NTIA), shall file a petition for rulemaking with the Federal Communications Commission (FCC) requesting that the FCC expeditiously propose regulations to clarify:

(i) the interaction between subparagraphs (c)(1) and (c)(2) of section 230, in particular to clarify and determine the circumstances under which a provider of an interactive computer service that restricts access to content in a manner not specifically protected by subparagraph (c)(2)(A) may also not be able to claim protection under subparagraph (c)(1), which merely states that a provider shall not be treated as a publisher or speaker for making third-party content available and does not address the provider's responsibility for its own editorial decisions;

(ii) the conditions under which an action restricting access to or availability of material is not "taken in good faith" within the meaning of subparagraph (c)(2)(A) of section 230, particularly whether actions can be "taken in good faith" if they are:

(A) deceptive, pretextual, or inconsistent with a provider's terms of service; or

(B) taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard; and

(iii) any other proposed regulations that the NTIA concludes may be appropriate to advance the policy described in subsection (a) of this section.

Sec. 3. Protecting Federal Taxpayer Dollars from Financing Online Platforms That Restrict Free Speech. (a) The head of each executive department and agency (agency) shall review its agency's Federal spending on advertising and marketing paid to online platforms.

Such review shall include the amount of money spent, the online platforms that receive Federal dollars, and the statutory authorities available to restrict their receipt of advertising dollars.

(b) Within 30 days of the date of this order, the head of each agency shall report its findings to the Director of the Office of Management and Budget.

(c) The Department of Justice shall review the viewpoint-based speech restrictions imposed by each online platform identified in the report described in subsection (b) of this section and assess whether any online platforms are problematic vehicles for government speech due to viewpoint discrimination, deception to consumers, or other bad practices.

Sec. 4. Federal Review of Unfair or Deceptive Acts or Practices. (a) It is the policy of the United States that large online platforms, such as Twitter and Facebook, as the critical means of promoting the free flow of speech and ideas today, should not restrict protected speech. The Supreme Court has noted that social media sites, as the modern public square, "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017). Communication through these channels has become important for meaningful participation in American democracy, including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate. Cf. PruneYard Shopping Center v. Robins, 447 U.S. 74, 85-89 (1980).

(b) In May of 2019, the White House launched a Tech Bias Reporting tool to allow Americans to report incidents of online censorship. In just weeks, the White House received over 16,000 complaints of online platforms censoring or otherwise taking action against users based on their political viewpoints. The White House will submit such complaints received to the Department of Justice and the Federal Trade Commission (FTC).

(c) The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices in or affecting commerce, pursuant to section 45 of title 15, United States Code. Such unfair or deceptive acts or practice may include practices by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices.

(d) For large online platforms that are vast arenas for public debate, including the social media platform Twitter, the FTC shall also, consistent with its legal authority, consider whether complaints allege violations of law that implicate the policies set forth in section 4(a) of this order. The FTC shall consider developing a report describing such complaints and making the report publicly available, consistent with applicable law.

Sec. 5. State Review of Unfair or Deceptive Acts or Practices and Anti-Discrimination Laws. (a) The Attorney General shall establish a working group regarding the potential enforcement of State statutes that prohibit online platforms from engaging in unfair or deceptive acts or practices. The working group shall also develop model legislation for consideration by legislatures in States where existing statutes do not protect Americans from such unfair and deceptive acts and practices. The working group shall invite State Attorneys General for discussion and consultation, as appropriate and consistent with applicable law.

(b) Complaints described in section 4(b) of this order will be shared with the working group, consistent with applicable law. The working group shall also collect publicly available information regarding the following:

(i) increased scrutiny of users based on the other users they choose to follow, or their interactions with other users;

(ii) algorithms to suppress content or users based on indications of political alignment or viewpoint;

(iii) differential policies allowing for otherwise impermissible behavior, when committed by accounts associated with the Chinese Communist Party or other anti-democratic associations or governments;

(iv) reliance on third-party entities, including contractors, media organizations, and individuals, with indicia of bias to review content; and

(v) acts that limit the ability of users with particular viewpoints to earn money on the platform compared with other users similarly situated.

Sec. 6. Legislation. The Attorney General shall develop a proposal for Federal legislation that would be useful to promote the policy objectives of this order.

Sec. 7. Definition. For purposes of this order, the term “online platform” means any website or application that allows users to create and share content or engage in social networking, or any general search engine.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

UK Legislation on freedom of speech

Hate speech vs. free speech: the UK laws
www.theweek.co.uk, February 12, 2020

Swiss voters have backed a new law extending anti-racial discrimination legislation to cover sexual orientation.`

The Swiss government passed a law that specifically protects LGBTQ+ people from discrimination or hate speech in December 2018, but an alliance of right-wing parties opposed the change and sought a referendum to prevent it.

That referendum was held on Sunday, with 63.1% of the public voting in favour of the new law. Opposition campaigners had sought to frame it as a “gagging law” that infringed on rights to free speech.

Under the new legislation, those who “publicly degrade or discriminate” others on the basis of their sexual orientation could face a jail sentence of up to three years, although the law doesn’t cover private conversations such as between friends and family.

So where do UK courts stand on the issue of free speech versus hate speech?

What is the law on free speech?

Under Article 10 of the Human Rights Act 1998, “everyone has the right to freedom of expression” in the UK. But the law states that this freedom “may be subject to formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”.

Those restrictions may be “in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

What is the law on hate speech?

A number of different UK laws outlaw hate speech. Among them is Section 4 of the Public Order Act 1986 (POA), which makes it an offence for a person to use “threatening, abusive or insulting words or behaviour that causes, or is likely to cause, another person harassment, alarm or distress”. This law has been revised over the years to include language that is deemed to incite “racial and religious hatred”, as well as “hatred on the grounds of sexual orientation” and language that “encourages terrorism”.

The Terrorism Act 2006 criminalises “encouragement of terrorism” which includes making statements that glorify terrorist acts.

Section 127 of the Communications Act 2003 makes it illegal to send a message via a public electronic communications network that is considered grossly offensive, or of an indecent, obscene or menacing character.

“This offence is incredibly broad and has been used to address jovial, albeit misjudged communications – it carries huge implications for freedom of expression,” says justice and freedom campaign group Liberty.

In October 2018, the Law Commission announced that it would conduct a wide-ranging review into hate crime to explore how to make current legislation more effective and to consider if there should be additional protected characteristics such as misogyny and age. But 16 months later, the project is still in pre-consultation phase.

The move came after research revealed “overwhelming public support” for a two-year pilot scheme that saw Nottinghamshire Police become “the first force in the UK to record public harassment of women – such as groping, using explicit language, or taking unwanted photographs – as well as more serious offences, such as assault, as misogyny hate crimes”, reports The Guardian.

But police chiefs insist the current law on hate speech is sufficient and does not need extending.

“In terms of misogyny, we have hate crime in legislation currently. We have aggravating factors, racially, or race hate. We have specific statutes and offences, we don’t have those in relation to gender-related crime or misogyny and, in my view, we should be focusing on the things that the public tell me they care about most,” Metropolitan Police commissioner Cressida Dick told BBC Radio 4’s Today programme.

Why is the debate so controversial?

Criminalising the incitement of violence or threats “can be seen to be a justifiable limit on freedom of expression”, says Liberty. What is controversial “is the criminalisation of language (or behaviour) which may be unpleasant, may cause offence but which is not inciting violence, criminality etc”, the organisation adds.

Writing for Prospect magazine, Hugh Tomlinson QC argues that the problem lies with the lack of a UK constitution. “Free speech does not, historically, have the same primacy under English law [as the US],” he explains.

“A proper ‘written’ constitution sets limits on the powers of the institutions of government, but the loose and flexible set of rules that is described as Britain’s unwritten constitution sets no such limits.”

Writing in The Spectator, Lionel Shriver says the UK should follow the US playbook.

“Because the alternative is what the UK has now, and it will only get worse: government systematically legislating not just what we say but what we may believe.”

Hot button issues

Social media censorship threatens to widen rift in U.S.
The Boston Herald, October 19, 2020

This week, social media giants Twitter and Facebook proved that their monopolistic malpractice is a big problem for politics and culture in America.

