HARM AND HEGEMONY: THE DECLINE OF FREE SPEECH IN THE UNITED STATES

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INTRODUCTION

Throughout its history, the United States has struggled with movements that aim to silence others through state or private action. These periods have been pendulous, with acute suppression followed by relative tolerance for free speech. This boom–or-bust pattern for free speech may well continue. However, the United States is arguably living through one of its most serious anti-free speech periods, and there are signs that the current period could result in lasting damage for free speech due to a rising orthodoxy and intolerance on our campuses and in our public debate. Where fighting for freedom of speech was once a near-universal rallying cry, opposing free speech has now become an article of faith for some in our society. This has led to a rising movement that justifies silencing opposing views, often on the grounds that stopping others from speaking is, in fact, an exercise in free speech. This movement has both public and private components, but it is different from any prior period due to new technological, political, and economic pressures on the exercise of free speech.

The struggle for free speech in the United States is interwoven with our history, from the colonial period to the present day. From the outset, there was a clear concept of free speech, but not a clear

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commitment to protecting it. Indeed, figures like Thomas Paine and John Peter Zenger raised many issues against the English Crown that are still debated today in conflicts over free speech and the free press.[2] Anti-free speech movements tend to rise from deep fractures in our society in periods of unrest. The sense of great injury felt by many can be translated into a license to silence those who are seen as causing or exacerbating that injury. These periods provide an opportunity not only for government abuses but also for extremist groups to feed on social unrest. In recent years, various extremist groups have emerged on both ends of the ideological spectrum, from the Boogaloo movement on the far right to the Antifa movement on the far left. However, the greatest threat to free speech today is the growing support for censorship and speech codes in the mainstream of political and academic thought.

The intolerance for dissenting speech recurs across countries and historical periods. Orthodoxy is the enemy of free speech, and orthodox views are often the result of religious or social values. Heretical and immoral speech has long been the target of majoritarian anger, combining speech intolerance with religious dogma. At one time or another, virtually every religion has tried to compel outsiders to adhere to orthodox views, and blasphemy prosecutions continue in many countries today.[3] Even after the adoption of the Constitution and the Bill of Rights, dominant faiths continued to use

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2. *See* Jonathan Turley, *The War on Free Speech: Politicians and Commentators Label War Critics "Traitors"*, RES IPSA, March 18, 2022, https://jonathanturley.org/2022/03/18/the-war-on-free-speech-politicians-and-commentators-label-war-critics-traitors/ [https://perma.cc/ZE6D-AXF5]; Jonathan Turley, *Viewpoint: How Likely Is an Assange Conviction in US?*, BBC (Apr. 11, 2019), https://www.bbc.com/news/world-us-canada-47874728 [https://perma.cc/JW5S-3CED].

3. Jonathan Turley, *Just Say No To Blasphemy: U.S. Supports Egypt in Limiting Anti-Religious Speech*, RES IPSA (Oct. 19, 2009), https://jonathanturley.org/2009/10/19/just-say-no-to-blasphemy-u-s-supports-eygpt-in-limiting-anti-religious-speech [https://perma.cc/BYA9-QU6E]; *see also* Haroon Janjua, *Eight-Year Old Boy Becomes Youngest Person Charged with Blasphemy in Pakistan*, THE GUARDIAN (Aug. 9, 2021),

social or governmental controls to perpetuate their values, including abuses directed at other faiths. Yet the most damaging anti-free speech movements in our history tended to be secular efforts involving government-mandated or government-encouraged speech controls. That is true of the current threats against free speech, involving private groups and companies that have imposed unprecedented levels of speech controls across digital and educational platforms.[4]

There has already been a great deal of discussion on the erosion of free speech in the United States.[5] There is obviously no meter that continually measures free speech protection, so this debate is unavoidably anecdotal. Yet objections to the "cancel culture" now extend from academia to journalism to the arts.[6] In each of these areas, long-standing principles of diversity and tolerance of viewpoints

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https://www.theguardian.com/global-development/2021/aug/09/eight-year-old-becomes-youngest-person-charged-with-blasphemy-in-pakistan [https://perma.cc/QY4M-AJXJ].

4. Indeed, calls for greater censorship often emphasize a false sense of neutrality in the use of benign algorithms to remove content. Jonathan Turley, *Enlightened Algorithms? Progressives Ask Big Tech to Censor "Bad" Ideas to Save Us from Ourselves*, USA TODAY (Sept. 26, 2021), https://www.usatoday.com/story/opinion/2021/09/26/elizabeth-warren-wants-amazon-censor-your-reading/5832060001 [https://perma.cc/RUC4-A99W].

5. I have previously testified on issues related to this article. *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 7, 2022) (testimony of Professor Jonathan Turley); *Fanning the Flames: Disinformation and Extremism in the Media: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce*, 117th Cong. (Feb. 24, 2021) (testimony of Professor Jonathan Turley); *The Right of The People Peaceably To Assemble: Protecting Speech By Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley).

6. My blog, Res Ipsa (www.jonathanturley.org), chronicles such cases on a rolling basis. I will be offering examples from the blog of some of the more notable controversies but recognize that much of this record remains anecdotal in the absence of a reliable comprehensive study. Yet these public controversies are important in their own right since they can create a chilling effect on the exercise of free speech and academic freedom.

have been replaced by increasing rigidity and hegemony. Underlying these controversies is a fundamental debate over the meaning of free speech and its inherent harm. The notion of silencing others as a form of speech reflects a deep and widening disagreement over the protections for heterodoxy in a variety of different fields. Leading publications like the *New York Times* have apologized for publishing opposing views on issues, while leading journalists, editors, and columnists have resigned under fire for publishing dissenting viewpoints.[7] Museum curators have been forced out for questioning calls for race-based policies on acquisition or preferences.[8] When leading writers, from Salman Rushdie to J.K. Rowling to

7. In June 2020, Sen. Tom Cotton (R-AR) ran a column encouraging the use of troops to quell rioting, discussing the history of repeated such deployments by American presidents. The column was controversial, but it did not misstate the law. Though many of us disagreed with Sen. Cotton's proposal, it offered a conservative opinion. The outcry after the column's publication led to the opinion editor's resignation, a promise to reduce future opinion articles, and an overhauling of staff. Elahe Izadi et al., *After Staff Uproar, New York Times Says Sen. Tom Cotton Op-Ed Urging Military Incursion into U.S. Cities 'Did Not Meet Our Standards'*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/media/2020/06/03/new-york-times-tom-cotton [https://perma.cc/79LU-HLKN]; *see also* Jonathan Turley, *Mea Culpa: New York Times Caves to Protests and Apologizes For Posting Conservative Opinion*, RES IPSA (June 5, 2020), https://jonathanturley.org/2020/06/05/mea-culpa-new-york-times-caves-to-protests-and-apologizes-for-posting-conservative-opinion [https://perma.cc/RT63-2ZAW]. A similar apology was issued by *Newsweek* after it ran a story on the possible challenge to the eligibility of Kamala Harris for president by John Eastman, a conservative law professor. *See* Tal Axelrod, *Newsweek Apologizes for Kamala Harris Op-Ed*, THE HILL (Aug. 15, 2020), https://thehill.com/homenews/media/512155-newsweek-apologizes-for-kamala-harris-op-ed [https://perma.cc/R9WP-LB6Y]; *see also* Jonathan Turley, *Yes, Kamala Harris Is Eligible for Vice President*, RES IPSA (Aug. 14, 2020), https://jonathanturley.org/2020/08/14/yes-kamala-harris-is-eligible-for-vice-president [https://perma.cc/TDX9-5BA4].

8. *See, e.g.*, Julia Halperin, *Gary Garrels, the San Francisco Museum of Modern Art's Longtime Chief Curator, Resigns Amid Staff Uproar*, ARTNET NEWS (July 11, 2020), https://news.artnet.com/art-world/gary-garrels-departure-sfmoma-1893964 [https://perma.cc/33EZ-C25P] (detailing how a senior museum curator resigned after stating the San Francisco Museum of Modern Art could not avoid collecting the work of white men, as it would amount to "reverse discrimination").

Noam Chomsky, signed a letter raising alarm over the growing intolerance for opposing views,[9] they were denounced by colleagues.[10] At the same time, legislative proposals to criminalize speech have been proposed in the cause of protecting democracy.[11]

These conflicts are often dismissed because many are the actions or policies of private actors like Big Tech companies rather than a form of state action. While some have called to amend the Constitution to allow for greater speech regulation,[12] others insist that blacklisting of authors or banning certain cable networks are not true free speech conflicts since they fall outside of the First Amendment.[13] However, free speech values are neither synonymous with nor contained exclusively within the First Amendment. As will be discussed below, all of these public and private forms of censorship undermine free speech values.

The rise in speech regulation is often defended on the basis that free speech itself is a danger. This article explores the rationalization that speech controls are justified as a defense or response to the

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9. *JK Rowling Joins 150 Public Figures in Warning over Free Speech*, BBC NEWS (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105 [https://perma.cc/R3YJ-LGFK].

10. *See, e.g.*, Allyson Chiu, *Backlash After Cultural Icons Including Margaret Atwood Warn Free Speech Is Under Threat*, NAT'L POST (July 8, 2020), https://nationalpost.com/news/world/backlash-after-cultural-icons-including-margaret-atwood-warn-free-speech-is-under-threat [https://perma.cc/3ZX6-273L].

11. *See, e.g.*, Jonathan Turley, *New York Considers Legislation to Curtail Free Speech in the Name of Democracy*, RES IPSA (Dec. 30, 2021), https://jonathanturley.org/2021/12/30/new-york-considers-legislation-to-curtail-free-speech-in-the-name-of-democracy [https://perma.cc/XPQ3-M6RH].

12. *See, e.g.*, Jonathan Turley, *"Aggressively Individualistic": Miami Law Professor Proposes a "Redo" of the First and Second Amendments*, RES IPSA (Dec. 20, 2021), https://jonathanturley.org/2021/12/20/aggressively-individualistic-miami-law-professor-proposes-a-redo-of-the-first-and-second-amendments [https://perma.cc/EY96-R4NN].

13. *See, e.g.*, Jonathan Turley, *Free Speech Inc.: How Democrats Have Found a New but Shaky Faith in Corporate Speech*, RES IPSA (May 10, 2021), https://jonathanturley.org/2021/05/10/free-speech-inc [https://perma.cc/EDJ2-WXYA].

harm posed by opposing views. It is a framing that explicitly or implicitly raises the "harm principle" of John Stuart Mill—with a lethal twist. Many have long relied upon the harm principle in a myriad of areas to define the limits on government controls and action, particularly in defense of free speech.[14] A type of Millian harm principle is now being used to justify both government controls and private action to silence those with opposing views. Indeed, the anti-free speech movement on our campuses is often defended as a type of militant Millian movement,[15] a construct that is neither faithful to Mill's writing nor logical in its application. Yet that same rationale has been used by social media companies[16] as the foundation for the robust censorship programs now enforced across the media in what is often called the "post-truth" environment.[17]

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14. Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905 (2015).

15. *See, e.g.*, Jason Pontin, *The Case for Less Speech*, WIRED (Nov. 6, 2018), https://www.wired.com/story/ideas-jason-pontin-less-speech [https://perma.cc/24GH-LK5D] ("I don't want speech to be less free, exactly. I want less speech absolutely and I want what is said to be less destructive. Less speech is more. Less speech, more coolly expressed, is what we all need right now—a little less goddamn talk altogether.").

16. For example, Facebook's former "content moderation director" Dave Willner has explained that the company used Millian harm principles as the foundation for its censorship program. However, he admitted that the use of the principle was "more utilitarian than we are used to in our justice system. It's fundamentally not rights–oriented." Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children*, PROPUBLICA (June 28, 2017), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms [https://perma.cc/44TH-7BDQ]. As discussed in this article, the use of the harm principle for censorship gradually expanded to encompass a broader and broader scope of speech. *Id.*

17. "Post-truth" has become a convenient re-framing of the free speech debate to maintain that prior free speech principles are no longer suited to a world where virality rather than truth dominates in discourse. Post-truth has been defined as "circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." Cynthia Kroet, *'Post-Truth' Enters Oxford English Dictionary*, POLITICO (June 27, 2017), http://www.politico.eu/article/post-truth-enters-oxford-english-dictionary [https://perma.cc/R8E8-NQ89].

This article looks at the anti-free speech movement and its reliance on the harm rationale. However, it is important to note that arguments for greater speech regulation often reject another aspect of Mill's writings on free speech: the self-corrective or protective capacity of free speech systems. That view is treated as hopelessly and even dangerously outdated. One commentator wrote, "Many more of the most noble old ideas about free speech simply don't compute in the age of social media. John Stuart Mill's notion that a 'marketplace of ideas' will elevate the truth is flatly belied by the virality of fake news."[18] Such claims are often presented as manifestly true. The fact that "disinformation" or hateful speech exists on social media is treated as evidence that traditional Millian notions of free speech are proven failures. Such a view ignores that neither Mill nor his adherents ever claimed that free speech would chase bad speech from the media platforms or our lives. Disinformation and hateful speech existed in Mill's life and have always existed as part of human interactions. Free speech does not cure stupidity; it merely exposes it. Likewise, speech intolerance is pronounced across the ideological spectrum.[19]

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18. Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018), https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship [https://perma.cc/S232-6KWS].

19. For example, while some advocating critical race theory (CRT) or related concepts have shown intolerance for opposing views on campus, they have also been the subject of intolerance. *See, e.g.*, Jonathan Turley, *Lawyer Sues Legal Aid Society for Discrimination After Being Attacked for Her Criticism of Critical Race Theory*, RES IPSA (July 14, 2021), https://jonathanturley.org/2021/07/14/lawyer-sues-legal-aid-society-for-discrimination-after-being-attacked-for-her-criticism-of-critical-race-theory [https://perma.cc/K2XK-UA8S]; Jonathan Turley, *GoFundMe Shuts Down Fundraiser of Parents Opposing Critical Race Theory in Loudoun County*, RES IPSA (Mar. 31, 2021), https://jonathanturley.org/2021/03/31/gofundme-shuts-down-fundraiser-of-parents-opposing-critical-race-theory-in-loudoun-county [https://perma.cc/WP5A-Z5YW]. Efforts to prevent the teaching of CRT in universities reflect the same intolerance for diversity of thought. *Republicans Try to Ban Critical Race Theory in Colleges*, DAILYCABLE, https://thedailycable.com/06/14/politics/39183/republicans-try-to-ban-critical-race-theory-in-colleges [https://perma.cc/U85P-MYUV] (last visited Feb. 8, 2022).

Recent controversies have reinforced the view that forms of public and private censorship only make it harder for good speech to prevail. With the rise of speech controls, the faith of the public in both the government and the media has declined.[20] As a result, people no longer have faith in what they read, or they confine themselves to siloed news sources. Ironically, while disinformation is often used to justify censorship systems, the current mistrust is a breeding ground for disinformation that feeds on the isolation and suspicions of citizens. That in turn undermines, rather than strengthens, our democracy. As Alexander Meiklejohn noted, the ability to marshal your own facts and reach your own conclusions is an essential component of self-governance:

> Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.[21]

The distrust fueled by speech controls can undermine not just political but also public health discussions on issues like vaccines.[22] Controlling information tends to diminish faith in that information.

In addressing these rationales for speech regulation, this article looks at our long struggle with free speech over the decades and how a new anti-free speech movement has emerged. This movement is proving far more effective due to a synthesis of private and

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20. Jonathan Turley, *Trust in the Media Hits All-Time Low*, RES IPSA (Jan. 22, 2021), https://jonathanturley.org/2021/01/22/trust-in-the-media-hits-an-all-time-low-in-new-polling [https://perma.cc/NQM5-YHW6] (noting only forty-six percent trust the media).

21. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961).

22. Caroline Catherman & Leslie Postal, *Central Florida Doctors Urge Vaccinations as Parents Debate Whether to Get COVID-19 Shots for Kids*, ORLANDO SENTINEL (Nov. 5, 2021), https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-cdc-pfizer-covid-vaccine-kids-5-to-11-20211105-jhdd45rn2jdbpagwzhbcvtmaia-story.html [https://perma.cc/EEK6-PASU] ("The polling found 75% of unvaccinated parents get most of their information from social media and distrust mainstream media sources.").

public forms of speech regulation. The idea that free speech values will be instinctively and jealously defended can no longer be assumed, even by academics and writers who have been traditional advocates for those values. That raises the question of what alternatives exist to ensure free speech values are upheld in our institutions. This article proposes that free speech values can be legislatively protected, even coerced, by the government. There is a role for the government in reinforcing traditional enclaves for the exercise of the freedom of expression in our society. Indeed, with the rise of massive private systems of censorship, free speech may now depend on the government more than at any time in our history.

I. FREE SPEECH AND THE ILLIBERAL INTERPRETATION OF MILLIAN HARM

The right to free speech holds the curious position of being universally accepted as a defining right of our democracy while also being continually challenged as to what it actually means. For some of us, free speech is a normative value or human right—a right that is not just an essential part of a truly free society but also an essential part of a fully human person. Others view free speech in more functionalist terms as supporting a free society, but not necessarily a transcendent or unalterable right. Not surprisingly, one's view often depends on a broader understanding of the proper role (and limitations) of government. That understanding has direct bearing, not simply in defining the right of free speech, but also in delineating the role of government in protecting the right.[23] Someone who

23. While some opinions echo functionalist rationales, the Court has expressly emphasized that the First Amendment is not just a protection for speech directly related to democratic values:

> It is no doubt true that a central purpose of the First Amendment "was to protect the free discussion of governmental affairs." . . . But our cases have

holds a functionalist view may be more willing to make tradeoffs against free speech, particularly if the utility of free speech can be achieved by other means.

Free speech theories often interlace normative and functionalist rationales. This duality is captured in Cato's letters that were widely distributed in the colonies, which included the statement: "[w]ithout Freedom of Thought, there can be no such Thing as wisdom; and no such thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt and Control the right of another."[24] The statement captures many of the elements discussed below. It recognized the importance of the right to the search for wisdom and fulfillment. Yet, it also speaks of the right itself in functionalist terms as a necessary protection of liberty. Finally, it alludes to a type of harm principle (à la John Stuart Mill) as the measure of permissible government interference regarding the right to free speech. Many of today's rivaling views come down to claims of harmful speech as a justification to regulate said speech, or to prevent others from engaging in it. The harm principle is generally viewed by libertarians as a barrier to speech regulation,[25] but it has also been used by extremist groups as a tool to justify the denial of opposing views.[26]

> never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (citations omitted) (quoting concurring opinion of Powell, J., 431 U.S. at 259).

24. JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110 (Ronald Hamowy ed., Liberty Fund 1995) (1755).

25. *See* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 455 (1988). The Millian influence is also evident in the writings of justices like Justice Scalia, Justice Kennedy, Justice Breyer, and Chief Justice Roberts. *See* Eric T. Kasper & Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence*, 15 U. MASS. L. REV. 2, 52 (2020).

26. *See infra* Part III.B and accompanying citations.

The Constitution expresses the protection of speech from government in absolutist terms: "Congress shall make no law . . . abridging the freedom of speech."[27] That language led jurists like Justice Black to take the position that the Constitution "says 'no law,' and that is what I believe it means."[28] Justice Black's position was more textual than ideological on the meaning of the right. Yet, even if not absolute, free speech is properly treated as a defining freedom. Indeed, despite the erosion of free speech in Europe,[29] this view is captured in Article Ten of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms that the right to freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[30]

As Cato's statement reflects, free expression is inextricably tied to human rights. While John Locke recognized that humans yielded the total freedom afforded by the state of nature when they embraced civilization, he still recognized certain rights as inalienable, including the freedom of thought.[31] Locke did not address the right to free speech directly, and some have challenged arguments that

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27. U.S. CONST. amend. I.

28. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962) (quoting Justice Black in an interview with Professor Edmond Cahn).

29. *See, e.g.*, Jonathan Turley, *The Biggest Threat to French Free Speech Isn't Terrorism. It's the Government.*, WASH. POST (Jan. 8, 2015), https://www.washingtonpost.com/opinions/what-it-means-to-stand-with-charlie-hebdo/2015/01/08/ab416214-96e8-11e4-aabd-d0b93ff613d5_story.html [https://perma.cc/9LVC-JATK].

30. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

31. While Locke recognized the authority of the state after transcending the state of nature, certain pre-state rights remain attached to the individual. This view of natural rights was highly influential for the generation of the Framers. *See, e.g.*, THOMAS GORDON, OF FREEDOM OF SPEECH: THAT THE SAME IS INSEPARABLE FROM PUBLICK LIBERTY., NO. 15 (1721), *reprinted in* CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, & OTHER IMPORTANT SUBJECTS 96 (Da Capo Press 1971) (1755).

his writings on freedom constitute a robust endorsement of free speech.[32] However, without the freedom of speech, there is no freedom of thought, which Locke explicitly named as an inalienable right.[33] Thus, Cato's letters maintained that in a free society, you must be able to "think what you would, and speak what you thought."[34] It is the paradigmatic right embraced by writers like Milton who declared, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[35] This deontological view was manifest in the early American expression of the freedom of speech.[36] For example, the Pennsylvania Declaration of Rights affirmed "certain natural, inherent and inalienable rights"[37] and expressly stated that "the people have a right to freedom of speech, and of writing, and publishing their sentiments."[38] James Madison said that speech was one of the inalienable natural rights "retained" by individuals when they establish a government.[39]

A natural rights foundation for free speech waned with the greater adherence to utilitarianism and positivism in legal theory. The latter movement spawned figures like Oliver Wendell Holmes who rejected the natural rights premise of figures like Locke. For

32. Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 703 (1987) ("Because of its explicitly religious premise, Locke's defense cannot be imported unaltered to serve as a theory of free speech under the [F]irst [A]mendment.").

33. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 353 (Peter H. Nidditch ed., Clarendon Press 1975) (1689) ("[T]hough Men uniting into politick Societies, have resigned up to the publick the disposing of all their Force . . . yet they retain still the power of Thinking . . . .").

34. TRENCHARD & GORDON, *supra* note 24, No. 15, at 113.

35. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND 40 (NuVision Publ'ns 2010) (1644).

36. *See generally* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922 (1993).

37. PA. CONST. of 1776, art. I (1776).

38. *Id.* at art. XII.

39. THE FOUNDERS' CONSTITUTION vol. 5, 20, 26 (Philip B. Kurland & Ralph Lerner eds., 1987).

Holmes, rights like free expression were separate from "the rights of man in a moral sense."[40] Advocates for free speech shifted toward defending free speech in terms of its functional value to the democratic process and balanced value against what Roscoe Pound called "public interests."[41] Free speech increasingly was defended as critical to Holmes's marketplace of ideas[42]—a value of "social interests" as opposed to "the individual interest."[43] Once defined in this way, balancing allowed for tradeoffs with state interests in limiting speech. Thus, Pound declared free speech "may so affect the activities of the state necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech."[44]

Once unmoored from a natural rights foundation, free speech becomes a socially defined and socially tolerated right, often balanced against countervailing interests like combatting hate speech.[45] Even with Pound's construction, the discussion returns to where it began, with a question of harm. Under this construct, the right could be curtailed when social interests outweigh individual interests. For libertarians, the use of Millian harm can be appealing since Mill is widely read as sharply curtailing the range of government action to areas where a person's actions or speech harms others.[46] However, the harm principle can be used perversely as a rationale for speech controls. How one defines *harm* can turn a

40. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

41. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 344 (1915).

42. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (valorizing the "free trade in ideas").

43. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 445, 453 (1915).

44. *Id.* at 456.

45. Early advocates of a broad interpretation of free speech included Theodore Schroeder, who confined speech limits to criminal acts. *See The Meaning of Unabridged "Freedom of Speech"*, *in* THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 37, 40 (1916).

46. *See generally* JOEL FEINBERG, HARM TO OTHERS (1987).

libertarian principle into an authoritarian measure. Indeed, as discussed below, that is precisely what many governments and groups like Antifa have done.

The harm rationale underlies many of the calls for the barring of both speakers and viewpoints from social media and even news programming. Members of Congress have demanded that Big Tech companies bar views that are misinformative on questions ranging from election fraud to climate change to transgender policies.[47] Given the prior use of Mill's harm principle by companies like Facebook as the basis for "content modification" programs, these politicians sought continually greater harm avoidance. Indeed, banning entire networks became plausible, if not imperative. In a letter to all major cable suppliers, Democratic members of Congress demanded that companies explain why they allow networks like Fox News to be carried on cable. Underlying the suggestion of removing the network from cable access was the notion that it was harming society through disinformation. Representatives Anna Eshoo and Jerry McNerney stressed:

> [N]ot all TV news sources are the same. Some purported news outlets have long been misinformation rumor mills and conspiracy theory hotbeds that produce content that leads to real harm. Misinformation on TV has led to our current polluted information environment that radicalizes individuals to commit seditious acts and rejects public health best practices, among other issues in our public discourse.[48]

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47. *See, e.g.*, Jonathan Turley, *Twitter CEO Admits Censoring the Hunter Biden Story Was "Wrong" . . . Democrats Call for More Censorship*, RES IPSA (Nov. 18, 2020), https://jonathanturley.org/2020/11/18/twitter-ceo-admits-censoring-hunter-biden-story-was-wrong-democrats-call-for-more-censorship [https://perma.cc/53DL-KH9A].

48. Letter from Rep. Anna Eshoo and Jerry McNerney to Thomas M. Rutledge, CEO and Chairman, Charter Communications, Inc. (Feb. 22, 2021) (footnote omitted) https://eshoo.house.gov/sites/eshoo.house.gov/files/Eshoo-McNerney-TV-Misinfo%20Letters-2.22.21.pdf [https://perma.cc/LQM9-VLJV].

The harm rationale has been repeated, mantra-like, in Congress as many members have threatened to pull immunity protections from social media companies under Section 230 of the 1996 Communications Decency Act.[49]

It is important to note that the use of the harm rationale as a limit on speech is also now common in mainstream academic work. Professor Randall Bezanson has argued that recent Supreme Court cases on free speech are "analytically and methodologically flawed" and that these rulings have led to a countervailing danger of "too much free speech."[50] Likewise, Professor Mary Anne Franks has dismissed claims of a free speech crisis in America's universities, stating,

> The true threat to free speech on college campuses is posed not by university norms on free speech, but by the attack on those norms by the Internet culture of free speech. The Internet model of free speech is little more than cacophony, where the loudest, most provocative, or most unlikeable voice dominates . . . . If we want to protect free speech, we should not only resist the attempt to remake college campuses in the image of the Internet, but consider the benefits of remaking the Internet in the image of the university.[51]

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49. 47 U.S.C. § 230(c) (2018). *See* Jonathan Turley, *Learning to Fear Free Speech: How Politicians Are Moving to Protect Us from Our Unhealthy Reading Choices*, RES IPSA (Oct. 11, 2021), https://jonathanturley.org/2021/10/11/learning-to-fear-free-speech-how-politicians-are-moving-to-protect-us-from-our-unhealthy-reading-choices [https://perma.cc/8FJF-RAGT].

50. RANDALL P. BEZANSON, TOO MUCH FREE SPEECH? 258 (2012).

51. Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 242 (2019), https://www.virginialawreview.org/volumes/content/miseducation-free-speech [https://perma.cc/75YG-2844] [hereinafter Franks, *Miseducation*]. Professor Franks calls free speech advocates "elitists" who call for tolerance but who do not experience the harm or costs from free speech. Mary Anne Franks, *Free Speech Elitism: Harassment Is Not the Price 'We' Pay for Free Speech*, HUFFINGTON POST: THE BLOG (Jan. 23, 2014), http://www.huffingtonpost.com/mary-anne-franks/harassment-free-speech-women_b_4640459.html [https://perma.cc/H7F8-LSLU].

The "cacophony" that Professor Franks finds so unsettling on the Internet is the very manifestation of free and open debate for free speech advocates. Franks simply discards some views as unworthy and inimical to education:

> While there are many competing ideas about the goal of higher education, and all universities fall short of the ideal, at the core of the educational project is the desire to learn more—about the world, about other people, about the nature of truth. That project requires discernment, not blind insistence on the value of hearing "both sides."[52]

"Discernment" is euphemistically appealing for intellectuals who still cannot admit to censorship. In the same fashion, denouncing "both sidesism" is more palpable than calling for the silencing of an opposing side.

Similarly, Professor Alexander Tsesis has argued that "regulating intimidating and defamatory speech on campus outweighs the minimal burden it places on speakers" and suggested that the First Amendment concerns tied to hate speech codes can be adequately addressed by current case law in such a way that the university can still "openly foster the discussion of ideas."[53] All of these arguments reject the strong normative basis for the preservation of an open "marketplace of ideas."[54] By abandoning the bright lines of norma-

52. Franks, *Miseducation*, *supra* note 51, at 239.

53. Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 671–72 (2010).

54. In fairness to such writers, the Court itself often espouses conflicting normative and functionalist sentiments on free speech even in the same opinions. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court noted:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on

tive free speech, scholars find themselves on a spectrum of censorship that runs from "discernment" in silencing certain speakers to the more extreme "deplatforming" by groups like Antifa. The extent of speech curtailment becomes a matter of degree. Antifa takes this harm rationale to the extreme of denying the right of expression to a wide array of voices deemed harmful and reactionary.[55]

The deep association with Mill and his harm principle can lead writers to slip the moorings of his actual writings on subjects like free speech. We often describe the Mill we want as opposed to the Mill we got in works like *On Liberty*.[56] Mill was in the end a utilitarian who incorporated rights into his view of what is best "for all

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> public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. at 339–40 (citations omitted). The Court directly references the Millian notion of the self-corrective capacity of free speech and the reliance on good speech to counter bad speech in the marketplace of ideas. However, it then notes the lack of value of false statements or false speech. This seemingly conflicted position however can be reconciled in the context of defamation law. Mill never suggested that citizens could not challenge false or fraudulent statements in their individual capacity, particularly when such statements caused concrete harm. Indeed, such harm is Millian. It is not a moral but cognizable legal injury. Allowing liability for such false statements is not imposing the "authoritative intrusion" denounced by Mill.

55. *See* Jonathan Turley, *Is Antifa the Greatest Movement Against Free Speech in America?*, THE HILL (Aug. 4, 2020) https://thehill.com/opinion/civil-rights/510405-is-antifa-the-greatest-movement-against-free-speech-in-america [https://perma.cc/3GQT-VERY].

56. JOHN STUART MILL, ON LIBERTY (Project Gutenberg ed. 2011) (1859), available at https://www.gutenberg.org/files/34901/34901-h/34901-h.htm [https://perma.cc/VH28-NPE3] [hereinafter MILL, ON LIBERTY]. Mill himself references limits on speech in cases of incitement for example. "No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act." *Id.* at 103–04. He went on to explain:

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob

concerned."[57] After all, utilitarian figures like Jeremy Bentham rejected natural law as "nonsense upon stilts."[58] Yet, the harm principle is arguably the single most influential theory in protecting individual rights from majoritarian controls. Mill identified "one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . ."[59] Under that principle, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is . . . to prevent harm to others."[60] Mill anticipated that his principle could be misused since "[h]ow (it may be asked) can any part of the conduct of a member of a society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them."[61]

Mill recognized the essentiality of free speech, "being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."[62] For those who view free speech as a natural right, such statements

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assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.

Id. at 104. While the reservation for opinions that become actions is nonproblematic, many of us would disagree with this passage as a rationalization for criminalization or regulation of speech. However, it has been cited by at least one court as the basis for treating former President Trump's January 6th speech as grounds for civil liability. *See* Thompson v. Trump, 2022 U.S. Dist. LEXIS 30049 (D.D.C. 2022).

57. JOHN STUART MILL, UTILITARIANISM (1861), *reprinted in* 10 COLLECTED WORKS OF JOHN STUART MILL 218 (J.M. Robson ed., University of Toronto Press 1963).

58. JEREMY BENTHAM, ANARCHICAL FALLACIES (1859), *reprinted in* NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN 201 (Jeremy Waldron ed., 1987).

59. MILL, ON LIBERTY, *supra* note 56, at 17.

60. *Id.*

61. *Id.* at 154.

62. *Id.* at 13.

support a categorical view of harm as excluding speech that does not fall into a narrow category of crimes like conspiracy. For others, Mill's harm principle can be read as part of a general utilitarian philosophy where utility favors functionalist limits on free speech and other values. At its most extreme, the harm principle can be reduced to a threshold exclusion for entirely harmless acts or views. Under that approach, once harm is found, the issue becomes not of harm but expediency.[63] Writers like Gerald Dworkin have stressed that it "is clear that the [harm] principle is supposed to settle the issue of the state's jurisdiction, not the question of when the state *should* exercise its power."[64] The danger of this jurisdictional, as opposed to categorical, approach is evident in the classic slippery slope where the question becomes a mere debate of the efficacy of particular speech controls in addressing harmful speech. Mill offered a more nuanced view between these extremes.[65] He was admittedly more utilitarian than categorical in his discussion on free speech. He viewed heterodoxy as a vital element of the advancement of thought and society.[66] He viewed the right as a guarantee that ideas could be tested, supplying a range of options for society to choose from.[67]

The discussion of the practicality or utility of free speech expressed in Mill's writings should not take away from his overall philosophy of maximizing individual freedom and confining state

63. *See* Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1 (2006).

64. Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 934 (1999).

65. *See* David A.J. Richards, *Constitutional Legitimacy, The Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779, 789 (1999) ("John Stuart Mill's liberal theory of free speech and private life seems to many more normatively powerful than the utilitarian grounds he urges in support of it. In particular, nothing in the structure of utilitarian argument (which gives equal weight to all pleasures and pains) can reasonably explain the normative priority Mill, like most liberals, accords speech.").

66. MILL, ON LIBERTY, *supra* note 56, at 52.

67. *Id.* at 19.

action.[68] Mill started with a view that "all restraint, *qua* restraint, is an evil."[69] He also viewed free speech as essential to being fully human, describing "the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion."[70] Mill clearly rejected the notion of insults or offense as harms that crossed the threshold for coercive actions.[71] While he acknowledged that lines must be drawn, he argued that those lines ought to be as far removed from limitations on the freedom of thought as possible:

> That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question: the point to be determined is, where the limit should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example.[72]

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68. This overall context is lost in arguments that build on such rhetorical points like Mill not actually using the term "freedom of expression" as opposed to "expression of opinion." Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle*, 106 ETHICS 621, 622–23 (1996) ("'Discussion' and 'opinion' are words much narrower than 'expression' in their scope of reference. (They are narrower, even, than 'speech.')").

69. *Id.* at 623.

70. MILL, ON LIBERTY, *supra* note 56, at 97.

71. The solution to such annoying or insulting speech is voicing countervailing values and making countervailing associations. It is the same principle that applies to those claiming social harm to intimate relationships. Richard A. Epstein, *Toleration: The Lost Virtue*, 14 THE RESPONSIVE COMMUNITY 41, 50 (2004) ("[N]o one . . . requires [opponents of gay marriage] to alter anything that they do with their own lives. . . . The operative principle should remain that two individuals can form whatever associations they choose unless one can show harm (beyond offense) to third parties, and this cannot be done in this case.").

72. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (1848), *reprinted in* 3 THE COLLECTED WORDS OF JOHN STUART MILL 938 (J.M. Robson, ed., 1965).

Mill was the ultimate believer in heterodoxy, like Jeremy Bentham. While Mill tended to defend values like free speech in classic utilitarian terms, his very work, particularly *On Liberty*, was a testament to his faith in the freedom of thought. In his view, free speech allows both individuals and society at large to transcend calcified or orthodox values.[73]

The great irony is that the rise of speech control advocates represents a triumph of figures who long argued for morality laws and reactionary social measures during the life of Mill. One such figure was Lord Patrick Devlin, who used his Maccabaean Lecture at the British Academy in 1959 to argue that immorality was a social harm that justified coercive government measures.[74] That fluid concept of harm is the basis for a variety of laws and theories that would curtail free speech, including Catherine MacKinnon's effort to ban pornography.[75]

Governments have long used the claim of harm to justify the regulation of speech. Indeed, in Mill's lifetime, immoral or unorthodox views were often punished as unhealthy or harmful.[76] Mill himself was the target of such criticism.[77] The importance that Mill

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73. MILL, ON LIBERTY, *supra* note 56, at 30–31 (describing how the "peculiar evil of silencing the expression of an opinion is, that it is robbing the human race").

74. For a discussion of the Devlin lecture, *see* Turley, *Loadstone Rock*, *supra* note 14.

75. It is part of what I have previously called "coercive liberalism," in which opposing speech is declared harmful and therefore sanctionable. *Id.*

76. The famous Hart-Devlin debate was triggered by the release of the Report of the Committee on Homosexual Offenses and Prostitution (or the "Wolfenden Report") which declared that criminal law must be used to deter immoral ideas and advocacy:

> [I]ts function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, and economic dependence.

PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 2 (1965) (quoting REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION ¶ 13 (1957)).

77. Indeed, Mill himself was arrested as a young man for helping a poor individual obtain contraceptives. Adam Gopnik, *Right Again: The Passions of John Stuart Mill*, NEW

placed on free speech was reflected in the second chapter of *On Liberty*, entitled "Of the Liberty of Thought and Discussion."[78] The adoption of this expansive view nullifies any harm principle and allows for the expansion of speech regulation. It is not surprising, therefore, that this approach has been adopted by writers and groups seeking to deny the right to expression. Again, Mill emphasizes free thought and expression as belonging to one's internal "domain":

> With respect to the domain of the inward consciousness, the thoughts and feelings, and as much of external conduct as is personal only, involving no consequences, none at least of a painful or injurious kind, to other people: I hold that it is allowable in all, and in the more thoughtful and cultivated often a duty, to assert and promulgate, with all the force they are capable of, their opinion of what is good or bad, admirable or contemptible, but not to compel others to conform to that opinion; whether the force used is that of extra-legal coercion, or exerts itself by means of the law.[79]

Today's advocates of harm-based speech controls flip this concept on its head in treating censorship as a type of self-defense. That is the flawed logic behind the now common position on campuses that blocking or interrupting speakers is itself a form of free speech. Such private action, while not the focus of Mill's writings, contradicts his defense of the "the liberty of discussion." Mill was not assuming that all public advocacy would be a "discussion" of rivaling viewpoints. Protests are not particularly dialogic for the opposing sides, but they are part of a larger dialogue in articulating positions and viewpoints. However, many protests today focus on stopping speech by entering speaking areas to scream or shout out speakers.

YORKER (Sept. 29, 2008), https://www.newyorker.com/magazine/2008/10/06/right-again [https://perma.cc/3XG8-9MTD].

78. MILL, ON LIBERTY, *supra* note 56, at 28.

79. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 938.

It also occurs when protesters block entrances to speaking areas.[80] That is certainly a form of protest, but it is also designed to stop speech. That is at odds with Mill's concept of free discussion. Without the "freedom of the expression" to debate these questions, "the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct."[81]

Contemporary anti-free speech arguments explicitly or implicitly reject the model of tolerance underlying Millian and related theories. Mill considered speech regulation as inimical to both individual and societal growth because true knowledge for the individual cannot come in the vacuum of speech regulation where orthodox views are largely replicated rather than challenged. As Mill noted, "he who knows only his own side of the case, knows little of that."[82] However, the greater loss was expressed in terms of the loss to society:

> The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[83]

Indeed, the very stress or anxiety cited by many as a basis for banning speakers is precisely what Mill and others sought to produce in society. Such confrontation with opposing views developed not

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80. Jonathan Turley, *Schapiro's Unsafe Zone: Northwestern University Students Attack Police in Defunding Protest*, RES IPSA (Nov. 2, 2020), https://jonathanturley.org/2020/11/02/schapiros-un-safe-zone-northwestern-university-students-attack-police-in-defunding-protest [https://perma.cc/C3GX-NHS3].

81. MILL, ON LIBERTY, *supra* note 56, at 97–98.

82. *Id.* at 37.

83. *Id.* at 19.

just a tolerance for other views but better citizens. As Professor Jeremy Waldron has noted:

> [E]thical confrontation . . . is a positive good for Mill: it improves people and it promotes progress. But ethical confrontation is not a painless business. It always hurts to be contradicted in debate, if one takes seriously the views one is propounding . . . . If nobody is disturbed, distressed, or hurt in this way, that is a sign that ethical confrontation is not taking place, and . . . that the intellectual life and progress of our civilization may be grinding to a halt.[84]

Universities have always played a critical role in maintaining this heterodoxy and tolerance. That is not to say that universities have always risen to the challenge to protect dissenting viewpoints. Moreover, it is important to note that one can maintain a robust defense of free speech without embracing a natural rights basis for the right or even the individualism that underlies libertarian theories. A good example is Roscoe Pound. With figures like John Dewey and Herbert Croly, Pound was part of the movement against "excessive individualism" and in favor of balancing rights against social interests.[85] Yet Pound was involved in the fight for free speech on campuses at a time when it was the conservatives who were failing to actively protect those on the left in raising dissenting voices.[86] Pound advocated for permitting professors to speak out on public controversies and hold controversial views. He railed against the view that professors should remain silent on public controversies with direct bearing on "law reform and the law schools," stating that the idea "[t]hat the specialist has got to keep

84. Jeremy Waldron, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 115, 124 (1993).

85. *See generally* David M. Rabban, *Free Speech In Progressive Social Thought*, 74 TEX. L. REV. 951 (1996).

86. Letter from Roscoe Pound to Edwin R.A. Seligman (Dec. 8, 1914), Roscoe Pound Papers, Box 228, Folder 11, Harvard Law School Library; *see also* N.E.H. HULL, ROSCOE POUND AND KARL LEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 93 (1997).

quiet or confine himself to classroom discussion on such subjects seems to me distinctly against the public interest."[87] He added:

> I do not see why the university professor should be restrained in any way in the discussion of any subject of public interest which comes within the scope of his studies. . . . If he conducts his discussion as a scholar should, the fact that at the same time he makes a vigorous and possibly effective presentation of his views to the public ought not to be taken against him. . . . In short, I think the scholars in this country have been altogether too meek.[88]

Pound objected that "we are getting very intolerant in this country of even necessary freedom of speech."[89]

Pound's view of free speech would be reflected in the first Declaration of Principles of Academic Freedom in 1915 by the American Association of University Professors (AAUP).[90] The Declaration stressed the protection of free speech and the guarantee of "unfettered discussion" free of the "prescribed inculcation of a particular opinion upon a controverted question."[91] Yet academics have often grappled with the tension between their political causes and their obligation of objectivity and neutrality in the classroom. This concern is articulated by figures like Stan Fish, who objected that academic freedom loses its core legitimacy when professors use it to advocate rather than educate. For that reason, Fish maintains that when "academics are functioning not as academics, but as political advocates, [then] they do not merit academic freedom."[92] Some of the professors referenced in this article, particularly those who have

87. *Id.*

88. *Id.*

89. Rabban, *supra* note 85, at 999 (citing Letter from Roscoe Pound to Henry A. Forster (Apr. 25, 1916), Roscoe Pound Papers, Box 157, Folder 4, Harvard Law School Library).

90. Edwin R.A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), *reprinted in* 91 IND. L.J. 57, 60 (2015).

91. *Id.*

92. STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION 19 (2014).

violently attacked others or shut down the ability of others to speak, are the very antithesis of our profession.

As Fish noted, when a professor "tries to promote a political or social agenda, . . . he or she has stepped away from the immanent rationality of the [academic] enterprise and performed an action in relation to which there is no academic freedom protection . . . ."[93] There is a danger of such views sweeping too broadly. The right of professors to engage in political speech is protected by the freedom of speech, while academic freedom protects the right to pursue and teach ideas without fear of retaliation. Moreover, professors have faced efforts to bar them from advocating for social or political reforms, including a recent move by the University of Florida to keep political science professors from serving as experts to challenge changes in election rules.[94] While occurring outside of the classroom, such advocacy can be directly linked to (and is indeed the outgrowth of) academic work. There are clearly differences in how a professor expresses viewpoints inside and outside of a classroom. In the classroom, a professor is expected to facilitate the learning of students through the exposure to different viewpoints and values. In that capacity, proselytizing or politicizing can hamper the ability of students to form their own opinions and consider the full range of a subject. This line, however, is becoming increasingly difficult to discern. Indeed, the AAUP recently honored a controversial academic who allegedly holds anti-Israeli views.[95] The protection of such academics is paramount under principles of free speech and

93. STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 81 (2008).

94. Jonathan Turley, *University of Florida Bars Professors from Testifying Against New State Voting Rules*, RES IPSA (Oct. 31, 2021), https://jonathanturley.org/2021/10/31/university-of-florida-bars-professors-from-testifying-against-new-state-voting-rules [https://perma.cc/3Z29-KDRX].

95. *See, e.g.*, Aaron Bandler, *SFSU Professor Who Called Zionists White Supremacists Selected for Academic Award*, JEWISH J. (May 22, 2020), https://jewishjournal.com/news/united-states/316239/sfsu-professor-who-called-zionists-white-supremacists-selected-for-academic-award [https://perma.cc/KJ8W-MWH5].

academic freedom.[96] However, AAUP specifically noted that the professor "transcends the division between scholarship and activism that encumbers traditional university life."[97] It seemed to suggest the erasure of any distinction between advocacy inside or outside of the classroom that was drawn by figures like Pound.[98] Putting Fish's objections to the side, Pound was arguing for the ability of academics to engage in political discourse outside of the university.[99]

The irony is that Pound specifically objected to the effort to suppress anarchist speech and said that it is "almost impossible to advocate views at variance with those of the majority without being subjected to something very like persecution."[100] He warned that these same efforts to punish "the [hare]-brained reformer may be used by an impulsive plurality to hold down the sane, level-headed

96. The AAUP publication *Journal on Academic Freedom* was embroiled in a controversy after it solicited articles on viewpoint intolerance on campus, but only by conservatives. *See* Jonathan Turley, *AAUP Journal Solicits Papers on Conservative Intolerance on Campuses*, RES IPSA (Nov. 2, 2021), https://jonathanturley.org/2021/11/02/aaup-journal-solicits-papers-on-conservative-intolerance-on-campuses [https://perma.cc/P9NR-P5MJ].

97. *AAUP Announces 2020 Awards for Outstanding Faculty Activists*, AAUP (May 20, 2020), https://www.aaup.org/news/aaup-announces-2020-awards-outstanding-faculty-activists [https://perma.cc/Z3C2-4GFJ].

98. The line becomes even more uncertain when universities encourage particular viewpoint expression from faculty while sanctioning opposing views. For example, the University of Washington encouraged faculty to post "Indigenous Land Acknowledgements" on their syllabi but, when a professor posted a contrary statement, the university ordered the removal of the statement. *See* Jonathan Turley, *UW Professor Triggers Free Speech Fight over "Indigenous Land Acknowledgment"*, RES IPSA (Jan. 13, 2022), https://jonathanturley.org/2022/01/13/university-of-washington-professor-triggers-free-speech-fight-over-schools-indigenous-land-acknowledgement [https://perma.cc/M9L3-RUPE].

99. *See* Rabban, *supra* note 85, at 998–99.

100. *Id.* at 999 (citing Letter from Roscoe Pound to Henry A. Forster (Apr. 25, 1916), Roscoe Pound Papers, Box 157, Folder 4, Harvard Law School Library).

advocate of caution in matters of social legislation."[101] Pound's defense of free speech highlights how the politics have shifted while the underlying issue remains the same. Much of the viewpoint intolerance on campuses has come from the left, though there have been such cases from more conservative institutions.[102] As discussed above, we have seen professors and writers across the country subjected to discipline or campaigns for termination for expressing criticism of the recent protests or their underlying claims.[103] Others have faced retaliation for questioning Black Lives Matter as an organization, even while supporting the main premise of the organization.[104] The same danger of orthodoxy is evident in what Pound referred to as the same suppressive attitude used in "the old-time controversies as to heresy in religious matters."[105] The loss of "ethical confrontation" is evident in the many successful efforts to cancel or shut down those with opposing views on our campuses.

II. PUBLIC AND PRIVATE REGULATION OF THE "MARKETPLACE OF IDEAS"

The Millian foundation for the "marketplace of ideas" is evident in the writings of the Supreme Court, particularly those of Justice Holmes.[106] The concept embodies not just a free forum for creative and transformative thought but also the belief in a self-

101. *Id.*

102. *See, e.g.*, Jonathan Turley, *Speaking Event of Historian Jon Meacham Cancelled at Samford University*, RES IPSA (Oct. 30, 2021), https://jonathanturley.org/2021/10/30/speaking-event-for-historian-jon-meacham-cancelled-at-samford-university [https://perma.cc/JR2B-NEXV].

103. *See infra* Part III.C and accompanying text.

104. *Id.*

105. Rabban, *supra* note 85, at 999 (quoting Letter from Roscoe Pound to John N. Dryden (Feb. 5, 1916), Roscoe Pound Papers, Box 157, Folder 4, Harvard Law School Library).

106. Mill himself did not coin the term "marketplace of ideas." *See* Jill Gordon, *John Stuart Mill and the 'Marketplace of Ideas'*, 23 SOCIAL THEORY AND PRACTICE, 235, 235 – 49

corrective capacity in free speech.[107] This protected area for free speech is the very growth plate for democracy where ideas are expressed and tested. The curtailment of speech was a concern for the Framers but the First Amendment was confined to the threat of state censorship or punitive actions. The 21st Century has seen the rise of private censorship, which may ultimately prove a far greater threat to the Millian marketplace.

(1997). Indeed, the term is often credited to Justice Holmes in his 1919 dissent to *Abrams v. United States*: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

107. Professor Stanley Ingber criticized this view as "rooted in laissez-faire economics" and mythology. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984). In an account that strikingly mirrors the rationales used for curtailing free speech today, Ingber noted:

> Although laissez-faire economic theory asserts that desirable economic conditions are best promoted by a free market system, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals. Consequently, critics of the market model conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures.

Id. Like many today, Ingber argued that the faith in free speech serves as a chimera to protect the status quo. *Id.* at 6 ("[T]he present marketplace simply fine-tunes differences among elites while defusing pressure for change and fostering a myth of personal autonomy essential to the continued popular acceptance of a governing system biased toward the status quo."). Notably, as many in academia moved away from the Millian model, a new status quo has emerged based on a narrower band of tolerated ideas and viewpoints. Ironically, it has illustrated the self-destructive elements of centrally controlled economies— the extreme alternative to laissez-faire market approaches. As Mill predicted, there is less tolerance for experimentation and exploration of alternative or dissenting views.

A. Government Speech Controls and Coercion

The United States has gone through repeated periods of crackdowns and criminalization of free speech. Early in the Republic, the anti-sedition laws were used not only to intimidate but also to arrest those with opposing views. The use of the Sedition Act by President John Adams and the Federalists was recognized at the time as not just an abuse, but also the height of hypocrisy. Adams and the Federalists routinely engaged in false and malicious writings about Thomas Jefferson, including declaring that, if elected, "[m]urder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes."[108] Jefferson and James Madison denounced the law, which made it illegal for anyone to "print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . . ."[109] This included a Vermont congressman who was prosecuted for criticizing John Adams's "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[110] The prosecution proved the point but the irony was lost on Adams. It was not, however, lost on Jefferson, who remarked that "our general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of England."[111] Yet even those leaders seem to have had a more modest view of free

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108. Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, MILLER CTR., https://millercenter.org/president/jefferson/campaigns-and-elections [https://perma.cc/C9GM-PKN6] (last visited Mar. 6, 2022).

109. Sedition Act of 1798, Ch. 74, 1 Stat. 596 (1798) (expired 1801).

110. *See* CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON AND THE MISFITS WHO SAVED FREE SPEECH 114, 127–28 (2015).

111. *Id.* at 163–64 (citing Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), *in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971)).

speech protections, including the possibility of seditious prosecutions.[112] Whether a result of the conflict with the Federalists or a deep-seated view of free speech, the sedition prosecution period led to the articulation of our modern First Amendment values.[113] At least twenty-five leading Republicans were arrested, from journalists to politicians, though that number may not fully capture the full extent of the government crackdown.[114] All those convicted would later be pardoned by President Jefferson. The Sedition Act was never found unconstitutional and, fittingly, expired on Adams's last day in office as a lasting and indelible mark on his presidency.[115]

Prosecutions for unlawful speech continued periodically in the United States, becoming particularly abusive during periods like the Civil War and other times of armed conflict.[116] For example, under President Woodrow Wilson, the country experienced a crackdown on dissenting views when the United States entered World War I in April 1917.[117] Wilson called for new laws to punish dissenters, dismissing free speech concerns by declaring that "[disloyalty] was not a subject on which there was room for . . . debate" since such disloyal citizens "sacrificed their right to civil liberties."[118] To

112. In a statement during the Virginia Resolutions debate, Madison assured his opponents "every libellous writing or expression might receive its punishment in the state courts." Address of the General Assembly to the People of the Commonwealth of Virginia, *in* 6 THE WRITINGS OF JAMES MADISON 333–34 (Gaillard Hunt ed., 1908).

113. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 304 (1985) (discussing how this period of political conflict "provided the foundation for the Modern theory of the First Amendment").

114. Wendell Byrd, *New Light On The Sedition Act of 1798: The Missing Half Of The Population*, 34 L. & HIST. REV. 514, 545–46 (2016).

115. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 71 (2004).

116. ANTHONY R. FELLOW, AMERICAN MEDIA HISTORY 131–33, 136 (2d ed. 2010).

117. Jack A. Gottschalk, *"Consistent with Security" . . . A History of American Military Press Censorship*, 5 COMM. & L. 35, 38 (1983).

118. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979).

carry out the crackdown on free speech, Wilson needed and found an eager partner in Congress. Congress enacted the Espionage Act of 1917, introducing the criminalization of any acts that "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States" or willfully to "obstruct the recruiting or enlistment service of the United States."[119] At the time, Attorney General Charles Gregory made clear the menacing intent of such laws, declaring: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[120]

It was during this period that Congress rediscovered the allure of sedition laws. One year after passing the Espionage Act, Congress passed the Sedition Act of 1918.[121] From 1918 to 1921, Gregory's successor Attorney General Mitchell Palmer prosecuted hundreds of individuals under these laws—gaining infamy as the architect of the "Palmer Raids."[122] Communists, socialists, and anarchists faced repressive measures across the country.[123] In just one raid in January 1920, over 3,000 alleged Communists were rounded up.[124] The abuses during this period were not simply a failure of the Executive and Legislative branches, the so-called "political branches," to protect free speech. They were the result of a complete three-branch failure with the acquiescence of the Supreme Court and lower courts. A well-known example is the decision of

119. Espionage Act of 1917, Ch. 30, Tit. I, § 3, 40 Stat. 217, 219 (1917).

120. *All Disloyal Men Warned by Gregory*, N.Y. TIMES (Nov. 21, 1917), [https://perma.cc/9EMV-CQCD]. For a discussion of this period see Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009).

121. Sedition Act of 1918, Ch. 75, 40 Stat. 553 (1918) (repealed Mar. 3, 1921).

122. EDWIN P. HOYT, THE PALMER RAIDS, 1919–1920: AN ATTEMPT TO SUPPRESS DISSENT 6 (1969).

123. *See generally* CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 30, 32–34 (2007); STONE, *supra* note 115, at 220–26.

124. FINAN, *supra* note 123, at 1–4.

the Ninth Circuit in *Shaffer v. United States*,[125] where the court upheld the criminalization of clearly protected political speech.[126] The defendant was charged with mailing copies of *The Finished Mystery*, a book with the following passage:

> If you say it is a war of defense against wanton and intolerable aggression, I must reply that . . . it has yet to be proved that Germany has any intention or desire of attacking us . . . The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches.[127]

That is clearly protected speech, but the Ninth Circuit blissfully dismissed the First Amendment claim while adopting a wildly attenuated harm analysis:

> It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here . . . is whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute . . . . The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country . . . To teach that patriotism is murder and the spirit of the devil, and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.[128]

Similarly, in *Debs v. United States*,[129] the Court took the same approach to upholding the conviction of socialist leader Eugene

125. 255 F. 886 (9th Cir. 1919).
126. *Id.* at 886.
127. *Id.* at 887; *see also* Stone, *supra* note 115, at 945.
128. *Shaffer*, 255 F. at 888.
129. 249 U.S. 211 (1919).

Debs.[130] It was one of the lowest points in the Supreme Court's history, with the Court yielding to hysteria and government abuse.[131]

The Court upheld the conviction of Debs for speech that was the very essence of the First Amendment.[132] Debs merely gave a speech opposing the war.[133] Before the jury, Debs refused to back down in his exercise of free speech and reaffirmed his opposition to "the present government" and "social system":

> Your honor, I ask no mercy, I plead for no immunity. I realize that finally the right must prevail. I never more fully comprehended than now the great struggle between the powers of greed on the one hand and upon the other the rising hosts of freedom. I can see the dawn of a better day of humanity. The people are awakening. In due course of time they will come into their own.[134]

Justice Holmes, writing for a unanimous Court, ruled for the government, stating that these words had the "natural tendency and reasonably probable effect" of deterring people from supporting or enlisting in the war.[135]

Outside of wartime crackdowns, our struggle to protect free speech hit another low during the Cold War and the "Red Scare." Again, this period revealed a total failure of all three branches in supporting a crackdown on free speech. The Executive Branch arrested suspected Communists, and Congress enacted new powers

130. *Id.* at 217.

131. Jonathan Turley, *At Michigan Rally, Bernie Sanders Revels in his Role as Political Successor to Eugene Debs*, USA TODAY (Mar. 10, 2020), https://www.usatoday.com/story/opinion/2020/03/10/bernie-sanders-michigan-rally-political-successor-eugene-debs-column/5000675002 [https://perma.cc/R2M7-X9M6].

132. *Debs*, 249 U.S. at 217.

133. Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1173 (1984).

134. *Id.* at 1173 n.72.

135. *Debs*, 249 U.S. at 216.

under the Internal Security Act to allow the mass detention of dissidents.[136] The grand jury process was regularly used to target political dissidents and coerce people to reveal their associations and beliefs.[137] Of course, the most visible abuses occurred in the hearings on "Un-American Activities" with figures like Senator Joseph McCarthy. The work of these committees was replicated in myriad federal and state laws barring rights and privileges to suspected Communists.[138] Notably, however, some academics supported this crackdown. For example, Professor Carl Auerbach reconstructed the premise of the early anti-sedition laws by claiming that certain speech cannot be protected because it is inimical to the constitutional system.[139] Thus, Auerbach insisted that the First Amendment must be understood contextually as part of a "framework for a constitutional democracy."[140] Accordingly, if the First Amendment is a functionalist device to advance the democratic system, the right of free speech cannot be interpreted in a way that undermines the stability of the system. It becomes antithetical to interpret the amendment "to curb the power of Congress to exclude from the political

136. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 16, 19 (2003).

137. David J. Fine, Federal Grand Jury Investigation of Political Dissidents, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

138. As Professor Stone observed: "The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture . . . In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States." Stone, *supra* note 120, at 939, 949–50, 954.

139. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 184 (1956); *see also id.* at 189.

140. *Id.* at 189.

struggle those groups which, if victorious, would crush democracy and impose totalitarianism."[141]

The Auerbachian view captures the lingering rationale for excluding certain speech from constitutional or political protection. His construction is simple and familiar. Free speech is valued for its function in preserving a constitutional democracy. To the extent that it does not advance the stability of the system, it is disfavored. It is the rejection of the normative view that the constitutional system exists to guarantee the right, not the right to guarantee the constitutional system. Once a functionalist view is adopted, speech denial can become merely a matter of perspective. Those views deemed dangerous or hostile to the system are viewed as beyond the protections of the constitutional system. Consensus on harm leads to hegemony in speech. It is a relativistic view that will be readily embraced, not just by the government, but by those who believe that free speech only protects and fosters reactionary viewpoints.[142]

The Auerbachian model is reflected in opinions and writings that seek to tie the protection of speech to the inherent worth of its content. This includes treating some conflicts as "low-value speech" subject to greater regulation.[143] While the Court has largely held the line on requiring satisfaction of the strict scrutiny standard for curtailing, censoring, or punishing speech, it has recognized that some areas have been historically treated as low-value speech with less protection.[144] This distinction is often traced to *Chaplinsky*

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141. *Id.*

142. *See generally The Right of The People Peaceably to Assemble: Protecting Speech by Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley).

143. *See* Clay Calvert, *Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of* Stevens *and* Reed, 73 S.M.U. L. REV. 727 (2020).

144. Most famously, Justice Stevens advances this categorical treatment of speech with his statement that in *Young v. American Mini Theatres, Inc.*, that while "every schoolchild can understand why our duty to defend the right to speak" would apply

v. New Hampshire,[145] when the Court upheld the conviction of a Jehovah's Witness who used "offensive, derisive, or annoying word[s]" in public after he accused a city marshal of being a "God damned racketeer" and "a damned Fascist."[146] The differentiation of speech protection based on the perception of the underlying value of the speech presents the classic slippery slope danger. This is evident in past descriptions by the Court that are laden with subjectivity dressed up as objective criteria: maintaining that some speech is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[147] Thus, the Court has embraced the notion of speech curtailment where "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case–by-case adjudication is required."[148]

The Court has continued use of categorical distinction of speech to some extent in cases like *United States v. Stevens*.[149] The low value speech concept been challenged by academics like Professor Genevieve Lakier.[150] However, in *Stevens*, the Court also noted that "[w]hen we have identified categories of speech as fully outside the

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to "political oratory or philosophical discussion, . . . few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

145. 315 U.S. 568 (1942). *See* Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court's* R.A.V. *Decision*, 61 TENN. L. REV. 197, 205 (1993) (noting that *Chaplinsky* allowed for "extreme categorization, with the Court indicating that certain types of expression, such as fighting words, the lewd and obscene, the profane, and the libelous, are wholly outside the coverage and protection of the First Amendment").

146. *Chaplinsky*, 315 U.S. at 569.

147. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky*, 315 U.S. at 572).

148. *Id.* at 400 (citation omitted).

149. 559 U.S. 460, 468 (2010).

150. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169 (2015).

protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis."[151] The recognition of such exceptions accepts "a functionalist distinction between high- and low-value speech."[152] While the exceptions remain thankfully few, this is a distinction that would resonate later on campuses and with corporations limiting speech.

In a curious way, we are living through a period reminiscent of the Red Scare, though socialism is now popular with almost half of voters[153] and a majority of Democratic voters.[154] That, in my view, is a good thing in terms of diversity and tolerance in our political system. However, there is now an inverse intolerance against conservative voices.[155] The Red Scare was a period in which writers and others were put on blacklists and denied employment for holding the "wrong" views.[156] There now exists a palpable fear of being accused of being reactionary or racist in questioning any aspect of recent protests or their underlying demands. Where academics and

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151. *Stevens*, 559 U.S. at 471. Indeed, in a near unanimous decision, the Court declared a ban on "crush videos" to be unconstitutional while noting:

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

Id. at 470.

152. Lakier, *supra* note 150, at 2174.

153. Mohamed Younis, *Four in 10 Americans Embrace Some Form of Socialism*, GALLUP (May 20, 2019), https://news.gallup.com/poll/257639/four-americans-embrace-form-socialism.aspx [https://perma.cc/VD23-JXBE].

154. Hunter Moyler, *76 Percent of Democrats Say They'd Vote for a Socialist for President, New Poll Shows*, NEWSWEEK (Feb. 11, 2020), https://www.newsweek.com/76-percent-democrats-say-theyd-vote-socialist-president-new-poll-shows-1486732 [https://perma.cc/6GVT-SZL2].

155. *See generally* Young America's Found. v. Stenger, 2021 U.S. Dist. LEXIS 159439 (N.D.N.Y. 2021) (discussing pattern of viewpoint intolerance).

156. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 359–66 (2004).

writers were once targeted for their criticism of the government, one is more likely today to be denounced for support of the government, particularly law enforcement. At the same time, a distinctly anti-free speech movement has emerged with a harm-based philosophy. The result is not just a narrowing of tolerated speech but a narrowing of debate. There is a prejudice that becomes an orthodoxy, a danger discussed by John Milton, who warned: "if it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors."[157] What is "prohibited" today is often the result of corporate systems of censorship rather than the classic state action model. As discussed below, these companies fall outside of First Amendment controls and cite their associational and free speech rights as a basis for silencing opposing views on their platforms.

Anti-free speech campaigns for censorship on the Internet and anti-free speech groups have been more successful than their predecessors. That is due, in significant part, to an unprecedented coalition of private companies, academics, media, and activists in favor of speech controls.[158] Yet while various groups have chilled speech on campuses, their success pales in comparison to the actions of Facebook, Twitter, and other major companies.[159] The protection of free speech is far more challenging than its curtailment.

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157. JOHN MILTON, AREOPAGITICA (1644), *reprinted in* COMPLETE POEMS AND MAJOR PROSE 733 (Merritt Y. Hughes ed., 1957).

158. *See* Jonathan Turley, *Why Burn Books When You Can Ban Them? Writers and Publishers Embrace Blacklisting in an Expanding American Anti-Free Speech Movement*, RES IPSA (Jan. 22, 2021), https://jonathanturley.org/2021/01/22/why-burn-books-when-you-can-ban-them-writers-and-publishers-embrace-blacklisting-in-an-expanding-american-anti-free-speech-movement [https://perma.cc/Q5SC-4883].

159. I have opposed efforts to declare Antifa a terrorist group because such actions would create their own free speech concerns and actually further anti–free speech agendas. *See* Jonathan Turley, *Declaring Antifa a Terrorist Organization Could Achieve Its Own*

Any measures to guarantee free expression must also balance the countervailing rights of groups and corporations, including their anti-free speech advocacy.

B. Private Censorship and the Outsourcing of Speech Regulation

The functionalist theory of free speech has found fertile ground with those arguing for private censorship and blacklisting of individuals to prevent speech considered harmful. In rationalizing efforts to silence others, many emphasize that the targeted speech has little value[160] while stressing its negative impact on political or academic discourse.[161] This reframing of the issue has allowed censorship and speech intolerance to "go mainstream" as many writers, academics, and politicians call for the removal of viewpoints or individuals.[162] This includes pressure to use algorithms to favor

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Anti-Speech Agenda, L.A. TIMES, June 1, 2020, *available at* https://jonathanturley.org/2020/06/04/declaring-antifa-a-terrorist-organization-could-achieve-its-anti-free-speech-agenda [https://perma.cc/KVZ5-GYEM]; *see also The Right of the People Peaceably to Assemble: Protecting Speech by Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley). Yet, there is a push in Congress to make ideology a critical determinant in targeting groups for domestic terrorism investigations. *See Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 7, 2022) (testimony of Professor Jonathan Turley).

160. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 607–08 (1986).

161. *See generally* JEREMY WALDRON, THE HARM IN HATE SPEECH (2014).

162. As one writer put it:

> These scholars argue something that may seem unsettling to Americans: that perhaps our way of thinking about free speech is not the best way. At the very least, we should understand that it isn't the only way. Other democracies, in Europe and elsewhere, have taken a different approach. Despite more regulations on speech, these countries remain democratic; in fact, they have created better conditions for their citizenry to sort what's true from what's not and to make informed decisions about what they want their societies to be. Here in the United States, meanwhile, we're drowning in lies.

Emily Bazelon, *The First Amendment in the Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/magazine/free-speech.html [https://perma.cc/4HUW-7SAV].

"true" book selections or articles.[163] By distinguishing between worthy and unworthy speech, critics relieve themselves of any sense of responsibility for censorship and further allow for public campaigns to enlist major companies to enforce a system of exclusion and removal. This includes blocking others from speaking about disruptive or violent actions as part of "deplatforming" campaigns[164] or editorial decisions barring publications.[165]

The pandemic has reinforced this long-building movement toward harm-based claims for speech regulation. Misinformation on vaccines or masks can clearly be harmful to those who fail to rely

163. *See* Jonathan Turley, *Enlightened Algorithms? Progressives Ask Big Tech to Censor "Bad" Ideas to Save Us from Ourselves*, USA TODAY (Sept. 26, 2021), https://www.usatoday.com/story/opinion/2021/09/26/elizabeth-warren-wants-amazon-censor-your-reading/5832060001 [https://perma.cc/87K6-CRW7]; Jonathan Turley, *Learning to Fear Free Speech: How Politicians Are Moving to Protect Us from Our Unhealthy Reading Choices*, RES IPSA (Oct. 11, 2021), https://jonathanturley.org/2021/10/11/learning-to-fear-free-speech-how-politicians-are-moving-to-protect-us-from-our-unhealthy-reading-choices [https://perma.cc/C5P7-LJ2Z].

164. This includes refusing to recognize even free speech groups as potentially "harmful" or "divisive." Jonathan Turley, *"Potential and Real Harm": Emory Law SBA Refuses Recognition of Free Speech Group*, RES IPSA (Jan. 18, 2022), https://jonathanturley.org/2022/01/18/potential-and-real-harm-emory-law-sba-refuses-recognition-of-free-speech-group [https://perma.cc/NW99-BDWM].

165. Jonathan Turley, *Emory Law Journal Accused of Censorship as Law Professors Withdraw Articles in Protest*, RES IPSA (Jan. 5, 2022), https://jonathanturley.org/2022/01/05/emory-law-journal-accused-of-censorship-as-law-professors-withdraw-articles-in-protest [https://perma.cc/6HHB-DRY9]; Jonathan Turley, *The Rising Generation of Censors: Law Schools Are the Latest Battleground over Free Speech*, RES IPSA (July 8, 2021), https://jonathanturley.org/2021/07/08/the-rising-generation-of-censors-law-school-are-the-latest-battleground-over-free-speech [https://perma.cc/524X-G5NS].

on credible sources, leading to harms like drinking bleach[166] or ingesting dangerous chemicals.[167] However, social media companies also barred studies and theories that were later found to be credible, ranging from the origins of the virus[168] to the lack of efficacy of commonly worn masks[169] to the higher protection afforded by natural immunities.[170] The censorship of those theories curtailed meaningful debate over issues directly impacting the health of the public. Yet advocates insisted that free speech does not offer its own protection against bad speech in the "post-truth" world.[171] Virality, not

166. Nicholas Reimann, *Some Americans Are Tragically Still Drinking Bleach as a Coronavirus 'Cure'*, FORBES (Aug. 24, 2020), https://www.forbes.com/sites/nicholasreimann/2020/08/24/some-americans-are-tragically-still-drinking-bleach-as-a-coronavirus-cure/?sh=51f999756748 [https://perma.cc/N35Q-RR3J]. *But see* Sally Robertson, *Reports of Drinking Bleach to Prevent Covid-19 Skewed by "Problematic" Claims*, NEWS-MEDICAL.NET (Dec. 15, 2020), https://www.news-medical.net/news/20201215/Reports-of-drinking-bleach-to-prevent-COVID-19-skewed-by-problematic-claims.aspx [https://perma.cc/YUN6-YDZR].