When the New York Post published a story about suspicious emails that had been allegedly discovered between Hunter Biden and officials at the Ukrainian energy company Burisma, where he was paid tens of thousands of dollars a month to serve on the board, the revelations were remarkable.

In one alleged missive from 2015, a Burisma adviser named Vadym Pozharskyi thanked the vice president's son "for inviting me to DC and giving an opportunity to meet your father and spent (sic) some time together. It's realty (sic) an honor and pleasure."

The Biden campaign has insisted that no such meeting was found to be on the official schedule, but they do not outright dispute the content of the emails or deny that an informal meeting could have occurred.

A year earlier, right after the younger Biden had been added to the company's board, Pozharskyi asked him for "advice on how you could use your influence to convey a message/signal" to put a stop to an investigation into the company. Later, Vice President Biden bragged he had been able to get the prosecutor fired.

The trove of correspondence was passed on to the Post by Rudy Giuliani who has been loudly trying to draw connections of corruption between interests in Ukraine and Joe Biden via his son, Hunter.

According the the New York Post, the emails were recovered from a computer that was dropped off at a Delaware repair shop and never retrieved. It is not known who dropped the machine off.

What makes all this most newsworthy is that Joe Biden, the Democratic nominee for president, has been denying that he'd ever taken part in his son's business overseas or that he was even aware of what that business was.

These emails go directly to refuting that and suggest that Biden was used by his son for payment in exchange for influence.

Thus, the story ran and was distributed through social media until prominent, anti-Trump users demanded that it stop.

Kyle Griffin, an MSNBC producer with more than 900,000 followers tweeted, "No one should link to or share that NY Post 'report'. You can discuss the obvious flaws and unanswerable questions in the report without amplifying what appears to be disinformation."

Andy Stone, who works in the communications department at Facebook but has a long resume featuring jobs with various Democratic organizations was also containing the story. “While I will intentionally not link to the New York Post,” Stone tweeted, “I want be clear that this story is eligible to be fact checked by Facebook’s third-party fact checking partners. In the meantime, we are reducing its distribution on our platform.”

By the afternoon, Twitter started blocking sharing of the article in any form, warning users away from the link, and locking prominent accounts that shared it, including that of the New York Post itself, Press Secretary Kayleigh McEnany and the Trump campaign account @teamtrump.

In doing so, they turned a shady October surprise leak that would have been ignored by many in the mainstream into a major story that is reverberating through the country. What, many Americans wonder, do these massive tech companies want so badly to hide from them?

The selective censorship by social media monopolies threatens to divide our nation to a degree we have never seen before.

Hong Kong and the University's Free Speech Responsibility
The Chicago Maroon, by Devin Haas, October 19, 2020

In order to stay true to the Chicago Principles, the University must work actively to protect faculty and students' free speech in and outside of Hong Kong

The University of Chicago has a long, proud commitment to freedom of speech. After the Communist Party USA's presidential candidate called for the violent abolition of capitalism on campus in 1935, the University president defended the "seditious" speech before a special session in the Illinois Senate. More recently, the University administration generated controversy and earned plaudits for rejecting "safe spaces" and promoting "Chicago Principles" of free expression. The report that outlines these principles states, "the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it."

However, months into the most alarming restriction of campus free speech in decades, the University administration has not lifted a finger or said a peep. If it really does care about the freedom of speech, the University must do more than end its silence. It must act decisively and again lead academia on the issue.

After a year of protests, the People's Republic of China imposed a new national security law on Hong Kong this June. The law harshly penalizes broadly defined crimes including "sedition, subversion, terrorism, and colluding with foreign forces" and advocating "secession" from mainland China. Most disquietingly, the law's Article 38 asserts extraterritorial jurisdiction to prosecute activism and offenses "committed against the Hong Kong Special AdministrativeRegion from outside the Region by a person who is not a permanent resident of the Region."

In other words, the law applies to everybody inside Hong Kong and out. It applies to you.

Beijing has a history of seeking the extradition of non-Chinese citizens to China for criminal prosecution. Students at American universities are not exempt from its pursuits and crackdowns. Just this year, a 20-year-old University of Minnesota student was sentenced to six months of imprisonment upon returning to China for tweets posted while in the U.S. The tweets were deemed to portray a "national leader" in an unflattering light because they likened him to a certain banned cartoon bear and "created a negative social impact."

Hong Kong student activists as young as 16 have already been arrested under the national security law for social media posts that called for "regaining [Hong Kong's] right of self-determination." Hong Kong authorities have also released the arrest warrant for Samuel Chu—a Hong Kong-born activist and community organizer who has lived in the U.S. since 1990 and has American citizenship.

Many UChicago students unable to return to Hyde Park are currently taking classes remotely from Hong Kong and mainland China. As Zoom classes are recorded and stored as files, and many classes require blog posts, there is a real risk of immediate arrest for remarks made in class discussions and writing. While this risk is most acute for mainland Chinese

and Hong Kongstudents, it exists for any and all students and faculty who may one day visit Hong Kong.

Classes at other universities now carry labels to alert students that they will cover "material considered politically sensitive by China," and their professors are experimenting with blind grading, codes in place of individual names, anonymous online chats, and allowing students to opt-out of discussions without an impact on their grade.

UChicago's Tom Ginsburg, Leo Spitz Professor of International Law and Professor of Political Science, has a regional specialty in East Asia and has written specifically about the national security law. He confirmed that he has received no guidance from the University administration on what privacy precautions he should take. Ginsburg wrote to me, "I do think that, in our era of remote attendance, those of us who teach relevant subjects should be aware if we have students who are physically located in Chinese territory, including Hong Kong, that might be at risk." He supports giving such students the option to opt-out of discussions that may violate local law and uses blind grading.

The University of Chicago must uniformly adopt the measures advised by the Association for Asian Studies and the additional suggestions of Asia Society scholars. While some may be, and have already been, adopted by individual faculty, technology policies and video software are university-wide concerns.

Zoom's cooperation with mainland Chinese authorities is worrying, and the University must further inquire into which "local laws" its technology partners comply with to ensure that student and faculty data are secure. The collection of student and staff data of any kind must be minimized, and data storage must be decentralized. Overreliance on Zoom is dangerous; having multiple and redundant software systems would further decentralize and mitigate the risk of one company deciding to comply with Chinese law in ways that jeopardize data security and student safety.

Unless the University takes decisive action soon, an arguably more dangerous threat to academic freedom will worsen: self-censorship.

Author George Packer wrote, "Fear breeds self-censorship, and self-censorship is more insidious than the state-imposed kind because it's a surer way of killing the impulse to think, which requires an unfettered mind." At a time when U.S.-China relations have deteriorated to their worst state in decades, we cannot afford to suspend rigorous inquiry and research into the affairs of the world's most populous country. Students and professors must be able to continue honest, candid, and complete discussions about Hong Kong and mainland China in line with the Chicago Principles of which the University administration is so proud.

Ginsburg emailed me, "The purpose [of uncensored academic discussion] is not advocacy but analysis." I think it can be both. When students are arrested for social media posts and pro-democracy professors are fired for dissidence, to resist self-censorship and forthrightly analyze the "politically sensitive" are acts of solidarity. When under the shadow of totalitarian censorship, studying and speaking freely are not neutral.

Good people can disagree over whether Steve Bannon should speak on campus. But surely all can agree that being imprisoned for a Winnie the Pooh tweet is as unjust as it is absurd.

Until the University administration rises to the challenge of ensuring its community's safety, let us continue to speak, study, think, and tweet freely and merrily. We must.

Everything to know about the political food fight over Section 230
www.fortune.com, by Danielle Abril, October 20, 2020

Regulators are increasingly squeezing social media companies over a law that protects them from liability from the hate, hoaxes, and violence that their users post.

On Thursday, Federal Communications Commission Chairman Ajit Pai said he plans to review Section 230, as the law is known, to "clarify" the law to determine whether it should be reined in or eliminated.