167. *Arizona Man Dies After Attempting to Take Trump Coronavirus Cure*, THE GUARDIAN (Mar. 20, 2020), https://www.theguardian.com/world/2020/mar/24/coronavirus-cure-kills-man-after-trump-touts-chloroquine-phosphate [https://perma.cc/57BQ-9XHW].

168. Bret Stephens, *Media Groupthink and the Lab-Leak Theory*, N.Y. TIMES, (May 31, 2021), https://www.nytimes.com/2021/05/31/opinion/media-lab-leak-theory.html [https://perma.cc/VN3M-367Y].

169. Apoorva Mandavilli, *The C.D.C. Concedes That Cloth Masks Do Not Protect Against the Virus as Effectively as Other Masks*, N.Y. TIMES (Jan. 14, 2022), https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html [https://perma.cc/JF9K-MDZN].

170. James Hockaday, *Instagram 'Fueling Conspiracy Theorists' by Banning #Naturalimmunity Hashtag*, METRO (Sept. 17, 2021), https://metro.co.uk/2021/09/17/instagram-fueling-conspiracy-theorists-by-banning-naturalimmunity-hashtag-15275249/ [https://perma.cc/WYC6-56XY]. *See also* Julie Steenhuysen & Manas Mishra, *Prior COVID Infection More Protective Than Vaccination During Delta Surge — U.S. Study*, REUTERS (Jan. 19, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/prior-covid-infection-more-protective-than-vaccination-during-delta-surge-us-2022-01-19 [https://perma.cc/SKR5-9NQZ].

171. Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018), https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship [https://perma.cc/NW6L-4M73] ("John Stuart Mill's notion that a 'marketplace of ideas' will elevate the truth is flatly belied by the virality of fake news.").

truth, is now the defining element for leaders like President Joe Biden, who accused these companies of "killing people" by failing to censor more statements.[172] There is an assumption that such censorship was a net positive for society without any real balancing of countervailing costs, like the failure to test certain public health policies or the plummeting trust in the media to report fairly on such issues.[173]

The complaints about deplatforming and blocking individuals and groups on social media have already been discussed extensively in the popular and academic press.[174] The greatest concern, however, is that the use of these companies hits the blind spot in the Constitution as a "Little Brother" rather than a "Big Brother" threat to free speech. The First Amendment was focused on the threat of government censorship, an emphasis that spared the country a history with the type of state media bureaucracies in countries such as China or Iran.[175] Yet, the focus on preventing state media controls is increasingly inconsequential in light of the growing levels of control exercised by private companies. Recent years have shown that a uniform system of corporate censorship can be

172. Jonathan Turley, *Fear Free Speech: Biden Denounces Big Tech as "Killing People" by Not Censoring Speech*, RES IPSA (July 17, 2021), https://jonathanturley.org/2021/07/17/the-lethality-of-free-speech-biden-denounces-big-tech-as-killing-people-by-not-censoring-speech/ [https://perma.cc/97B3-DJG7].

173. Megan Brenan, *Americans' Trust in Media Dips to Second Lowest on Record*, GALLUP (Oct. 7, 2021), https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx [https://perma.cc/Z5SF-PXTP].

174. *See generally* Disinvitation Database, FIRE, https://www.thefire.org/resources/disinvitation-database [https://perma.cc/8MPK-WMKU].

175. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (explaining that states and cities did have censorship boards like New York's board which monitored content deemed "obscene, indecent, immoral, inhuman, sacrilegious, or . . . of such a character that its exhibition would tend to corrupt morals or incite to crime"); *see generally* Simeon Djankov et al., *Who Owns the Media*, 46 J.L. & ECON. 341 (2003) (explaining how those boards fell to the wayside over time and how this led to the rise of free speech values in the country; around the world, however, much of the media remains under the economic control of governments).

far more effective than the classic model of a central ministry in controlling information. What is particularly concerning is how the use of private companies to impose an extensive censorship system has been embraced by many in academia and the media.[176] As noted earlier, while companies like Twitter or publishing houses are clearly not the subjects of the First Amendment, they can still eviscerate free speech through private censorship. There are over three billion social media users, and people spend an average of two hours and twenty-four minutes a day on social media sites.[177] These platforms now are the primary form of communication and political discourse for the public—exceeding telephonic and mail communications by an overwhelming and growing margin.[178] In terms of speech curtailment, the level of censorship meted out through social media companies is unprecedented. Given that social media dominates today's political discourse, these companies have direct control over a far greater range of speech than would any state apparatus.[179]

The dangers posed by private censorship for a political system are the same as government censorship in the curtailment of free speech. The danger of such private censorship was evident when

176. *See, e.g.*, MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021).

177. Deyan G., *How Much Time Do People Spend on Social Media in 2021?*, TECHJURY (Jan. 4, 2022), https://techjury.net/blog/time-spent-on-social-media [https://perma.cc/BEY8-PC54].

178. *Id.*

179. Indeed, authoritarian figures have long recognized the threat of these companies. Russian President Vladimir Putin denounced Big Tech as a threat to "democratic institutions." As one of the world's most authoritarian and murderous figures, Putin is hardly concerned with democratic institutions. Madeline Roache, *Putin Warns Big Tech Poses a Threat to "Legitimate Democratic Institutions"*, TIME (Jan. 27, 2021), https://time.com/5933666/putin-davos-agenda-speech/ [https://perma.cc/7S88-6T33]. He can, however, recognize (and even begrudgingly respect) a system of continual speech regulation and control that surpasses his own capabilities on a global scale.

Twitter blocked the *New York Post* story on Hunter Biden's influence-peddling before the 2020 election.[180] While the story could still be located on other sites, the company (and other sites subsequently) dramatically curtailed access and effectively labeled the story as unreliable.[181] After the election, Twitter Chief Executive Officer Jack Dorsey appeared before the Senate and admitted that the company's actions were wrong. Dorsey's statement was apologetic but still incomplete and evasive. He admitted that "this action was wrong and corrected it within 24 hours."[182] However, it was not Dorsey's statement but the response of Democratic senators that was so striking. Various senators demanded an increase, not a decrease, in censorship.[183]

The hearing highlighted the demand for corporate censorship and the threat of congressional monitoring to ensure the removal of certain viewpoints. Dorsey pledged to continue to censor "misleading" content.[184] Adopting the same functionalist rhetoric,

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180. *See* Jonathan Turley, *Joe Biden and the Disappearing Elephant: How to Make a Full-Sized Scandal Disappear Before an Audience of Millions*, RES IPSA (Oct. 19, 2021), https://jonathanturley.org/2021/10/19/joe-biden-and-the-disappearing-elephant-how-to-make-a-full-sized-scandal-vanish-in-front-of-an-audience-of-millions [https://perma.cc/4G38-WUY7].

181. Adi Robertson, *New York Post's Hunter Biden Laptop Source Sues Twitter for Defamation*, THE VERGE (Dec. 28, 2020), https://www.theverge.com/2020/12/28/22203412/john-paul-mac-isaac-hunter-biden-laptop-new-york-post-twitter-moderation-hacked-materials-lawsuit [https://perma.cc/CDY4-34T7]. *But see FEC Backs Twitter over Hunter Biden Censorship in a Decision Based on Lies*, N.Y. POST (Sept. 13, 2021), https://nypost.com/2021/09/13/fec-backs-twitter-over-hunter-biden-censorship/ [https://perma.cc/2D5K-LA6N].

182. Brittany Bernstein, *Twitter CEO Dorsey Says It Was 'Wrong' to Block New York Post Hunter Biden Story*, YAHOO! NEWS (Nov. 17, 2020), https://news.yahoo.com/twitter-ceo-dorsey-says-wrong-171149910.html [https://perma.cc/VY3Q-HJ7E].

183. Jonathan Turley, *Twitter CEO Admits Censoring the Hunter Biden Story Was "Wrong" . . . Democrats Call for More Censorship*, RES IPSA (Nov. 18, 2020), https://jonathanturley.org/2020/11/18/twitter-ceo-admits-censoring-hunter-biden-story-was-wrong-democrats-call-for-more-censorship/ [https://perma.cc/Q33W-4K6H].

184. *Id.*

Dorsey and others emphasized that misleading speech had little value and indeed undermined the democratic process. While acknowledging that "[i]t's hard to define it completely and cohesively," he said such censorship would focus on "the highest severity of harm."[185] Once the members accepted the license to censor low-value speech, members seemed to rush forward with additions of other categories of unworthy or harmful speech. Delaware Senator Chris Coons demonstrated the very essence of the "slippery slope" danger of the harm rationale for speech controls:

> Well, Mr. Dorsey, I'll close with this. I cannot think of a greater harm than climate change, which is transforming literally our planet and causing harm to our entire world. I think we're experiencing significant harm as we speak. I recognize the pandemic and misinformation about COVID-19, manipulated media also cause harm, but I'd urge you to reconsider that because helping to disseminate climate denialism, in my view, further facilitates and accelerates one of the greatest existential threats to our world. So thank you to both of our witnesses.[186]

Despite the difficulty in defining the category, Dorsey reaffirmed the commitment to combat it through censorship or "content modification."[187] In response, Coons pressed for expanded censorship to include "harmful" postings viewed as "climate denialism."[188] Likewise, Connecticut Senator Richard Blumenthal seemed to take the opposite meaning from Twitter admitting that it was wrong to censor the Biden story.[189] Blumenthal said that he was "concerned that both of your companies are, in fact, backsliding or retrenching, that you are failing to take action against dangerous disinformation."[190] Accordingly, he demanded an answer to this question:

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Breaking the News: Censorship, Suppression, and the 2020 Election: Before the S. Comm. On the Judiciary*, 116th Cong. (2020).

190. *Id.*

> Will you commit to the same kind of robust content modification playbook in this coming election, including fact-checking, labeling, reducing the spread of misinformation, and other steps, even for politicians in the runoff elections ahead?[191]

"Robust content modification" has a certain Orwellian feel to it. It is, in fact, censorship. Indeed, academics have acknowledged that censorship is modeled on measures long associated with authoritarian countries. Harvard Law School professor Jack Goldsmith and University of Arizona law professor Andrew Keane Woods are resigned to the idea that speech regulation has become unavoidable on the Internet and suggest that government decisionmakers ought to be more involved in the speech regulation decisions so far delegated (ostensibly) to the private sector.[192] While Goldsmith and Woods are obviously not calling for authoritarian abuse, they are advocating for control over the internet to regulate speech—crossing the Rubicon from free speech to censorship models. They declared:

> In the great debate of the past two decades about freedom versus control of the network, China was largely right and the United States was largely wrong. . . . Significant monitoring and speech control are inevitable components of a mature and flourishing internet, and governments must play a large role in these practices to ensure that the internet is compatible with a society's norms and values.[193]

The pressure brought upon Big Tech companies by political figures highlights the danger of a type of out-sourcing of censorship

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191. *Id.* This was a reference to the runoff elections in Georgia which would determine the control of the Senate in the 117th Congress.

192. Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, THE ATLANTIC (Apr. 25, 2020), https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549 [https://perma.cc/4Q7K-YLMM].

193. *Id.*

functions by governmental actors.[194] In some cases, the nexus is open and obvious. Recently, Twitter admitted that it was censoring criticism of the Indian government over its handling of the pandemic, particularly its failure to prepare for a second wave of infections.[195] There are widespread reports that the actual number of cases in the country could be three times higher than reported by the government[196] and that hundreds of thousands could be at risk or have died due to government neglect.[197] However, journalists, political figures, and others who critiqued government inaction were blocked by Twitter at the behest of the government.[198] Twitter simply asserted its authority to "withhold access to the content" if the company determined the content to be "illegal in a particular jurisdiction."[199] Once the Indian government restricted free speech, Twitter became the instrument for the enforcement of the rule through private censorship. Elsewhere, Twitter has been censoring critics of pandemic orders and those who have challenged scientific

194. *See* Jonathan Turley, *'Shadow State': Embracing Corporate Governance to Escape Constitutional Limits*, THE HILL (July 17, 2021), https://thehill.com/opinion/judiciary/563520-shadow-state-embracing-corporate-governance-to-escape-constitutional-limits [https://perma.cc/XJ3M-D3YF].

195. Jonathan Turley, *Twitter Admits to Censoring Criticism of the Indian Government*, RES IPSA (Apr. 25, 2021), https://jonathanturley.org/2021/04/25/twitter-admits-to-censoring-criticism-of-the-indian-government [https://perma.cc/URG3-5N6R].

196. Michael Le Page, Clare Wilson et al., *Covid-19 News: Japan To Declare State of Emergency*, NEW SCIENTIST, April 23, 2021.

197. Shaikh Azizur Rahman & Emma Graham-Harrison, *India's Covid Death Toll at Record High, but True Figure Likely to Be Worse*, THE GUARDIAN (Apr. 24, 2021) https://www.theguardian.com/world/2021/apr/24/indias-covid-death-toll-hides-stark-truth-for-the-poor-its-even-worse [https://perma.cc/LK2J-VWZZ].

198. Sheikh Saaliq & Aijaz Hussain, *Virus 'Swallowing' People in India; Crematoriums Overwhelmed*, ASSOCIATED PRESS (Apr. 25, 2021), https://apnews.com/article/health-india-religion-coronavirus-c644fc9eb09beb04e16d0215a6693886 [https://perma.cc/RP72-LMLX].

199. *Id.*

claims as a threat to public health.[200] Yet in India, critics are attempting to reveal what they believe are threats to public health.[201] For Twitter, the sole issue appears to be that expressing such views is unlawful. Thus, the company has become a private arm of state censorship by enforcing such rules.

In the United States, the corporate-government alliance has been less direct but no less damaging for free speech. The demands for censorship have been reinforced by letters threatening congressional action. Many of those threats have centered on removing Section 230 immunity, pursuing antitrust measures, or other vague regulatory responses to penalize or deplatform conservative sites or speakers. That was the case with the previously referenced letter

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200. *See, e.g.*, Jonathan Turley, *Twitter Suspends Science Writer After He Posts Results of Pfizer Clinical Test*, RES IPSA (July 31, 2021), https://jonathanturley.org/2021/07/31/twitter-suspends-science-writer-after-he-posts-results-of-pfizer-clinical-test [https://perma.cc/3DSJ-9NUD].

Twitter's policy states:

> Content that is demonstrably false or misleading and may lead to significant risk of harm (such as increased exposure to the virus, or adverse effects on public health systems) may not be shared on Twitter. This includes sharing content that may mislead people about the nature of the COVID-19 virus; the efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease; official regulations, restrictions, or exemptions pertaining to health advisories; or the prevalence of the virus or risk of infection or death associated with COVID-19. . . . When Tweets include misleading information about COVID-19, we may place a label on those Tweets that includes corrective information about that claim. . . . In some cases we may also add labels to provide context in situations where authoritative (scientific or otherwise) opinion might change or is changing over time, in situations where local context is important, or when the potential for harm is less direct or imminent.

TWITTER, COVID-19 MISLEADING INFORMATION POLICY (2021), available at https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy [https://perma.cc/JLR9-Y3RL] (last visited Mar. 6, 2022).

201. *India Covid: Anger as Twitter Ordered to Remove Critical Virus Posts*, BBC (Apr. 26, 2021), https://www.bbc.com/news/world-asia-56883483 [https://perma.cc/GU4E-URQU] ("One Twitter user accused the government of 'finding it easier to take down tweets than ensure oxygen supplies.'").

to cable companies from Representatives Eshoo and McNerney asking why viewers should be allowed access to Fox News, which was the most watched cable news channel in 2020.[202] In stressing that "not all TV news sources are the same," the members confronted the carriers on airing the networks as purported "hotbeds" of disinformation and conspiracy theories.[203] Specifically, they objected that "Fox News . . . has spent years spewing misinformation about American politics."[204] The first question raised by the members seemed more like a statement:

> What moral or ethical principles (including those related to journalistic integrity, violence, medical information, and public health) do you apply in deciding which channels to carry or when to take adverse actions against a channel?[205]

The obvious answer would incorporate the foundational principles of free speech and the free press, which are not even referenced in a letter pushing for major news outlets to be essentially shut down. Instead, the companies are asked if they will impose a morality judgment on news coverage and, ultimately, access. This country went through a long and troubling period of morality codes being used to censor material in newspapers, speeches, books, and movies, including material created by feminists, atheists, and other disfavored groups.[206] To invite a return to such subjective standards is alarming.

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202. Letter from Reps. Anna Eshoo and Jerry McNerney to John Stankey, CEO, AT&T, Inc. (Feb. 22, 2021). For full disclosure, the author has worked as a legal analyst for NBC, CBS, BBC, and currently Fox News.

203. *Id.*

204. *Id.* While Rep. Eshoo later insisted that she was "just asking" questions, the absence of a question mark after these lines left little doubt that they were demands, not inquiries. Kimberley A. Strassel, *'Just Asking' for Censorship*, WALL ST. J. (Feb. 25, 2021), https://www.wsj.com/articles/just-asking-for-censorship-11614295623 [https://perma.cc/9H2W-A9XM].

205. Letter from Reps. Anna Eshoo and Jerry McNerney to John Stankey, CEO, AT&T, Inc. (Feb. 22, 2021).

206. *See* Turley, *Loadstone Rock*, *supra* note 14.

The type of demands contained in the Eshoo-McNerney letter has led some to question whether Congress is crossing the line into coercing companies to engage in censorship, particularly in the use of Section 230. The language of the Section itself is problematic in that it gives these companies immunity "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."[207] As Columbia Law professor Philip Hamburger has noted, the statute appears to permit what is made impermissible under the First Amendment: "Congress makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them."[208] As Hamburger notes, that does not mean that the statute is unconstitutional, particularly given the judicial rule favoring narrow constructions to avoid unconstitutional meanings.[209] However, there is another lingering issue raised by the use of this power to carry out the clear preference on "content modification" of one party.

The Section 230 controversy raises the question of whether government actors (including members of Congress) can do indirectly what they are prohibited from doing directly. With members openly suggesting areas for speech bans, the risk of censorship by surrogate is obvious. That is particularly important when the challenged actions may be the result of coercion or compulsion. In the area of federalism, states are protected by decisions barring both

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207. 47 U.S.C. § 230(c).

208. Philip Hamburger, *The Constitution Can Crack Section 230*, WALL ST. J. (Jan. 29, 2021), https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851 [https://perma.cc/XE8K-JJ4V].

209. *Id.*; *see, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (narrowly construing law to avoid constitutional problems); Republican Party of Hawaii v. Mink, 474 U.S. 1301, 1302 (1985) (narrowly interpreting the recall provisions of the Honolulu City Charter).

coercion and commandeering by the federal government in cases like *New York v. United States*[210] and *Printz v. United States*.[211] In *National Federation of Independent Business v. Sebelius*,[212] seven members of the Court ruled that the Affordable Care Act's requirement that states expand Medicaid eligibility "runs contrary to our system of federalism" as embodied in the anti-commandeering principle.[213] In cases like *Murphy v. National Collegiate Athletic Association*,[214] the Court has reaffirmed that Congress may not issue direct orders to state governments.[215] While obviously distinct from the federalism context, the use of Section 230 and other demands on both Big Tech and cable companies raises an analogy to achieving unconstitutional results by commandeering third parties. The question is whether the threat of removing immunity protections or other benefits under laws like Section 230 is coercive to the point of "abridging the freedom of speech, or of the free press" as applied to these companies.[216]

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210. 505 U.S. 144, 161 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981) ("Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'").

211. 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved . . . .").

212. 567 U.S. 519 (2012).

213. *Id.* at 577–78.

214. 138 S. Ct. 1461 (2018).

215. *Id.* at 1476.

216. Notably, Facebook even blocked former-President Donald Trump's voice. Facebook removed a video of an interview by Lara Trump of her father-in-law and the company declared that it would censor any content "in the voice of Donald Trump." Brooke Singman, *Facebook Removes Video of Trump Interview with Daughter-in-Law Lara Trump*, FOX NEWS (Mar. 31, 2021), https://www.foxnews.com/politics/facebook-removes-trump-interview-video-daughter-in-law-lara-trump [https://perma.cc/4MGZ-AYP5]. The classic commandeering case involves the conscription of states to carry out federal goals under threat of losing vital federal support. For example, in *New York v. United States*, 505 U.S. 144 (1992), the Court held that part of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was unconstitutional because it "commandeer[ed] the

Likewise, courts have found that third parties can be considered state actors, such as when private security guards conduct searches under the direction of—or in coordination with—law enforcement. As with the First Amendment, the Fourth Amendment applies to governmental, not private actors. However, "[t]he Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as instruments or agents of the Government."[217] This creates the same difficulty in determining whether private actors are responding to their own priorities or the directions of the government. In the case of congressional pressure, these companies can claim that a cooperative rather than an "agency relationship"[218] existed. Whether such threats can constitute a type of state action or even a type of commandeering through regulatory or legislative threats is a novel question. There are a few cases raising such issues, but they are limited and inconclusive.[219] However, the calls for greater censorship from the President and

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legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program . . . ." *Id.* at 176, 188 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)). Specifically, the Court found that the "take title" provisions represented an unconstitutional command to the states. *Id.* The Court further expanded on that holding in *Printz v. United States*, 521 U.S. 898 (1997), by striking down one of the Brady Handgun Violence Prevention Act requirements. Specifically, the Court declared that that the Federal Government, in conducting background checks, "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.

217. United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)) (internal quotation marks and alterations omitted).

218. *Id.* (citing United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003)).

219. It may be possible for pressure from government officials to constitute state action for the purposes of an actual First Amendment claim. *See* Okwedy v. Molinari, 333

members of Congress create a credible fear of retaliation for companies if they fail to carry out political agendas.

This is admittedly a novel threat to free speech, but courts have long barred actions that indirectly curtailed constitutionally protected rights. Prohibited congressional actions range from voter deterrence to restriction of religious exercise to racial discrimination. Such protections are largely meaningless if Congress can pass laws that pressure or coerce private actors to limit the exercise of such rights.[220] Yet absent direct punitive actions, it is hard for a court to attribute private actions to governmental coercion.[221] After all, these

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F.3d 339, 344 (2d Cir. 2003); Rattner v. Netburn, 930 F.2d 204, 210 (2d Cir. 1991). In one case, a borough president in New York City asked a billboard company to take down a sign. *Okwedy*, 333 F.3d at 341–42. In another case, a village official wrote to a local chamber of commerce, objecting to an ad. *Rattner*, 930 F.2d at 205–07. In both cases, however, the standard involved a dismissal where all facts must be inferred in favor of the opposing party. The point is valid that letters can cross the line as a threat of retaliation or action against a private company. Yet, members of Congress have countervailing political speech and legislative interests. Courts are often uncomfortable in drawing such lines between advocacy and coercion by elected officials. *See* X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 70 (2d Cir. 1999) (finding that legislators expressing criticism of a private company were "not decisionmakers but merely advocates"). *But see Okwedy*, 333 F.3d at 344 ("A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.").

220. Even in the Fourteenth Amendment area, the use of private actors is largely insulated from review absent a close level of coordination. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (holding that the conduct of private individuals will not be attributed to the state unless there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself").

221. That was the case in the recent ruling by the United States Court of Appeals for the District of Columbia in *Association of American Physicians & Surgeons v. Schiff,* 23 F.4th 1028 (D.C. Cir. 2022), *which rejected a claim that a letter from Rep.* Adam B. Schiff, Chairman of the House Intelligence Committee, was a form of state action after he wrote letters to Google and Facebook "encourag[ing] them to use their platforms to prevent what [Representative] Schiff asserted to be inaccurate information on vaccines." *Id.* at 1030. The Court ruled that:

companies could have taken the same action without the coercion of Congress. As private companies, they can align themselves with one side of the political spectrum. There are also many who honestly believe that certain political, medical, or social views are harmful. It would be difficult for courts to attribute the censorship solely to coercion rather than these other factors. Yet despite these challenges, the express threats to remove Section 230 immunity absent greater censorship could offer a good faith basis for challenging some of these programs or policies.

Given the limits of judicial review, any effort to limit private censorship is more likely to succeed due to legislative action. The federal government has an interest in free speech not only as a protected right in the Constitution but also as a vital component for thriving social, political, and economic systems. Protection for the "marketplace of ideas" should be prioritized along with other fundamental liberties like voting and religious worship.[222] For example, the Supreme Court has recognized the importance of free speech and association to higher education:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[223]

> [A]ppellants' allegations have not presented a plausible account of causation. Even assuming the Association's content was indeed demoted in search results and on social media platforms, the technology companies may have taken those actions for any number of reasons unrelated to Representative Schiff. Appellants offer no causal link that suggests it was an isolated inquiry by a single Member of Congress that prompted policy changes across multiple unrelated social media platforms.

Id. at 1034.

222. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

223. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

There is no question that protecting free speech and academic freedom is in the national interest. Moreover, orthodoxy limits intellectual discourse and exploration. It chills those who might challenge assumptions or assertions. If heterodoxy is the "marketplace of ideas," orthodoxy is its graveyard. Yet, private universities and companies can claim intolerance of opposing viewpoints as a protected bias. The question is whether the government has the capability to protect that interest through legislation or whether enforced orthodoxy is itself merely a form of protected speech.

III. COERCING FREE SPEECH: THE ROLE OF LEGISLATION AND REGULATION IN PROTECTING THE MILLIAN "MARKETPLACE OF IDEAS"

Harm-based rationales have long been used to limit or deny free speech. Harm avoidance can be a license for speech controls. Yet, as discussed above, Mill's harm principle offers both a measure of the problem and a method for correcting it. It is possible to reorient current rules to focus more narrowly on Millian harm to maximize the space for free speech. Of course, legislating viewpoint toleration can seem oxymoronic as a way of coercing free speech.[224] There is a false dichotomy, however, in coercing others to support particular viewpoints and in coercing authorities (whether governmental or educational) to protect all viewpoints. One seeks to silence others while the other seeks to guarantee speech. Coercing free speech is premised on the notion that speech alone is not a harm and, to the contrary, is essential from not only a normative but a functionalist perspective. Mill's writings obviously can be used more narrowly where the harm principle is treated as more of

224. It is fair for some to ask whether there is a conceptual or practical difference between coercing values through legislation barring pornography, as discussed in an earlier article, *see* Turley, *Loadstone Rock*, *supra* note 14, at 1933–37, and coercing values like free speech, as suggested in this article. The difference is that supporting free speech generally is not content-based or fixed on a particular viewpoint. It favors all viewpoints in supporting a defining value in our society.

a threshold exclusion for entirely harmless acts or views. Once harm is found under this approach, the issue becomes not a question under the harm principle but rather under a type of expediency principle.[225] As noted above, this view ignores the full context of Mill's view and fails to see how such an interpretation would render the harm principle a virtual nullity. The government currently coerces private parties such as restaurants or schools to respect the civil rights of citizens and to stop discriminatory policies. That coercion is not viewed as equivalent to that of racists who try to stop segregation or inclusion. Civil rights laws force access for everyone in the same way that free speech legislation would force the access of all viewpoints.

The government encourages the exercise of speech in myriad ways from maintaining open forums to crafting legal standards. For example, in *New York Times Co. v. Sullivan*,[226] Justice Brennan cited Mill as part of the justification for extending First Amendment protections to defamation cases.[227] Brennan notably focused on free speech, not as a natural right but as a right that was instrumental or important to the democratic process.[228] He quoted Mill to reaf-

225. *See* Smith, *supra* note 63, at 5 (citing Jorge Menezes Oliveira, *Harm and Offence in Mill's Conception of Liberty* at 19 (unpublished paper, Oxford University), available at http://www.trinitinture.com/documents/oliveira.pdf [https://perma.cc/MK9B-63WX])("If a kind of conduct is deemed harmless, then it is outside the coercive authority of the state. Conversely, if conduct *does* cause harm, then it is within the state's regulatory domain; but whether regulation is prudent or appropriate still depends on the application of the 'principle of expediency.' There is much conduct that government legitimately *could* regulate but prudently *should not*.")).

226. 376 U.S. 254 (1964).

227. *Id.* at 272 n.13, 277, 279 n.19.

228. *Id.* at 278–83. Despite such functionalist rationales, Brennan publicly eschewed positivism:

> The shift must be away from finespun technicalities and abstract rules. The vogue for positivism in jurisprudence—the obsession with what the law is . . . had to be replaced by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe which confronts our

firm that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[229] The *Sullivan* decision reflects how legislative or judicial choices can expand or shrink the range of viewpoints by offering safe harbors for free speech.

Mill wrote about the role of government supporting such rights. He generally divided governmental actions into authoritative and non-authoritative acts under which "the authoritative form of government intervention has a much more limited sphere of legitimate action than the other."[230] Non-authoritative action includes the role of a government to protect the space of individual choice and action, "not meddling with them, but not trusting the object solely to their care, establishes, side by side with their arrangements, an agency of its own for a like purpose."[231] There is even a role for authoritative action, but the burden is much higher and it is excluded from areas that must be left to individual choice:

> [Authoritative action] requires a much stronger necessity to justify it in any case; while there are large departments of human life from which it must be unreservedly and imperiously excluded. Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep: there is a part of the life of every person

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> senses, and the function of law as the historic means of guaranteeing that preeminence.

William J. Brennan, Jr., Address at the Annual Survey of American Law at New York University Law School (Apr. 15, 1982), *in* Daniel J. O'Hern, *The Twelfth Annual Chief Justice Joseph Weintraub Lecture: Brennan and Weintraub: Two Stars to Guide Us*, 46 RUTGERS L. REV. 1049, 1058 (1994).

229. *Sullivan*, 376 U.S. at 279 n.19 (quoting JOHN STUART MILL, UTILITARIANISM AND ON LIBERTY 100 (Mary Warnock ed., Blackwell Publ'g 2d ed. 2003) (1859)).

230. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 19.

231. *Id.*

> who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively.[232]

The issue of free speech straddles the line of Millian authoritative and non-authoritative action. Federal legislation involves the government "issuing a command and enforcing it by penalties,"[233] but those commands are designed to protect, not reduce, the "circle[s]" around individuals in their freedom of thought and expression.

This is why "coercing free speech" can be consistent with expanding individual freedoms. Writers like Mill wrote about how civilization promotes the pursuit of individual happiness and development. Hobbes described how the social contract underlying the creation of a state was prompted by a desire to leave the state of nature where "every man has a right to everything, even to one another's body."[234] It is in the state of nature where no rights are respected and individual existence is "solitary, poor, nasty, brutish, and short."[235] Legislation designed to protect civil liberties, like civil rights laws, is aligned with that social contract—it combats those who would use intimidation or violence to silence opposing viewpoints. If the social contract helped create Mill's circles, legislation can reinforce them and maximize individual choice.

From a classical liberal perspective, the notion of governmental action to protect free speech has a certain Hobbesian appeal. After all, the reason to leave the state of nature was so no longer to be ruled by the brutish and violent realities of stateless existence. The social contract to surrender powers to the state was based on the promise of protection from the violence and intimidation of others. For a state or local government to stand by idly as others violently stop the exercise of free speech constitutes something of a bait–and-

232. *Id.* at 937–38.

233. *Id.* at 937.

234. THOMAS HOBBES, LEVIATHAN, ch. xiv, at 99 para. 4 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).

235. *Id.*

switch, where powers are surrendered but protections are withheld by the state.

The challenge is to find a suitable role for the federal government that does not itself threaten free speech values or associational rights. In some cases, the federal government has been excessive in its response to violent protests. For example, the classification of Antifa as a terrorist organization is unwarranted,[236] and individual terrorism charges in cases in Charlottesville,[237] New York,[238] Seattle,[239] and Oklahoma City[240] raise questions of overreach. Conversely, the federal government has focused on the threat to tangible property rather than to the intangible constitutional rights of others. Antifa often directs its violence toward preventing others from speaking. However, the government has worked to stretch laws to cover what are primarily state offenses, including bringing federal arson charges for the burning of a municipal police vehicle in Chicago.[241] Ideally, the denial of a civil liberty protected under

236. Jonathan Turley, *Why Trump's Tweet About Labeling 'Antifa' a Terrorist Group Is So Dangerous*, L.A. TIMES (June 1, 2020), https://www.latimes.com/opinion/story/2020-06-01/antifa-protests-donald-trump-terrorist-group [https://perma.cc/67PQ-EJZV].

237. Jonathan Turley, *Should Protesters Be Classified as Terrorists?*, THE HILL (Aug. 13, 2017), https://thehill.com/blogs/pundits-blog/civil-rights/347702-opinion-should-protesters-be-classified-as-terrorists [https://perma.cc/9WQK-996K].

238. Jonathan Turley, *"Gasoline is Awfully Cheap": Police Action Against "Ace Burns" Raises Free Speech Concerns*, RES IPSA (June 8, 2020), https://jonathanturley.org/2020/06/08/gasoline-is-awfully-cheap-police-action-against-ace-burns-raises-free-speech-concerns [https://perma.cc/6R7M-ZER7].

239. Jonathan Turley, *How Seattle Autonomous Zone Is Dangerously Defining Leadership*, THE HILL (June 13, 2020), https://thehill.com/opinion/judiciary/502576-how-seattle-autonomous-zone-is-dangerously-defining-leadership [https://perma.cc/YX73-UABM] [hereinafter Turley, *Seattle Autonomous Zone*].

240. Jonathan Turley, *Oklahoma Teens Charged with Terrorism for Breaking Windows During Protests*, RES IPSA (July 22, 2020), https://jonathanturley.org/2020/07/22/oklahoma-teens-charged-with-terrorism-for-breaking-windows-during-protests [https://perma.cc/3RK9-P6YD].

241. Jonathan Turley, *"Joker" Case in Chicago Shows New Expansive Claim of Federal Jurisdiction*, RES IPSA (June 4, 2020), https://jonathanturley.org/2020/06/04/joker-case-in-chicago-shows-new-expansive-claim-of-federal-jurisdiction [https://perma.cc/7J3D-252V].

the Bill of Rights in Chicago should be more of a federal priority than should be the torching of a police cruiser.

As noted earlier, there is the countervailing concern that protecting free speech can be viewed as compelled speech. Since corporations and universities often claim Millian harms from unregulated speech, that claim is likely to be made in challenging any effort to guarantee the expression of diverse viewpoints. Yet, there is already ample protection against the government compelling adherence to particular viewpoints or preventing opposing viewpoints from being heard. As shown in *West Virginia State Board of Education v. Barnette*,[242] any law forcing the expression of ideologies or beliefs is subject to strict scrutiny: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[243] However, this is not a case of forcing speech but allowing speech. The government is not forcing groups to speak by including opposing views in their own demonstrations. Rather, these groups are being denied the right to stop others from speaking through violence or threats.