For Facebook and Twitter, the law is critical to how they operate. Without the legal protection, the companies would have to further restrict and police content on their services—at a huge cost considering the millions of posts in question annually.

"Social media companies have First Amendment right to free speech," Pai said in a statement. "But they do not have a First Amendment right to special immunity denied to other media outlets."

Here's what you need to know about the fight over Section 230.

What Section 230's opponents say

Lawmakers from both political parties have pushed for increased regulation of social media companies. Republicans accuse Twitter and Facebook of unfairly censoring conservative views while Democrats complain that they fail to control misinformation and hate speech.

In September, the Justice Department unveiled proposed changes to Section 230. First, it recommended new language that would hold online services accountable for "unlawfully" censoring speech. Second, the agency wants to crack down on services for "knowingly" facilitating online criminal activity, by making them subject to civil suits, especially related to child sexual abuse and terrorism.

Earlier this year, lawmakers introduced several bills that could affect Section 230. One, proposed in March, would remove some of the legal protections for companies while another, in June, is somewhat less aggressive.

The federal government put Section 230 in its sights after President Trump signed an executive order in May requesting that the FCC and the Federal Trade Commission eliminate legal protections for social media companies. His move came after Twitter had added new warning labels to some of his tweets because he had included false information.

U.S. Supreme Court Justice Clarence Thomas added fuel to the fire by suggesting that online services have benefited from "sweeping protections" that go beyond the actual text of the law. Thomas said the court should consider narrowing what the law covers if there's a relevant case the justices can review.

What Section 230's supporters say

Tech industry supporters say Section 230 is critical for people to express themselves freely online. Instead of reducing misinformation, they say the repealing the law will silence users and cause companies to go overboard in policing speech on their services.

U.S. Sen. Ron Wyden, a Democrat from Oregon who co-authored Section 230 pointed to yet another consequence of changing the law: Companies would be reluctant to remove and label misinformation, which he suggested plays into Trump's hand.

"Without Section 230, sites would have strong incentives to go one of two ways," he said in a CNN op-ed in June. "Either sharply limit what users can post, so as to avoid being sued, or to stop moderating entirely. ... I think we would be vastly worse off in either scenario."

What’s fueling the fight?

Lawmakers had hoped to take swift action on Section 230 because of the upcoming election and the various related problems on social media.

Some lawmakers are upset by several recent actions social media companies have taken that clamp down on free speech, while others think the companies are doing far too little far too late. Over the past several months, Facebook and Twitter have increasingly been cracking down on misinformation and adding new rules banning QAnon conspiracy theories and prohibiting Holocaust denial. They've also tightened restrictions on voter misinformation and intimidation, labeling and in some cases removing posts aimed at deterring people from voting.

Meanwhile, Twitter and Facebook both targeted a recent New York Post article that links Biden to corruption in Ukraine. Twitter blocked the article only to later reverse its decision after receiving blowback from conservatives who suggested the move censored important information that could sway voters. Facebook said it reduced the sharing of the article in order to allow third-party fact checkers to review the content for accuracy.

Despite the new rules and extra vigilance, the companies are struggling to keep up with the number of problematic posts. Conspiracy theories and misinformation continue to go viral across the services.

The myth of the free speech crisis
The Guardian, by Nesrine Malik, September 3, 2019

How overblown fears of censorship have normalised hate speech and silenced minorities.

When I started writing a column in the Guardian, I would engage with the commenters who made valid points and urge those whose response was getting lost in rage to re-read the piece and return. Comments were open for 72 hours. Coming up for air at the end of a thread felt like mooring a ship after a few days on choppy waters, like an achievement, something that I and the readers had gone through together. We had discussed sensitive, complicated ideas about politics, race, gender and sexuality and, at the end, via a rolling conversation, we had got somewhere.

In the decade since, the tenor of those comments became so personalised and abusive that the ship often drowned before making it to shore – the moderators would simply shut the thread down. When it first started happening, I took it as a personal failure – perhaps I had not struck the right tone or not sufficiently hedged all my points, provoking readers into thinking I was being dishonest or incendiary. In time, it dawned on me that my writing was the same. It was the commenters who had changed. It was becoming harder to discuss almost anything without a virtual snarl in response. And it was becoming harder to do so if one were not white or male.

As a result, the Guardian overhauled its policy and decided that it would not open comment threads on pieces that were certain to derail. The moderators had a duty of care to the writers, some of whom struggled with the abuse, and a duty of care to new writers who might succumb to a chilling effect if they knew that to embark on a journalism career nowadays comes inevitably with no protection from online thuggery. Alongside these moral concerns there were also practical, commercial ones. There were simply not enough resources to manage all the open threads at the same time with the increased level of attention that was now required.

In the past 10 years, many platforms in the press and social media have had to grapple with the challenges of managing users with increasingly sharp and offensive tones, while maintaining enough space for expression, feedback and interaction. Speech has never been more free or less intermediated. Anyone with internet access can create a profile and write, tweet, blog or comment, with little vetting and no hurdle of technological skill. But the targets of this growth in the means of expression have been primarily women, minorities and LGBTQ+ people.

A 2017 Pew Research Center survey revealed that a “wide cross-section” of Americans experience online abuse, but that the majority was directed towards minorities, with a quarter of black Americans saying they have been attacked online due to race or ethnicity. Ten per cent of Hispanics and 3% of whites reported the same. The picture is not much different in the UK. A 2017 Amnesty report analysed tweets sent to 177 female British MPs. The 20 of them who were from a black and ethnic minority background received almost half the total number of abusive tweets.

The vast majority of this abuse goes unpunished. And yet it is somehow conventional wisdom that free speech is under assault, that university campuses have succumbed to an epidemic of no-platforming, that social media mobs are ready to raise their pitchforks at the most innocent slip of the tongue or joke, and that Enlightenment values that protected the right to free expression and individual liberty are under threat. The cause of this, it is claimed, is a liberal totalitarianism that is attributable (somehow) simultaneously to intolerance and thin skin. The impulse is allegedly at once both fascist in its brutal inclinations to silence the individual, and protective of the weak, easily wounded and coddled.

This is the myth of the free speech crisis. It is an extension of the political-correctness myth, but is a recent mutation more specifically linked to efforts or impulses to normalise hate speech or shut down legitimate responses to it. The purpose of the myth is not to secure freedom of speech – that is, the right to express one's opinions without censorship, restraint or legal penalty. The purpose is to secure the licence to speak with impunity; not freedom of expression, but rather freedom from the consequences of that expression.

The myth has two components: the first is that all speech should be free; the second is that freedom of speech means freedom from objection.

The first part of the myth is one of the more challenging to push back against, because instinctively it feels wrong to do so. It seems a worthy cause to demand more political correctness, politeness and good manners in language convention as a bulwark against society's drift into marginalising groups with less capital, or to argue for a fuller definition of female emancipation. These are good things, even if you disagree with how they are to be achieved. But to ask that we have less freedom of speech – to be unbothered when people with views you disagree with are silenced or banned – smacks of illiberalism. It just doesn't sit well. And it's hard to argue for less freedom in a society in which you live, because surely limiting rights of expression will catch up with you at some point. Will it not be you one day, on the wrong side of free speech?

There is a kernel of something that makes all myths stick – something that speaks to a sense of justice, liberty, due process and openness and allows those myths to be cynically manipulated to appeal to the good and well-intentioned. But challenging the myth of a free speech crisis does not mean enabling the state to police and censor even further. Instead, it is arguing that there is no crisis. If anything, speech has never been more free and unregulated. The purpose of the free-speech-crisis myth is to guilt people into giving up their right of response to attacks, and to destigmatise racism and prejudice. It aims to blackmail good people into ceding space to bad ideas, even though they have a legitimate right to refuse. And it is a myth that demands, in turn, its own silencing and undermining of individual freedom. To accept the free-speech-crisis myth is to give up your own right to turn off the comments.

At the same time that new platforms were proliferating on the internet, a rightwing counter-push was also taking place online. It claimed that all speech must be allowed without consequence or moderation, and that liberals were assaulting the premise of free speech. I began to notice it around the late 2000s, alongside the fashionable atheism that sprang up after the publication of Richard Dawkins's The God Delusion. These new atheists

were the first users I spotted using argumentative technicalities (eg “Islam is not a race”) to hide rank prejudice and Islamophobia. If the Guardian published a column of mine but did not open the comment thread, readers would find me on social media and cry censorship, then unleash their invective there instead.

As platforms multiplied, there were more and more ways for me to receive feedback from readers – I could be sworn at and told to go back to where I came from via at least three mediums. Or I could just read about how I should go back to where I came from in the pages of print publications, or on any number of websites. The comment thread seemed redundant. The whole internet was now a comment thread. As a result, mainstream media establishments began to struggle with this glut of opinion, failing to curate the public discussion by giving into false equivalence. Now every opinion must have a counter-opinion.

I began to see it in my own media engagements. I would be called upon by more neutral outlets, such as the BBC, to discuss increasingly more absurd arguments with other journalists or political activists with extreme views. Conversations around race, immigration, Islam and climate change became increasingly binary and polarised even when there were no binaries to be contemplated. Climate change deniers were allowed to broadcast falsehoods about a reversal in climate change. Racial minorities were called upon to counter thinly veiled racist or xenophobic views. I found myself, along with other journalists, regularly ambushed. I appeared on BBC’s Newsnight to discuss an incident in which a far-right racist had mounted a mosque pavement with his car and killed one of the congregation, and I tried to make the point that there was insufficient focus on a growing far-right terror threat. The presenter then asked me: “Have you had abuse? Give us an example.” This became a frequent line of inquiry – the personalisation and provocation of personal debate – when what was needed was analysis.

It became common for me and like-minded colleagues to ask – when invited on to TV or radio to discuss topics such as immigration or Islamophobia – who was appearing on the other side. One British Asian writer was invited on to the BBC to discuss populist rage. When he learned that he would be debating Melanie Phillips – a woman who has described immigrants as “convulsing Europe” and “refusing to assimilate” – he refused to take part, because he did not believe the topic warranted such a polarised set-up. The editor said: “This will be good for your book. Surely you want to sell more copies?” The writer replied that if he never sold another book in his life as a result of refusing to debate with Melanie Phillips, he could live with that. This was now the discourse: presenting bigotry and then the defence of bigotry as a “debate” from which everyone can benefit, like a boxing match where even the loser is paid, along with the promoters, coaches and everyone else behind arranging the fight. The writer Reni Eddo-Lodge has called it “performing rage”.

Views previously consigned to the political fringes made their way into the mainstream via social and traditional media organisations that previously would never have contemplated their airing. The expansion of media outlets meant that it was not only marginalised voices that secured access to the public, but also those with more extreme views.

This inevitably expanded what was considered acceptable speech. The Overton window – the range of ideas deemed to be acceptable by the public – shifted as more views made their way from the peripheries to the centre of the conversation. Any objection to the airing of

those views would be considered an attempt to curtail freedom of speech. Whenever I attempted to push back in my writing against what amounted to incitement against racial or religious minorities, my opponents fixated on the free speech argument, rather than the harmful ramifications of hate speech.

In early 2018, four extreme-right figures were turned away at the UK border. Their presence was deemed "not conducive to the public good". When I wrote in defence of the Home Office's position, my email and social media were flooded with abuse for days. Rightwing media blogs and some mainstream publications published pieces saying my position was an illiberal misunderstanding of free speech. No one discussed the people who were banned, their neo-Nazi views, or the risk of hate speech or even violence had they been let in.

What has increased is not intolerance of speech; there is simply more speech. And because that new influx was from the extremes, there is also more objectionable speech – and in turn more objection to it. This is what free-speech-crisis myth believers are picking up – a pushback against the increase in intolerance or bigotry. But they are misreading it as a change in free speech attitudes. This increase in objectionable speech came with a sense of entitlement – a demand that it be heard and not challenged, and the freedom of speech figleaf became a convenient tool. Not only do free speech warriors demand all opinions be heard on all platforms they choose, from college campuses to Twitter, but they also demand that there be no objection or reaction. It became farcical and extremely psychologically taxing for anyone who could see the dangers of hate speech, and how a sharpening tone on immigration could be used to make the lives of immigrants and minorities harder.

When Boris Johnson compared women who wear the burqa to "letterboxes" and "bank robbers", it led to a spike in racist incidents against women who wear the niqab, according to the organisation Tell Mama, a national project which records and measures anti-Muslim incidents in the UK. Pointing this out and making the link between mockery of minorities and racist provocation against them was, according to Johnson's supporters, assailing his freedom of speech. The British journalist Isabel Oakeshott tweeted that if he were disciplined by his party for "perfectly reasonable exercise of free speech, something has gone terribly wrong with the party leadership", and that it was "deplorable to see [the Tory leadership] pandering to the whinings of the professionally offended in this craven way".

Free speech had seemingly come to mean that no one had any right to object to what anyone ever said – which not only meant that no one should object to Johnson's comments but, in turn, that no one should object to their objection. Free speech logic, rather than the pursuit of a lofty Enlightenment value, had become a race to the bottom, where the alternative to being "professionally offended" is never to be offended at all. This logic today demands silence from those who are defending themselves from abuse or hate speech. It is, according to the director of the Institute of Race Relations, "the privileging of freedom of speech over freedom to life".

Our alleged free speech crisis was never really about free speech. The backdrop to the myth is rising anti-immigration sentiment and Islamophobia. Free-speech-crisis advocates always seem to have an agenda. They overwhelmingly wanted to exercise their freedom of speech in order to agitate against minorities, women, immigrants and Muslims.

But they dress these base impulses up in the language of concern or anti-establishment conspiracism. Similar to the triggers of political-correctness hysteria, there is a direct correlation between the rise in free speech panic and the rise in far-right or hard-right political energy, as evidenced by anti-immigration rightwing electoral successes in the US, the UK and across continental Europe. As the space for these views expanded, so the concept of free speech became frayed and tattered. It began to become muddled by false equivalence, caught between fact and opinion, between action and reaction. The discourse became mired in a misunderstanding of free speech as absolute.

As a value in its purest form, freedom of speech serves two purposes: protection from state persecution, when challenging the authority of power or orthodoxy; and the protection of fellow citizens from the damaging consequences of absolute speech (ie completely legally unregulated speech) such as slander. According to Francis Canavan in Freedom of Expression: Purpose As Limit – his analysis of perhaps the most permissive free speech law of all, the first amendment of the US constitution – free speech must have a rational end, which is to facilitate communication between citizens. Where it does not serve that end, it is limited. Like all freedoms, it ends when it infringes upon the freedoms of others. He writes that the US supreme court itself "has never accepted an absolutist interpretation of freedom of speech. It has not protected, for example, libel, slander, perjury, false advertising, obscenity and profanity, solicitation of a crime, or 'fighting' words. The reason for their exclusion from first-amendment protection is that they have minimal or no values as ideas, communication of information, appeal to reason, step towards truth etc; in short, no value in regard to the ends of the amendment."

Those who believe in the free-speech-crisis myth fail to make the distinction between "fighting" words and speech that facilitates communication; between free speech and absolute speech. Using this litmus test, the first hint that the free speech crisis is actually an absolute speech crisis is the issues it focuses on. On university campuses, it is overwhelmingly race and gender. On social media, the free speech axe is wielded by trolls, Islamophobes and misogynists, leading to an abuse epidemic that platforms have failed to curb.

This free speech crisis movement has managed to stigmatise reasonable protest, which has existed for years without being branded as "silencing". This is, in itself, an assault on free expression.

What is considered speech worthy of protection is broadly subjective and depends on the consensual limits a society has drawn. Western societies like to think of their version of freedom of speech as exceptionally pristine, but it is also tainted (or tempered, depending on where you're coming from) by convention.

There is only one way to register objection of abhorrent views, which is to take them on. This is a common narcissism in the media. Free speech proponents lean into the storm, take on the bad guys and vanquish them with logic. They also seem, for the most part, incapable of following these rules themselves.