An obvious comparison can be drawn to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[244] in which the Court held that organizers of a St. Patrick's Day parade could not be forced under anti-discrimination laws to allow GLIB—an Irish gay affinity group—to march in the parade.[245] The inclusion of the group was deemed a transgression upon "the general rule of speaker's autonomy."[246] The decision in *Hurley* can be cited on both sides of this debate. It treats an anti-discrimination law as compelling speech and thus could support a similar claim under an anti-free

242. 319 U.S. 624 (1943).
243. *Id.* at 642.
244. 515 U.S. 557 (1995).
245. *See id.* at 566.
246. *Id.* at 578.

speech law. However, *Hurley* involved a compelled inclusion of a message in the parade. The issue often raised in deplatforming is the failure of cities to protect demonstrations or the canceling of events at public universities due to expected security issues. A law or policy based on protecting the right to demonstrate in such spaces would not force the inclusion of any viewpoint. Indeed, it would protect all sides in being able to speak with the condition that no group could use threats or violence to prevent opposing speech.[247] In *Hurley*, the Court viewed the parade itself as more akin to a "protest march" where the organizers were not barring GLIB members from participating but rather barring their displays of countervailing messages.[248]

The greatest retort to the compelled speech argument would likely be found in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[249] The case involved a challenge to the Solomon Amendment, which conditioned federal aid to law schools on allowing access of students to military recruiters. Many universities barred such access due to the discrimination of the military against homosexuals under the "Don't Ask, Don't Tell" policy.[250] The schools argued that the pressure not to discriminate against military recruiters (and some students) was itself compelled speech.[251] The Court rejected that claim. It found that the involvement of the

247. A distinction can be drawn with social media companies, which clearly have free speech and associational rights of exclusion. The issue with social media is whether the government can condition the receipt of benefits, like immunity, on maintaining forums akin to public spaces. However, absent some regulation, such as a public utility or change in status, these private companies can forego such benefits and continue to engage in viewpoint discrimination. Such federal funding conditions makes the case more similar to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006).

248. 515 U.S. at 577.

249. 547 U.S. 47 (2006).

250. Claudio Sanchez, *U.S. Government Punishes Schools That Ban Military Recruiting*, NPR (June 1, 2005), https://www.npr.org/templates/story/story.php?storyId=4675926 [https://perma.cc/4Z2K-YQVL].

251. *Rumsfeld*, 547 U.S. at 62–63.

law schools in dealing with recruiters through such channels as email was too inconsequential to constitute compelled association.[252] Unlike in *Hurley*, the Court found that permitting such associations did not involve an "overwhelmingly apparent" message attributable to the schools.[253] The Court held that

> The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school's First Amendment rights.[254]

The standard for compelled speech goes back to the original *Barnette* decision from 1943, when the Court declared a "compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."[255] The Court's defense of the "fixed star in our constitutional constellation" was to bar compelled speech and state-enforced orthodoxy."[256] Coercing free speech is not the same as compelling speech. The former forces tolerance for diverse viewpoints while the latter forces expression of viewpoints. That is why the principal arguments against free speech legislation are more likely to focus on the harm rather than the exercise of free speech.

A. Protecting the Virtual Marketplace

The Internet is arguably the single greatest invention for free speech since the printing press. The focus of legislation should be

252. *Id.* at 62.
253. *Id.* at 66.
254. *Id.* at 69–70.
255. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).
256. *Id.* at 650.

to return to the original vision of social media companies and Internet providers as being largely content-neutral.[257] Sites like Facebook were pitched by figures like Mark Zuckerberg as meant to "give people the power to build community and bring the world closer together."[258] The Internet is now a vital means for people to exercise Mill's ideal of "liberty of expressing and publishing opinions."[259] It is the space for individual exploration and invention that Mill saw as the fulfillment of the human purpose. That pursuit should not be hampered by the opposing values or priorities or sensitivities of others:

> [L]iberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.[260]

There are clearly countervailing free speech and associational interests in the growing controversy over censorship on the Internet. These companies have free speech and associational rights in the content of their platforms as well as contractual reservations of the right to exclude some viewpoints. However, the virtual marketplace is largely controlled by a handful of massive corporations, which increasingly bar views deemed to be "disinformation" or "misinformation." The private status of these companies hits the previously discussed blind spot in the Constitution. As a result, some have called for the reexamination of the status of Internet Service Providers (ISPs) and, specifically, social media companies.

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257. Jonathan Turley, *The Case for Internet Originalism*, THE HILL (Oct. 31. 2020), https://thehill.com/opinion/judiciary/523750-the-case-for-internet-originalism [https://perma.cc/CHR9-BF2B] [hereinafter Turley, *Internet Originalism*].

258. Mark Zuckerberg, *Bringing the World Closer Together*, FACEBOOK (Mar. 15, 2021), https://www.facebook.com/notes/mark-zuckerberg/bringing-the-world-closer-together/10154944663901634 [https://perma.cc/LYV9-3FM5].

259. MILL, *supra* note 56, at 71.

260. *Id.*

The expansive view of harmful speech on the Internet has led to one of the largest censorship systems in history. With that expansion has come increasing complaints of bias. Establishing such bias, however, is difficult since these companies control data and records and have resisted efforts at transparency. Recently, there was a widely reported study that purportedly showed that the censoring of material on Twitter and other platforms showed no political bias.[261] However, the report states the following:

> The question of whether social media companies harbor an anti-conservative bias can't be answered conclusively because the data available to academic and civil society researchers aren't sufficiently detailed. Existing periodic enforcement disclosures by Facebook, Twitter, and YouTube are helpful but not granular enough to allow for thorough analysis by outsiders.[262]

Thus, the report is not actually based on a review of individuals and groups censored by these companies because the companies refuse to release the data. Congress could require greater transparency through both legislative inquiry as well as regulatory means in the censoring of speech on the Internet. There are also options for a more sweeping change in the status of these companies as a regulated industry.

The legal foundation for such a free speech protection on the Internet can be based on well-established federal jurisdictional grounds over interstate commerce. There is also a long line of statutes seeking national uniformity in areas impacting commerce and communications. Congress commonly relies on the preemption

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261. PAUL M. BARRETT & J. GRAM SIMS, CTR. FOR BUS. & HUM. RTS., N.Y.U., FALSE ACCUSATION: THE UNFOUNDED CLAIM THAT SOCIAL MEDIA COMPANIES CENSOR CONSERVATIVES (Feb. 2021), https://bhr.stern.nyu.edu/bias-report-release-page [https://perma.cc/RG6C-2JWA].

262. *Id.*

doctrine to create uniform national standards.[263] Whether laws are meant to guarantee clean air standards or the uniformity of medical devices, the courts recognize that, absent commandeering concerns, there is an inherent right for the federal government to supersede conflicting state laws. Some of these laws arguably curtail forms of speech or at least the regulation of commercial speech. For example, the Public Health Cigarette Smoking Act of 1969 provides that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[264] There is clearly a difference between requiring airbags in cars and requiring free speech in schools. The question is whether Congress should, or can, claim the right to create a uniform protection of free speech as it does with technological or safety standards.

Congress has long exercised jurisdiction over interstate communications in wire, mail, and electronic communications or transfers. The Internet companies are already subject to a host of federal laws. Nevertheless, Congress would have to tailor legislation to address not only constitutional concerns but also practical considerations. Some specific speech measures have been tried in the past, but those efforts have had mixed, and at times counterproductive, results. One coercive measure that would not advance the interests of free speech or the free press would be the restoration of the Fairness Doctrine, requiring radio and television news outlets to feature opposing viewpoints "in any case in which broadcast facilities are

263. For example, the National Traffic and Motor Safety Act of 1966 provides that "no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (1988) (repealed 1994); *see* Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000).

264. 15 U.S.C. § 1334 (2018); *see* Cipollone v. Liggett Grp., 505 U.S. 504, 515 (1992).

used for the discussion of a controversial issue of public importance."[265] That 1949 rule[266] was an ill-conceived measure ultimately rescinded in 1987.[267] From traditional free speech and free press perspectives, government regulation of media is often anathema to the language and purpose of the First Amendment. It raises the same objection from Justice Black that "I read 'no law . . . abridging' to mean *no law abridging*."[268] Yet the Supreme Court upheld the doctrine in 1969, but applied a lower standard of review (the intermediate scrutiny test) in *Red Lion Broadcasting Co. v. FCC*.[269] The analysis remains highly controversial, particularly in the application of an intermediate standard of review. There is ample reason to question whether *Red Lion* would be reaffirmed or alternatively applied to cable, rather than to broadcast, companies.[270] When *Red Lion* was decided, there were only a small number of broadcasters, and that "scarcity" played a major role in the Court's analysis:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the

265. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964). Under the rule, "[a] licensee . . . is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming." *Id.*

266. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949).

267. Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987) (concluding "that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest").

268. Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring).

269. 395 U.S. 367, 400–01 (1969).

270. That includes the countervailing logic and holding of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a state fairness law as applied to a newspaper's coverage).

> viewers and listeners, not the right of the broadcasters, which is paramount.[271]

This reasoning is no longer compelling, given the diversity of media outlets today, including cable programming.[272] Moreover, in a 1985 report, the FCC created a record that shows that the rule did not lead to greater diversity of views. Rather, it actually reduced coverage in some cases.[273] Broadcasters acknowledged that they would not run certain stories or cover issues out of concern that they would face scrutiny under the Fairness Doctrine.[274] The FCC also noted that the doctrine was imposing high costs for broadcasters and that there was an uneven enforcement of the policy.[275] The Fairness Doctrine would only introduce greater control over the media and enable those who want to manipulate content. It did little beyond superficial balancing opinions and was widely criticized as ineffectual. The key to coercing free speech is to protect forums of content neutrality and protection. It requires Congress to do something that it has shown little appetite for or interest in doing in the past, which is limiting its own influence and power. The focus should be on preserving neutral forums on the Internet such as social media sites rather than forcing companies to publish a balance of views. This is the difference between a focus on limiting viewpoint censorship and the compulsion of viewpoint expression.

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271. *Red Lion*, 395 U.S. at 390 (citations omitted).

272. Jonathan Turley, *The Fairness Doctrine Is Bad News*, THE HILL (Mar. 13, 2021), https://thehill.com/opinion/judiciary/543043-the-fairness-doctrine-is-bad-news [https://perma.cc/JBA9-WBJY].

273. 1985 Fairness Report, General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 30, 1985); *see also* Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987) (concluding "that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest").

274. 50 Fed. Reg. 35,418 (Aug. 30, 1985).

275. *Id.*

A focus on social media is based on a recognition of its status as the dominant forum for contemporary expression and communications. As discussed earlier, social media companies have substantially increased the censorship and flagging of content deemed false or misleading. The companies engage in such censorship increasingly at the behest of political figures, who control whether the industry will continue to enjoy immunity under Section 230(c)(1) of the Communications Decency Act (CDA). The CDA states: "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."[276] It further defines "interactive computer service" as "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."[277] The Fourth Circuit issued an opinion in *Zeran v. America Online*[278] that remains the foundational case for this immunity. The opinion emphasized the status of Internet providers as neutral forums. Given "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium," the court concluded that the law means that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[279] In this way, Congress

276. 47 U.S.C. § 230(c)(1).

277. 47 U.S.C. § 230(f)(2).

278. Zeran v. Am. Online, 129 F.3d 327 (4th Cir. 1997).

279. *Id.* at 330. Courts have pushed back on the sweeping interpretation of Section 230 in other leading cases. *See, e.g.*, Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–69 (9th Cir. 2008) (barring website's encouragement of illegal content); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1106–09 (9th Cir. 2009) (rejecting immunity from liability for subsequent promises regarding content).

solved the "moderator's dilemma," where moderation could make companies liable for user content but neutrality could turn sites into fora for harmful speech.

The special protection afforded social media companies was consistent with other neutral industries. For example, in *Smith v. California*,[280] the Court overturned the conviction of a Los Angeles bookstore owner whose store sold an obscene book. Justice Brennan stressed in the majority opinion that "[b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."[281] If such a bookseller is criminally liable for content, "he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."[282] Yet companies like Twitter now openly engage in those "traditional editorial functions" while enjoying immunity denied to others performing those functions like newspapers and television programming. These companies originally were viewed as alternatives to telephone companies. They have indeed reached that goal, with billions of annual users at sites like Facebook and Twitter. The "Internet originalist" position is still possible if the companies return to the function of neutral communicative companies as opposed to publishers.[283] However, that does not appear to be the intent of these companies, which have pledged continuing censorship programs. That position simplifies the question for many. For years, the concern was that removing immunity from these companies would only increase their censorship of content. The status quo maintains the worst of both worlds of companies engaged in extensive censorship while the government bars lawsuits from citizens who are injured

280. 361 U.S. 147 (1959).
281. *Id.* at 153.
282. *Id.*
283. *See* Turley, *Internet Originalism*, supra note 257.

by publications. These companies have resolved the "moderator's dilemma" by becoming full-fledged moderators.

As discussed earlier, Mill believed that free speech requires "some space in human existence thus entrenched around, and sacred from authoritative intrusion."[284] What has changed today is that such "authoritative intrusion" can come from not just state action but also corporate and private action. Moreover, the most important "space" today is not physical but virtual on the Internet and through social media. Accordingly, the most important role for state action in the area of free speech is to protect the entire "marketplace of ideas"—both physical and virtual forums for the expression of viewpoints. The protection of such spaces affirms the Millian, rather than the functionalist, model of free speech. It is protecting free speech for the sake of free speech itself. The obvious countervailing concern is that, as private companies, social media platforms are allowed to pursue their own free speech and associations interests. As noted earlier, absent regulations as public utilities or a change in that status,[285] these remain private companies with First Amendment rights to engage in viewpoint discrimination.[286] The question is whether these companies can be induced to reduce censorship policies through conditional federal benefits or immunities.

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284. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 938.

285. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016) (rejecting challenge to the FCC's 2015 net neutrality order because the FCC's rules "affect[ed] a common carrier's neutral transmission of *others'* speech, not a carrier's communication of its own message").

286. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 9 (1986) (plurality opinion); *see also id.* at 24 (Marshall, J., concurring in the judgment) ("While the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden.").

Section 230 was designed to protect what Congress saw as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[287] Congress understood that providers had to be able to remove objectionable material. However, the immunity provision was seen as furthering free speech by reducing the pressure of lawsuits that could lead to greater censorship. This point was made in *Zeran*:

> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.[288]

Congress certainly wanted to foster Internet sites by limiting liability, and it further wanted the removal of child pornography and other material. However, it also viewed providers as the platform for millions (now billions) of communications that would not be the responsibility of the companies.[289] It was hoped that immunity would allow this "forum for true diversity" in viewpoints to flourish.

As social media censorship expanded exponentially, questions over the continued logic of immunity have also increased. The debate has forced a conceptual clash between users and these companies. The outrage over the increased censorship reveals a view that these sites should serve as neutral platforms for communication

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287. 47 U.S.C. § 230(a)(3).

288. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

289. *Id.* at 331 ("The amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems.").

and expression. As the forums increasingly replace telephonic communications, the analogies (and expectations) vis-à-vis telephone companies also increase. If Verizon or Sprint interrupted calls to stop people from expressing false or misleading thoughts, the public would be outraged. Twitter serves the same communicative function between consenting parties; it simply allows thousands of people to participate in such digital exchanges.

The status of social media companies was raised in dicta by Justice Thomas in his concurrence in the Supreme Court's dismissal of the appeal in *Biden v. Knight First Amendment Institute*,[290] a case challenging the blocking of users from then-President Donald Trump's Twitter account. Thomas observed that "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers."[291] Thomas noted that these companies had supplanted telephone and mail companies and the support given to social media companies was used as a basis for regulation: "By giving these companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken."[292] Justice Thomas continued:

> In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader

290. 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).
291. *Id.* at 1223.
292. *Id.*

> public. Federal law dictates that companies cannot 'be treated as the publisher or speaker' of information that they merely distribute.[293]

The regulation of social media companies as akin to a telephone company would allow the government to impose public forum protections from censorship.[294] Since the government itself is subject to the First Amendment, any regulations would need to be content neutral, with the exception of narrow categories like child pornography. The treatment of Internet Service Providers (ISPs) like common carriers would be a broader application of Section 230, which is modeled on the treatments of telephone companies or postal carriers. Those companies do not exercise editorial control over communications. ISPs do exercise an expanding degree of such editorial control. In conditioning operations of ISPs on maintaining public fora, the harm principle would allow for a workable and reasonable standard for such companies. ISPs could continue to delete threats of actual harm, criminal conduct, or fraudulent or deceptive practices, but the censorship of the amorphous categories of "misinformation" or "disinformation" would be impermissible. That broader notion of harm placed the Internet on the slippery slope of corporate speech management as different groups demanded curtailment of their own views of "untruth" in areas ranging from climate change to election fraud. The "harm" from such views is precisely what Mill rejected as the basis for state action. As Jeremy Waldron discussed, moral distress is not part of the balance of liberty and harm under Mill's approach.[295] To the contrary, moral distress, "far

293. *Id.* at 1224 (citations omitted).

294. Various academics have raised this possible shift in status in light of the monopolistic powers exercised by these companies. *See, e.g.*, Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021), https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343 [https://perma.cc/3KRB-45MK].