Bret Stephens of the New York Times – a Pulitzer prize-winning star columnist who was poached from the Wall Street Journal in 2017 – often flatters himself in this light, while falling

apart at most of the criticism he receives. For a man who calls for "free speech and the necessity of discomfort" as one of his flagship positions as a columnist, he seems chronically unable to apply that discipline to himself.

In his latest tantrum, just last week, Stephens took umbrage against a stranger, the academic David Karpf, who made a joke calling him a "metaphorical bedbug" on Twitter, as a riff on a report that the New York Times building was suffering from a bedbug infestation. (The implication was that Stephens is a pain and difficult to get rid of, just to kill the punchline completely.)

Stephens was alerted to the tweet, then wrote to Karpf, his provost, and the director of the School of Media and Public Affairs, where Karpf is a professor. He in effect asked to speak to Karpf's managers so that he could report on a man he doesn't know, who made a mild joke about him that would otherwise have been lost in the ether of the internet because – well, because, how dare he? The powerful don't have to suffer "the necessity of discomfort"; it's only those further down the food chain who must bear the moral burden of tolerance of abusive speech. Stephens's opponents – who include Arabs, whose minds Stephens called "diseased", and Palestinians, who are en masse one single "mosquito" frozen in amber – must bear it all with good grace.

Stephens has a long record of demanding respect when he refuses to treat others with the same. In response to an objection that the New York Times had published an article about a Nazi that seemed too sympathetic, he wrote: "A newspaper, after all, isn't supposed to be a form of mental comfort food. We are not an advocacy group, a support network, a cheering section, or a church affirming a particular faith – except, that is, a faith in hard and relentless questioning." He called disagreement "a dying art". This was particularly rich from someone who at one time left social media because it was too shouty, only to return sporadically to hurl insults at his critics.

In June 2017, Stephens publicly forswore Twitter, saying that the medium debased politics and that he would "intercede only to say nice things about the writing I admire, the people I like and the music I love".

He popped up again to call ex-Obama aide Tommy Vietor an "asshole" (a tweet he later deleted after it was flagged as inappropriate by the New York Times). In response to a tweet by a Times colleague (who had himself deleted a comment after receiving flack for it, and admitted that it had not been well crafted), Stephens said: "This. Is. Insane. And must stop. And there is nothing wrong with your original tweet, @EricLiptonNYT. And there is something deeply psychologically wrong with people who think there is. And fascistic. And yes I'm still on Twitter."

A dying art indeed. Stephens again deactivated his account after bedbug-gate, retreating to the safe space of the high security towers of the New York Times where, I am told, the bedbug infestation remains unvanquished.

Stephens is a promoter of the "free speech crisis" myth. It is one that journalists, academics and political writers have found useful in chilling dissent. The free-speech-crisis myth serves many purposes. Often it is erected as a moral shield for risible ideas – a shield that some

members of the media are bamboozled into raising because of their inability to look past their commitment to free speech in the abstract.

Trolling has become an industry. It is now a sort of lucrative contact sport, where insults and lies are hurled around on television, radio, online and in the printed press. CNN's coverage of the "Trump transition", after Donald Trump was elected as US president, was a modern version of a medieval freak show. Step right up and gawk at Richard Spencer, the Trump supporter and head of far-right thinktank the National Policy Institute, as he questions whether Jews "are people at all, or instead soulless golem". And at the black Trump surrogate who thinks Hillary Clinton started the war in Syria. And at Corey Lewandowski, a man who appeared on CNN as a political commentator, who appears to make a living from lying in the media, and who alleged that the Trump birther story, in which Trump claimed that Barack Obama was not born on US soil, was in fact started by Hillary Clinton.

In pursuit of ratings – from behind a "freedom of speech" figleaf, and perhaps with the good intention of balance on the part of some – many media platforms have detoxified the kind of extreme or untruthful talk that was until recently confined to the darker corners of Reddit or Breitbart. And that radical and untruthful behaviour has a direct impact on how safe the world is for those smeared by these performances. Trump himself is the main act in this lucrative show. Initially seen as an entertaining side act during his election campaign, his offensive, untruthful and pugnacious online presence became instantly more threatening and dangerous once he was elected. Inevitably, his incontinence, bitterness, rage and hatemongering, by sheer dint of constant exposure, became less and less shocking, and in turn less and less beyond the pale.

A world where all opinions and lies are presented to the public as a sort of take-it-or-leave it buffet is often described as "the marketplace of ideas", a rationalisation for freedom of expression based on comparing ideas to products in a free-market economy. The marketplace of ideas model of free speech holds that what is true factually, and what is good morally, will emerge after a competition of ideas in a free, unmoderated and transparent public discourse, a healthy debate in which the truth will prevail. Bad ideas and ideologies will lose out and wither away as they are vanquished by superior ones. The problem with the marketplace of ideas theory (as with all "invisible hand"-type theories) is that it does not account for a world in which the market is skewed, and where not all ideas receive equal representation because the market has monopolies and cartels.

But real marketplaces actually require a lot of regulation. There are anti-monopoly rules, there are interest rate fixes and, in many markets, artificial currency pegs. In the press, publishing and the business of ideas dispersal in general, there are players that are deeply entrenched and networked, and so the supply of ideas reflects their power.

Freedom of speech is not a neutral, fixed concept, uncoloured by societal prejudice. The belief that it is some absolute, untainted hallmark of civilisation is linked to self-serving exceptionalism – a delusion that there is a basic template around which there is a consensus uninformed by biases. The recent history of fighting for freedom of speech has gone from something noble – striving for the right to publish works that offend people's sexual or religious prudery, and speaking up against the values leveraged by the powerful to maintain

control – to attacking the weak and persecuted. The effort has evolved from challenging upwards to punching downwards.

It has become bogged down in false equivalence and extending the sanctity of fact to opinion, thanks in part to a media that has an interest in creating from the discourse as much heat as possible – but not necessarily any light. Central in this process is an establishment of curators, publishers and editors for whom controversy is a product to be pushed. That is the marketplace of ideas now, not a free and organic exchange of intellectual goods.

The truth is that free speech, even to some of its most passionate founding philosophers, always comes with braking mechanisms, and they usually reflect cultural bias. John Milton advocated the destruction of blasphemous or libellous works: “Those which otherwise come forth, if they be found mischievous and libellous, the fire and the executioner will be the timeliest and the most effectual remedy, that mans [sic] prevention can use.” Today, our braking mechanisms still do not include curbing the promotion of hate towards those at the bottom end of the social hierarchy, because their protection is not a valued or integral part of our popular culture – despite what the free-speech-crisis myth-peddlers say.

Free speech as an abstract value is now directly at odds with the sanctity of life. It’s not merely a matter of “offence”. Judith Butler, a cultural theorist and Berkeley professor, speaking at a 2017 forum sponsored by the Berkeley Academic Senate, said: “If free speech does take precedence over every other constitutional principle and every other community principle, then perhaps we should no longer claim to be weighing or balancing competing principles or values. We should perhaps frankly admit that we have agreed in advance to have our community sundered, racial and sexual minorities demeaned, the dignity of trans people denied, that we are, in effect, willing to be wrecked by this principle of free speech.”

We challenge this instrumentalisation by reclaiming the true meaning of the freedom of speech (which is freedom to speak rather than a right to speak without consequence), challenging hate speech more forcefully, being unafraid to contemplate banning or no-platforming those we think are harmful to the public good, and being tolerant of objection to them when they do speak. Like the political-correctness myth, the free-speech-crisis myth is a call for orthodoxy, for passiveness in the face of assault.

A moral right to express unpopular opinions is not a moral right to express those opinions in a way that silences the voices of others, or puts them in danger of violence. There are those who abuse free speech, who wish others harm, and who roll back efforts to ensure that all citizens are treated with respect. These are facts – and free-speech-crisis mythology is preventing us from confronting them.

This is an edited extract from We Need New Stories: Challenging the Toxic Myths Behind Our Age of Discontent, published by W&N on 5 September and available at guardianbookshop.co.uk

The 'cancel culture' debate gets the fight for free speech entirely wrong
The Washington Post, by Eve Fairbanks, July 28, 2020

For some, defending free speech has become a tool to bully others into silence.

If you arrived in America from Mars and read about the left wing, you'd get the impression that it's divided into two warring factions. The first wants to give much more authority to people who have historically been cut out of publishing, policymaking and institutional leadership.

The other group argues that these pro-transformation liberals risk abandoning the essence of liberalism — free speech and expression — in favor of purity tests, which, if you don't pass them, disqualify you not only from claiming to be a liberal but from being a good person. In early July, more than 150 people from the latter group defined the battle over "cancel culture" via an open letter published in Harper's. They held that "the free exchange of information" has become "more constricted" in left-wing culture, creating a climate in which "an intolerance of opposing views, a vogue for public shaming and ostracism, and the tendency to dissolve complex policy issues in a blinding moral certainty" leads to a "fear" of speaking freely without "reprisal."

But there's also a third group, one that may be quieter than the other two. These are American liberals who have, indeed, witnessed events or exchanges that made them feel uneasy — online debates in which a speaker's character is inferred from one or a handful of tweets out of 16,000; episodes in which authors agree to withdraw upcoming books after accusations of insensitivity. This third group of liberals recognizes that some of what troubles the Harper's letter-writers is happening. Simultaneously, though, they think that the problems identified by the first group are real: Whole groups of people have been underrepresented in American life and should, at this juncture, be listened to more attentively.

What's more, these liberals — I'm one of them — often have the frustrating sense that they're being bullied by the very people who claim that their motivation is to uphold free speech. It's inescapable, the observation that the pro-free-speech activists exhibit the behavior they ostensibly claim to be fighting: invoking blinding moral certainty, belittling people who disagree with them or threatening them with lawsuits. They claim to celebrate debate but don't countenance any disagreement about the degree of threat to free speech. If you wonder how widespread or materially damaging this "cancel culture" really is, you reveal yourself, as the political scientist Yascha Mounk has written, to be an immoral person "more invested in parroting [propaganda] than in acknowledging the truth." In the arguments of people like Matt Lutz, Wesley Yang and Matt Taibbi, I encounter sweeping, dark presumptions about my motives and the motives of any other liberal who hasn't yet sworn fealty. If you haven't spoken out against a supposedly unhinged leftist fringe, you don't "care about truth or justice," you're driven by "tremendous personal envy," or you're terrified of losing your salary and living in "fear."

A robust defense of free speech sounds impossible to dislike. But if you interrogate it, you somehow end up proving the absolutists' point: that they cannot voice "anodyne" opinions, as they've characterized them, without attracting accusations of bad faith. When a journalist, Ezra Klein, noted that "a lot of debates that sell themselves as being about free speech are actually about power" — historically, a true statement — left-wing free-speech advocates said Klein had made a veiled threat against one of his colleagues who'd signed the Harper's letter. Klein apologized publicly, the exact kind of episode they lament. And so, liberals in this final category tend to fall quiet, unwilling to engage the free-speech defenders lest we

end up making their arguments for them — and unwilling to identify ourselves as an opponent of the “lifeblood of democracy.” Ironic.
The idea that free speech is the virtue from which democracy’s other benefits spring would have taken the American founders aback. They understood laws that shut down newspapers to be illiberal, but not insults or nasty arguments within institutions over ideas. Serious conversations about what “freedom of speech” meant emerged in the 20th century, as railroads, urbanization and the emergence of national media houses put new groups of people into conflict and growing economic inequality made urgent the question of how workers could argue against powerful employers.
But the way people invoked “freedom of speech” as a motive was critiqued from the beginning, and often by liberals. Left-wing legal scholars like Columbia’s Robert Hale and David Riesman — a clerk for Supreme Justice Louis Brandeis and then a Harvard professor — wondered whether some free-speech advocates weren’t using an incontrovertible-sounding principle to paper over a more specific desire for powerful people to remain the arbiters of America’s “marketplace of ideas.” They noticed that companies began to invoke “free speech” rights to prevent workers from criticizing them. Free-speech defenders, it seemed to Riesman, were sometimes hiding behind the phrase to deny their critics “the opportunity to urge an alteration of policy, simply because that policy would thereby be endangered.” Not to press free-speech defenders to clarify their motives, he wrote, was “to give away one’s liberalism.”
By the mid-20th century, though, “free speech” had acquired a hopeful reputation as the warp that could hold the ragged weave of America together. Alabama Gov. George Wallace said in a 1964 address that “freedom of speech” was one of the most important things civil rights advocates were trying to take away from the South. All he wanted, he claimed, was for “truth” to be put to “free and open encounter.” In Masai culture in Kenya, a colorful stick is used to impose order on village debates. If you hold the stick, nobody is allowed to interrupt you. By the end of the 20th century, “freedom of speech” had become that stick in America. If you waved it — or so some people hoped — you could not be talked over. You could not be displaced.
I grew up in a right-wing family, and we regularly listened to Rush Limbaugh’s radio show. Limbaugh always insisted that he stood not mainly for a particular ideology but for the value of free speech. It used to be “okay to express [your] true thoughts,” he told a TV host in 1990. But “there’s a new fascism out there. . . . If you don’t say the right things about an issue, it’s not enough that they just turn you off. They want to try to get you banned.” He often claimed that fascists were trying to kick him off the air; principled liberals rushed to his defense.
I remember the confusing sense of disempowerment I felt upon hearing this. Limbaugh bracketed his rhetoric with the assertion that free speech was his objective. But inside these brackets were many more specific claims, such as that refugees tend to have HIV or that Haitians were overrunning America. If I contested those claims, though, I was told by friends and family that I was a politically correct prig who couldn’t bear to listen to ideas that offended me.
That counter-silencing characterized the conservatism I came to know as a young adult. If I developed an interest in left-wing ideas, it was because I was susceptible to “groupthink” or wanted to secure a future job in some New York elite. I was told the only reason black people identified as liberal was because they were paid to do so, and the only reason women identified as liberal was because they wanted to have sex with Bill Clinton. I wanted

to be an “independent thinker.” But why did that mean I had to nod my head, unthinkingly, to the idea that refugees have HIV?

I came to feel that the speech argument was often wielded by people who worried that their points may be weak. I’ve felt that way about its use on the left, too. Think about its equivalent, rhetorically, in a marital fight: “I can’t believe you’re upset about this.” Such a statement positions the speaker as the rational one and burdens the other party to hedge himself so as not to sound hysterical. It also deflects the argument from its true subject to a dispute over its form — the other person’s way of presenting their complaint. In the Harper’s letter, and in other recent exhortations to the left to protect free speech, there’s a striking absence of any ideas. What propositions do these writers wish they were able to offer? But naming those ideas would open them up again to scrutiny and discussion.

The “free speech” argument can be a useful tactic. But it’s not necessarily a successful one in the long term. Overusing it can turn real debates into insoluble meta-arguments with no room for compromise, driving a self-perpetuating dynamic in which one party exudes a feigned and slyly provocative equilibrium while the other becomes increasingly bitter and confrontational. That’s what happened when Jesse Singal, a science journalist and free-speech advocate, exulted that a critical response to the Harper’s letter penned by more than 150 other writers and academics was hysterical and “insanely ignorant.” Singal then suggested that provoking his opponents was “everything I dreamed.”

Who’s responsible for stopping this dynamic? I’m not sure, morally, but I believe the free-speech defenders have more options than they recognize. For 10 years, I’ve lived part time in South Africa. In 1994, people who had been legally excluded from discussion forums, universities and publishing jobs were admitted to those spaces. Two decades later, those people began to argue that unspoken attitudes and prejudices still barred them from exerting influence — that tastemakers with long-standing power had refused to cede authority. South Africa has had its own massive anti-racism uprisings on campuses, its own debates over what academics ought to publish or teach, its own conflicts over whether “deplatforming” somebody is okay, its own free-speech defenders and critics who attacked those defenders in heated, even alarming language. Many of these conflicts happened a few years before their analogues in the United States, because South Africa’s demographic shift is ahead of ours. I felt I was watching our future.

As in America, South Africans who resisted the firing of a columnist or the renaming of a building expressed the most alarm not for the present but for a putative future. They treated these events as harbingers of much more extreme reprisals to come: Give the people who want to “cancel” things a hand, they said, and they’ll take the whole arm, and eventually we’ll be living in a “1984”-like dystopia. You have to push back hard and early.

I believe that many who made this fearful argument really did harbor this concern. The discrimination against South Africans of color was so great over such a long time that — if they truly were liberated from social norms to be cordial — the assumption was that they would seek a comprehensive revenge. But they didn’t. Their demands to rename buildings or exclude offensive rhetoric were not mere bitter performances. Once some buildings were renamed and some academics’ reputations downgraded, they, and the country, mostly moved on.

In other words, recalibrating public debate achieved something real. When the people who had been so angry were given power, often they tempered their arguments, because a real need had been satisfied. New black judges offered clemency to college students prosecuted for hate speech and expanded rights to freedom of expression. Black media personalities consulted white experts and engaged with white authors who’d written controversial works.

And most of the people who’d feared being canceled still hold their positions, still speak.

Is our cancel culture killing free speech?
The Seattle Times, by Victor Menaldo, August 7, 2020

Once upon a time, folks who considered themselves left of center believed in and practiced free speech and freedom of conscience. They saw these things not only as a fundamental right that transcends politics, but also as an effective tool to advance progressive objectives and social justice. They went so far as to fight to allow skinhead gangs to voice their delusions and hate in the public square. They did so not because they agreed with them but because they viewed skinheads' right to speak and protest — and that of all miscreants, gadflies, cranks and rabble-rousers, no matter how despicable their beliefs — as integral to the American experiment and way of life. Indeed, as integral to liberalism itself or, at least, as sunlight doing its job as the best disinfectant. In short, what previous generations of liberals understood is that allowing others to say something is not the same thing as endorsing what they say.

Is this a true American story or a fairy tale?

The truth is, it's hard to know. This may be a glorified view of a golden age of free speech and freedom of conscience that may never have existed. Perhaps this is a romanticized view of baby boomers and their hippie culture and values. Maybe it is easy to dismiss what they fought for — sex, drugs, rock 'n' roll and free speech? — with the epithet "OK boomer" because some of these things were wrongheaded? Could it be the only thing this generation deserves credit for is helping end the Vietnam War?

Indeed, maybe those who pine for the heyday of free speech and fulsome expression are on the wrong side of history. Throughout our strange and turbulent story as a species, there have always been taboos against saying, even thinking, certain things and fully expressing ourselves. We live in societies, and societies sometimes worship sacred cows. They therefore enshrine norms to protect their cherished icons — including policing conformity, silencing, shunning and even permanently ostracizing contrarians, dissenters and oddballs. Think of Socrates, Jesus, Galileo and Hester Prynne, of "Scarlet Letter" fame. We can now add comedians Kevin Hart (canceled by the left) and Kathy Griffin (canceled by the right) and even some lowly professors to the list (canceled by both sides). Indeed, the right notoriously called for the firing of "heterodox" professors during the McCarthy era, a threat that became very real with the purging at the University of Washington by President Raymond Allen of three tenured professors accused of harboring communist sympathies.

Yet even if free speech was never an ideal that liberals truly lionized, there is mounting evidence that some progressives don't even recognize it as a legitimate right. There have been concerted campaigns by political activists, intellectuals and the Twitterati to silence — and, worse, harass, intimidate and destroy — people who say things that are wrong, unscientific, bigoted, hateful, or that are simply insensitive or give aid and comfort to President Donald Trump and Republicans in general.

Recent victims of these efforts include a motley crew of scientists, pundits and writers, some of them self-described liberals. They include respected epidemiologists, such as John Ioannidis, who dared to question the consensus around the COVID-19 lockdown approach to containing the virus — but did not necessarily deny basic facts about the pandemic, even

if some of his initial predictions proved wrong. Public intellectuals also are on the list. Consider Steven Pinker, who has been accused by his critics — fellow colleagues, no less! — of "moving in the proximity of scientific racism" and "supporting [centrist] New York Times columnist David Brooks" (two unrelated accusations) when he actually argued that we should not censor or ignore controversial or even wrong work by scientists and thinkers that he, in fact, disagrees with.

Incidentally, Pinker has also made a strident, albeit old-fashioned and instrumental, defense of liberalism that has been denounced by fellow academics, despite the fact that he produced reams of evidence supporting the idea that, for all of our problems, we have made vast progress over the past few decades due to the widespread embrace of science, good government and the spread of (regulated) markets throughout the world.

Of course, the list also includes journalists, such as (now former) New York Times columnist Bari Weiss, who voiced what have become unpopular opinions within her newsroom and accused her colleagues of harassment and censorship. James Bennet, that newspaper's former opinion editor, also comes to mind: Bennett resigned over the backlash he received from the Twitterverse and his colleagues for publishing U.S. Sen. Tom Cotton's Op-Ed calling for federal troops to contain the rioting and looting that took place during the June protests against police brutality and racial injustice.

I hasten to emphasize that this is not simply a problem on the left, as the right's version of political correctness, rooted in conspiracy theories, gaslighting, scapegoating and fear mongering, also threatens free speech. Yet, complaints by journalists at the Wall Street Journal about inadequate fact-checking by the opinion editors is nothing if not ironic: The newspaper clearly states that there is a distinction between its Op-Eds and regular reporting, and that they are driven by values such as free markets and free speech.

While it may be true that things that have been said and written by some of the recently censored journalists, politicians, athletes, celebrities and ordinary Americans are fundamentally, even objectively, retrograde and incorrigible, and while it may also be true that those doing the censoring have noble intentions, it is not true that attempting to stifle speech is a good idea. It's always certainly a bad idea.

Indeed, it is a grievous mistake. The things that folks on the left claim to fight for require free speech and freedom of conscience. They always have. They always will. This is for several reasons.

Becoming our best selves is the key to bettering ourselves. This means being free to make mistakes and learn from them. It means the freedom to speak our mind and freedom to give people the benefit of the doubt.

But let's forget about individuals for a moment and consider what is best for society. Science and progress require openness, curiosity, skepticism, and the articulation and testing of strange, unconventional hypotheses. That means entertaining heterodox ideas in the first place, which means fighting the urge to peremptorily dismiss them when they strike us as odd or threatening.

Both science and liberalism also require intellectual humility. Nobody knows the solution to every problem, and getting to the right answer requires that we create an environment that is conducive to admitting our mistakes and changing our mind. But this requires that we first respect a process by which individuals can reach the wrong conclusions for themselves and correct their mistakes. That means the ability to engage in thought, reflection and judgment autonomously — again, without coercion.

The key to advancing liberalism is not latching onto a set of predetermined means but identifying and fighting for the right ends. We are flawed humans and will almost certainly choose the wrong or incomplete means at times. An ecosystem of open debate and constructive listening and criticism is the key to together discovering the best means to advance objectives such as equality, progress and justice.

There are myriad perverse consequences that emerge when we try to stifle thought and speech. These things that we don't like to hear about? If we don't try to solve the fundamental problem behind the speech that we dislike and work only to mitigate the symptom — by censoring it — we drive the problem somewhere else. Out of sight, out of mind and into the gutter: Untoward ideas silenced by polite society inevitably go underground. They don't disappear simply because we don't like them and censor them. Worse, silencing these ideas might mean stifling knowledge about their very existence. That helps make bad ideas fester, spread and mutate before they can be countered with facts, logic and evidence.

What promoting unfettered thought and speech does is allow us to weaken the viruses of bad, untested and morally bankrupt ideas before they infect all of society. It smokes them out and allows us to interrogate them. Free speech, it turns out, is the best vaccine against the speech we don't like.

The simple fact of the matter is that censoring speech is a recipe for illiberalism and regression. That is, and always has been, the reactionary way. Perhaps today's left wants to make common cause with those who throughout history have used social and political means to eliminate people perceived in their day as heretics. If so, why not just admit it? Alternatively, the left could revitalize its historical commitment to free and open debate.

Victor Menaldo is an avowed liberal and professor of political science at the University of Washington and, along with James Long (political science) and Rachel Heath (economics), one of the organizers of the Political Economy Forum at the UW.

Hong Kong primary teacher deregistered 'for talking about independence'
The Guardian, October 6, 2020

Teacher accused of violating legislation, reportedly discussing freedom of speech with pupils

A Hong Kong primary school teacher has been deregistered after being accused of using pro-independence materials in class, reportedly to teach students about the concepts of freedom of speech and independence.

The education bureau accused the teacher of a premeditated act in violation of Hong Kong's Basic Law, its de facto constitution, by having "spread a message about Hong Kong independence".

"In order to protect students' interest and safeguard teachers' professionalism and public trust in the teaching profession, the education bureau decided to cancel the teacher's registration," it said in a statement.

Local media reports said the teacher had shown the class a video featuring a pro-independence activist, and had then asked the students questions including "what is freedom of speech?", and "according to the video, what is the reason for advocating Hong Kong independence?"

The bureau said several teachers were warned over the incident, and that it would work to find other "black sheep" accused of professional misconduct.

At a press conference on Tuesday afternoon, the deputy secretary for education, Chan Siu Suk-fan, said the teacher "had a plan to spread the independence message" and the class discussed the manifesto of the National party – a political organisation outlawed in 2018.

Between July 2019, when mass pro-democracy protests began, and August this year, the bureau received 247 complaints about teachers' purported involvement with the demonstrations. Of the 204 investigations concluded, 33 have resulted in reprimands or warning letters to teachers, and the bureau's spokesman told the Guardian it had not ruled out removing the teaching registration of those found guilty of serious misconduct.

Hong Kong's largest teachers' union strongly condemned the teacher's disqualification. In a statement, the Hong Kong Professional Teachers' Union accused the education bureau of failing to conduct a fair investigation.

It said the unilateral disqualification and issuing of warning letters to the school were "despicable acts of intimidation of the school management" and were unacceptable.

Advocating for independence in Hong Kong – which was a growing but fringe demand of the mass pro-democracy protests through much of 2019 – is illegal under the national security law imposed by Beijing more than three months ago.

The secretary for education, Kevin Yeung, said the incident happened prior to the introduction of thenational security law, but for future cases they would consult with law enforcement agencies.

The broadly-worded and ill-defined law, targeting acts of secession, subversion, foreign collusion and terrorism, has drawn international condemnation, resulted in dozens of arrests, and caused a chilling effect across schools and academia.

Hong Kong's chief executive, Carrie Lam, who has driven a crackdown on dissidents and opposition in the region, said the case was a "very serious matter".

"But if there are a very tiny fraction of teachers who are using their teaching responsibilities to convey wrong messages, to promote misunderstanding about the nation, to smear the country and the Hong Kong SAR [special administrative region] government without basis, then that becomes a very serious matter," she said.

Freedom of speech in election season: What not to wear to polls, and other rules
Brown County Democrat, by Sara Clifford, October 21, 2020

Driving the back roads in a presidential election season, it's easier than normal to see why Brown County is such a colorful place.

No, we're not talking about the leaves, but the divergent viewpoints that pop up in neighbors' yards: "Dump Trump" on one side of the street, "Keep America Great" on the other.

Sometimes, signs go missing. In the past 10 days, three people have reported stolen signs to the newspaper — some taken multiple times.

That's not an unusual thing, said Brown County Prosecutor Ted Adams.

While you have every right to express your freedom of speech by erecting a sign, you do not have the right to take down signs you don't agree with or don't want to see.

"It has amazed me that our freedom of speech has been attacked like this in Brown County," wrote Norm Altop, an Air Force veteran who had his signs taken down and stolen twice in two days.

"Over the history of this great country, many, many heroes have died for the right of freedom of speech," he wrote. "The person or persons responsible for the theft of my sign has spit in the face of those heroes."

Stealing a political sign is considered theft, or possibly conversion, Adams said. Both are Class A misdemeanors and punishable by up to a year in jail and a $5,000 fine.

But though the prosecutor hears about signs being stolen, he rarely has enough evidence to charge anyone with a crime.

"We would file theft charges if we believed we could prove the matter beyond a reasonable doubt, and I always encourage folks to protect their signs with trail cameras," he said.

"To date, we have not had sufficient evidence to file theft charges against any person."

Speech in sign season

During election season, the Brown County Planning Department doesn't regulate any type of sign, even if that sign has nothing to do with politics.

The basis of that practice: freedom of speech, and a 2015 Supreme Court case out of Arizona. It involved a church whose signs were limited to a certain size by a town government.

In July 2017, a new Indiana state law went into effect which says that, in general, governments can't treat signs differently based on their content. A community can't have

different rules for political signs, church signs, directional signs or other types if the distinction is based on what the sign says or what its purpose is.

That law also says that a government can't limit the number or size of signs you put out for a 66-day period around a primary or general election — even if those signs have nothing to do with the election. The only exception is for public safety, such as a sign obstructing a driver's view of a road.

That period starts 60 days before an election and ends at the beginning of the sixth day after the election.

Limits on free speech

"Free speech" and "freedom of expression" are terms that are often invoked when citizens are participating in political activities, especially those that may evoke strong feelings on an opposing side.

There are limits to free speech, said Mark Williams, an attorney who also serves on the Brown County Election Board as the Republican representative.

"The Constitution, as it's been interpreted basically since the founding, allows for the abridgement of fundamental rights as long as the state — that is, the government — has a compelling interest to take that action, and the means by which they choose to take that action is reasonable," he said.

For instance, you have a "right" to yell "fire" in a crowded theater, but that doesn't mean you'll get off scot-free if that action harms the welfare of other citizens. In the case of elections, "the government has a compelling interest in assuring a free and fair election and in assuring that voters are not intimidated and to assure that there is no occurrence of events which could intimidate a voter," Williams said.

Electioneering is example, he said. These are rules about what you can wear when you go to vote, or what you can talk about when you're waiting in line.

Are you electioneering?

IC 3-14-3-16 prohibits anyone from "expressing support or opposition to any candidate or political party … in any manner that could reasonably be expected to convey that support or opposition to another individual" on election day in the polls, in the chute (the waiting area where voters stand), or an area where absentee voting is taking place. Electioneering also includes wearing or displaying clothing, signs or buttons with a candidate's name or picture within those voting zones.

It is also against election rules for a candidate, supporter or any other person to be in the chute, the 50-foot area from the entrance to a poll, unless they are voting.

Supporters can be at polls greeting voters or holding signs for their candidates, but they must be outside that 50-foot chute.

Violations could be prosecuted as Class A misdemeanors.

The chute area is marked with orange cones at the in-person early voting site at Deer Run Park, and will be marked at all the other voting sites that will be set up on election day, Nov. 3, Williams said.

Williams said he helped out with in-person early voting recently and had to gently remind some people of electioneering rules.

”I know that there have been people who had caps on that were inappropriate under the electioneering statute that had to be asked to leave, remove and take their caps out,” he said.

”The very, very busy day … when it was very warm, I kind of worked out in the entryway there to have people move through as quickly as possible to get them out of the sun, and when you get people together that know each other and you're there to vote, it's a natural thing to want to talk politics, and I would just remind them that we cannot discuss politics at the polls,” he said.

”Everybody said, ‘You're right, our mistake.’”

Most of the time, people just aren't aware of those rules, he said.

”If someone wants to be sure that they don't go have to change clothes, or walk back to their car to put up a hat, then they should just comply with those requirements,” Williams said of the electioneering law.

”Frankly, with the exception of just people inadvertently (talking) or people wearing candidate garb, I'm not aware of any other problems — nobody standing there preaching one candidate over another or anything like that,” he added.

On its face, a law against electioneering seems to run counter to the idea of freedom of expression, Williams said. However, the sentiment behind it is “to assure that the voters are free to vote their conscience.”

“If somebody is crying that their constitutional rights are being abridged,” he said, “I think the answer to that is, ‘No, their fundamental constitutional rights are being protected by temporary curtailment of other fundamental rights, and it's necessary to be sure that there's not an abridgement of rights.”