295. Waldron, *supra* note 84, at 115; *see also* Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHILOS. & TECHNOL. 739, 740 (2020), https://doi.org/10.1007/s13347-020-00429-0 [https://perma.cc/693U-WHN2] ("From

from being a legitimate ground for interference . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."[296]

The reason that we are now in this inherently conflicted position is that federal law does not expressly require editorial neutrality or limit moderation. Rather, it allows for moderation with an ill-defined and ambiguous standard of offensive content as material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[297] Reducing corporate censorship can be tied to the receipt of benefits or immunities (or as part of a more sweeping change as a regulated industry or common carrier). Bipartisan legislative proposals tend to focus on greater transparency but would not seriously mitigate the censorship of viewpoints. For example, the Platform Accountability and Consumer Transparency Act (PACT Act) would require internet platforms to "publish an acceptable use policy . . . in a location that is easily accessible to the user."[298] While PACT would improve transparency and avenues to contest censorship, it would not seek to create truly neutral platforms. A more aggressive approach would be to narrow that moderation language to focus on unlawful content and leave the rest of the "objectionable" content to people using free speech to voice their objections.[299] An alternative approach would be to tie the

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their earliest days, many social platforms adopted a hands-off approach and promoted the apparent benefits of connecting people, sharing information, and the free exchange of ideas.").

296. Waldron, *supra* note 84, at 125. *But see* Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1107 (2012).

297. 47 U.S.C. § 230(c)(2)(A).

298. Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. §5(a)(1) (2021).

299. Such legislation has been offered in Congress to narrow severely the moderation authority permitted under continued immunity. *See* Stop the Censorship Act, H.R. 4027, 116th Cong. (2020). In addition to the approach of Stop the Censorship Act, senators have introduced The Online Freedom and Viewpoint Diversity Act (OFVDA), to

scope of moderation to case law controlling upon the government in terms of protected speech. That is compelling for those who view the recent congressional pressure for "robust content modification" as an indirect form of government censorship. Under proposals like the Stopping Big Tech's Censorship Act,[300] moderation would be limited to situations where "(I) the action is taken in a *viewpoint-neutral manner*; (II) the restriction limits only the time, place, or manner in which the material is available; and (III) there is a compelling reason for restricting that access or availability."[301] Such a change would force companies like Twitter to make a choice — openly and honestly. It can be a platform for free speech and expression, or it can be a publisher with full regulation of content and viewpoints. It cannot be both.

The failure of executive orders, lawsuits, and public pressure to change censorship policies on social media shows the need for legislative change.[302] Some legislative changes could backfire in creating an opportunity for political interference and new free speech concerns. For example, the Ending Support for Internet Censorship Act[303] seeks to require "politically unbiased content moderation by covered companies" but also would require "an immunity certification from the Federal Trade Commission" that shows by clear and convincing evidence that the company did not engage in politically biased regulation of speech.[304] The proposal reflects a need for some outside review of the companies in fulfilling the conditions

change "otherwise objectionable" material to material "promoting self-harm, promoting terrorism, or unlawful." S. 4534, 116th Cong. §2(1)(B)(i)(II) (2020).

300. S. 4062, 116th Cong. (2020).

301. *Id.* §2(B)(i) (emphasis added).

302. Former President Donald Trump issued an executive order to seek "clarification" of such moderation. Exec. Order No. 13,925 §2, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020). That order mandated that "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." *Id.*

303. S. 1914, 116th Cong. (2019).

304. *Id.* §2(a)(1).

for immunity. However, giving such certification power to the executive branch could invite a new form of bias and threats to free speech. Such review is best left to the courts with clearly defined standards and transparency rules.

B. Protecting the Physical Marketplace

The Internet enables the vast majority of political speech today. However, in-person demonstrations and speeches continue to be a key part of our political dialogue even during the pandemic—the "space" that Mill likely had in mind in calling for protections from "authoritative intrusion." The ability to interact in real time with others is key to many forms of political and artistic speech. Those physical spaces, however, are also being subjected to anti-free speech campaigns—efforts to prevent speakers from being heard through violence or intimidation. Many now demonstrate their faith in their own values by preventing others from expressing theirs. The federal and state governments can also directly protect free speech activities through increased enforcement. There have been complaints that state and local governments show differing levels of protection for groups depending on their viewpoints.[305]

It is difficult to fulfill the defining goals of prior Supreme Court cases if such physical forums are effectively closed to speakers. In his articulation of the "marketplace of ideas" concept, Oliver Wendell Holmes described this perverse notion:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech

305. *Compare* Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Suggests*, THE GUARDIAN (Jan. 14, 2022), https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right [https://perma.cc/4CN9-DYWM], *with* Paul Bedard, *Two-Thirds Want BLM Riots Probed, More Than Jan. 6*, YAHOO! (July 21, 2021), https://www.yahoo.com/now/two-thirds-want-blm-riots-192600820.html [https://perma.cc/AGK4-QARY].

> impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[306]

The "marketplace of ideas" is often an actual marketplace or other public area for "the free trade of ideas." Obviously, counter protesters are also part of that free trade, as are the featured speakers. However, the deplatforming movement is designed to silence rather than rebut opposing views. The question is whether legislation can help close any gaps in enforcement or reduce the uncertainly over enforcement (which can create a chilling effect on free speech activities). For example, in July 2020, the Sixth Annual Law Enforcement Appreciation Day in Denver was cancelled after speakers, including state legislators, were physically assaulted.[307] Not only was there little coverage of the attack, but there were allegations that the police "stood down" as a mob descended on the

306. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

307. Danielle Wallace, *Anti-Cop 'Mob' Swarms Back the Blue Event in Denver, Bloodying Several Before Shutting Things Down: Reports*, FOX NEWS (July 20, 2020), https://www.foxnews.com/us/denver-back-the-blue-event-violence-black-lives-matter-mob-protesters-anti-police [https://perma.cc/HFV9-LBGS]. Such attempts to disrupt public events obviously also come from the right so shown in the arrest of far-right extremists heading to a pride march in Idaho. Will Carless, *White Supremacist Group Patriot Front Charged with Planning 'Riot' at Idaho Pride Event: What We Know*, USA TODAY (June 13, 2022), https://www.usatoday.com/story/news/nation/2022/06/13/patriot-front-idaho-pride-what-we-know/7610970001/ [https://perma.cc/4HQG-SPH2].

speakers.[308] The event was successfully blocked. The individuals who sought to speak at a properly permitted event were denied their First Amendment rights due to a lack of support for their exercise of free speech.[309]

Current federal criminal laws are not ideal for addressing this problem and can create their own dangers if used more broadly in the free speech area. One of the greatest concerns arises with the use of sedition and terrorism charges, particularly given our history of abusing such laws. For example, former President Trump declared in 2020 that "the United States of America will be designating ANTIFA as a Terrorist Organization."[310] As noted earlier, the use of terrorism powers against groups like Antifa is unwarranted absent new evidence of a change in its organizational and operational profile. The danger is that such designations could expand a narrow crime into one of more general application.[311] However, due in part to the lack of options, the federal government expanded ter-

308. Bradford Betz, *Denver Police Union Head: 'Stand-Down' Order Was in Effect When Pro-Cop Rally Attacked*, FOX NEWS (July 22, 2020), https://www.foxnews.com/us/denver-police-union-head-stand-down-order [https://perma.cc/WLY3-FBAU].

309. This is different from many individual cases of intimidation from such attacks like the beating of police officers present at a unity march with religious groups across the Brooklyn Bridge. While the counter protesters were linked to a Defund The Police encampment, there was no confirmation of the groups responsible for the attack. *See* Myles Miller et. al., *Top NYPD Cop Among Officers Hurt in Bloody Brooklyn Bridge Scuffle with Protesters*, NBC 4 N.Y. (July 16, 2020), https://www.nbcnewyork.com/news/top-nypd-cop-among-officers-hurt-in-scuffle-with-protesters/2517385 [https://perma.cc/UVU3-33HN].

310. *Antifa: Trump Says Group Will Be Designated 'Terrorist Organization'*, BBC (May 31, 2020), https://www.bbc.com/news/world-us-canada-52868295 [https://perma.cc/98X8-Z72Y]. Democrats have also sought to target far-right groups for terrorism designations or investigations. *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 7, 2022) (testimony of Professor Jonathan Turley).

311. *Id.* (testimony on the use of domestic terrorism designations against groups in the United States based on their ideology).

rorism investigations under 28 C.F.R. 0.85(l), which defines terrorism to include "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[312]

After the January 6 riot on Capitol Hill in 2021, the Justice Department made limited use of seditious conspiracy under 18 U.S.C. § 2384.[313] While the vast majority of charges were for crimes like trespass and unauthorized entry, a small number were charged with seditious conspiracy, which includes acting "by force to prevent, hinder, or delay the execution of any law."[314] Such prosecutions only address violent acts seeking the overthrow of the country or barring the execution of laws. The FBI has gradually broadened the scope of these investigations to include radical political groups, including "black identity extremism" (BIE) groups.[315] This work by the Joint Terrorism Task Forces (JTTFs) is a legitimate concern for free speech advocates. Even though we have not seen criminal cases brought solely on basis of the exercise of free speech, the investigations can have a chilling effect on various groups. Again, Antifa is a good example. Some of these individuals may be properly charged with terrorist acts, but Antifa itself is viewed by many as

312. 28 C.F.R. 0.85(l) (2021).

313. *See* Indictment, United States v. Elmer Stewart Rhodes et al., (D.D.C. Jan. 12, 2022).

314. 18 U.S.C. § 2384; *see* Jonathan Turley, *The Oath Keepers: What the Indictment Says and Does Not Say About the January 6 Riot*, RES IPSA (Jan. 14, 2022), https://jonathanturley.org/2022/01/14/the-oath-keepers-what-the-indictment-says-and-does-not-say-about-the-january-6-riot [https://perma.cc/DH7A-98AL]. Additional charges were brought against members of the Proud Boys. *See* Leader of Proud Boy and Four Other Members Indicted For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach, Press Release, Department of Justice, June 6, 2022, https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and [https://perma.cc/78SY-X84X].

315. JEROME P. BJELOPERA, CONG. RSCH. SERV.: IN FOCUS, IF10769, FBI CATEGORIZATION OF DOMESTIC TERRORISM (2017); JEROME P. BJELOPERA, CONG. RSCH. SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW (2017).

more of a movement than a single group.[316] There are, however, loosely associated individuals who appear at these protests. Our current laws seem to make a quantum leap from insular crimes, like statue destruction, to terrorism. Terrorism prosecutions cannot be the primary weapon against Antifa. If so, we have the problem captured in the old military adage that if you only have a hammer, every problem looks like a nail. If you only have enforcement powers with regard to terrorism, every wrongdoer looks like a terrorist.[317]

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316. However, those Antifa members who do not commit crimes still view others as "ethical" in doing so. Rick Paulas, *Why Antifa Dresses Like Antifa*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/style/antifa-fashion.html [https://perma.cc/P8GB-XK92].

317. It is also worth noting that Antifa is not known for killing people, and indeed, right-wing extremists are responsible for more terrorist incidents in the United States. *See* Jenny Gross, *Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds*, N.Y. TIMES (Oct. 24, 2020), https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html [https://perma.cc/FS2L-5RTJ]. A review of data suggests that their violence, while serious and unlawful, is not closely comparable to right-wing terrorist attacks perpetuated within the United States:

> Based on a CSIS data set of 893 terrorist incidents in the United States between January 1994 and May 2020, attacks from left-wing perpetrators like Antifa made up a tiny percentage of overall terrorist attacks and casualties. Right-wing terrorists perpetrated the majority—57 percent—of all attacks and plots during this period, particularly those who were white supremacists, anti-government extremists, and involuntary celibates (or incels). In comparison, left-wing extremists orchestrated 25 percent of the incidents during this period, followed by 15 percent from religious terrorists, 3 percent from ethno-nationalists, and 0.7 percent from terrorists with other motives. In analyzing fatalities from terrorist attacks, religious terrorism has killed the largest number of individuals—3,086 people—primarily due to the attacks on September 11, 2001, which caused 2,977 deaths. In comparison, right-wing terrorist attacks caused 335 fatalities, left-wing attacks caused 22 deaths, and ethno-nationalist terrorists caused 5 deaths.

Seth G. Jones, *Who Are Antifa, and Are They a Threat?*, CSIS (June 4, 2020), https://www.csis.org/analysis/who-are-antifa-and-are-they-threat [https://perma.cc/MDT6-M68A].

Among the other options is the broader use of the Racketeer Influenced and Corrupt Organizations (RICO) Act against groups seeking to prevent free speech activities through violence or threats.[318] Given the broad reach of RICO, it is possible that the pattern of criminal acts by Antifa groups constitutes "an enterprise."[319] Among the list of thirty-five federal and state offense predicates under RICO are acts like extortion and arson, which have been raised in areas with some of the most severe rioting.[320] The use of RICO, however, is a concern, given its broad application with only two required crimes for a pattern. Antifa does not ordinarily direct, as an organization, particular acts of arson or property destruction. The danger is that political organizations or groups could be treated as racketeering enterprises based on loose association with the misconduct of supporters.

The concerns over using existing laws should not deter efforts to address the threats to free speech activities. There is a striking disconnect in the federal government prosecuting crimes like "arson" (that can be prosecuted on the local level) while leaving the denial of free speech generally to state or individual legal actions. One crime involves can involve the loss of a vehicle and the other deals with the denial of a constitutional right. The federal code does address "Federally Protected Activities" but expressly recognizes that protection of such activities remains a state and local matter.[321] However, the law reserves federal authority to protect the right of

318. Former Attorney General Barr publicly declared that the JTTFs were designated as the "principal means" of investigating these groups, providing for the use of criminal and civil actions under RICO. *Oversight of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2020) (statement of William Barr, Attorney General).

319. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985); Katie Shepherd, *Portland Protesters Broke ICE Building Windows. Police Responded with Tear Gas.*, WASH. POST (Aug. 20, 2020), https://www.washingtonpost.com/nation/2020/08/20/portland-protests-ice-tear-gas [https://perma.cc/D3UY-R4P6].

320. *See, e.g.*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404–06 (2003).

321. 18 U.S.C. § 245(a)(1) (2020).

people "participating lawfully in speech or peaceful assembly" but it prefaces the exercise of such rights "without discrimination on account of race, color, religion or national origin."[322] Thus, these laws are directed at discriminatory policies on non-ideological grounds. It also focuses on the individuals committing unlawful conduct rather than the cities for failing to enforce laws or protect speech.

Justice Department officials have previously sought the expansion of the federal law by relaxing the necessity of showing that the act was intended to prevent citizens from participating lawfully in speech or peaceful assembly.[323] Yet, there has not been a push to allow enforcement when the denial of such lawful speech and assembly is based on viewpoint discrimination. Absent some external pressures, cities or states can create barriers to speech through lax enforcement or refusal to permit certain groups due to their political, religious, or social views. There is a legitimate issue as to whether the federal government should support municipal and state governments with law enforcement subsidies if these leaders withhold protection from certain citizens. Congress could create a better avenue for these citizens to present their grievances to federal officials if they believe that there is a systemic failure to protect lawful, permitted events. Otherwise, as on college campuses, officials can continue to blame the risk of violence by extremist groups for shutting down events or declining permits.

There is also an ability to protect free speech activities through civil actions. State and federal actions (like Section 1983 lawsuits) often focus on the denial of constitutional rights. For example, California allows recovery for:

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322. *Id.* § 245(b)(5).

323. *See Combating Hate Crimes: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 8–9 (1999) (statement of Eric H. Holder, Jr., Deputy Att'y Gen. of the United States).

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (b), may institute and prosecute in their own name and on their own behalf a civil action for damages.[324]

The problem is that the law addresses "interference" by third parties rather than inaction by local authorities to protect free speech activities.[325] As a result, absent state enforcement and prosecution, citizens have little recourse for the denial of core constitutional rights. Even if these laws addressed the failure to properly protect speakers, it would be difficult to prove a case against a particular law enforcement department. Past controversies have not involved a refusal to deploy personnel but rather the failure to deploy sufficient police presence and resources to guarantee that events could continue despite violent counterdemonstrators. It would be difficult to craft laws to have much of an impact on these failures given the situational discretion that must be afforded to police in responding to violent demonstrators. Police have a primary goal of avoiding injuries to themselves and others by not escalating confrontations and could plausibly make the case that waiting to intervene is their safest choice. Such laws would require admissions from police like the one of the D.C. Chief of Police[326] that he elected not to intervene in some violent protests. However, that type of admission is rare. Few courts would relish the role of determining

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324. CAL. CIV. CODE § 52.1(c) (West 2022).

325. Likewise, private citizens do not have the investigative capacity or tools to determine the names and associations of those who violently stop "platforming."

326. *See* Jonathan Turley, *"Where's the Police When You Need Them": D.C. Delegate Asks the Right Question After Bizarre Incident Near White House*, RES IPSA (June 24, 2020), https://jonathanturley.org/2020/06/24/wheres-the-police-when-you-need-them-d-c-delegate-asks-the-right-question-after-bizarre-incident-near-white-house [https://perma.cc/362Q-B75S] ("D.C. Chief of Police Peter Newsham stated that his department has made the 'tactical decision' not to intervene as certain statues have been torn down in front of them.").

when police deployment judgments were insufficiently aggressive to secure a location.[327]

Rather than shoehorn free speech protections into existing laws, Congress could craft a law designed to deter violent disruptions of free speech activities or to incentivize better local enforcement efforts. The most obvious concern is that federal legislation will itself be a threat to free speech. Yet, federalized protections of free speech would clearly be governmental action limited by the First Amendment. The danger of such legislation is also ameliorated by federalism principles in seeking to force state and local action to protect spaces for expression. Thus, federal legislation should be limited to the protection rather than the curtailment of speech. Protesting itself is protected. It is violent efforts to bar speech that would be the focus of federal legislation as well as incentivizing local officials to protect free speech events. The governmental interest in protecting the constitutional right of free speech should be easy to establish. It would also be difficult to challenge the interstate component for federal action, given that the regulated entities are involved in interstate commerce and travel. Of course, the creation of any private rights of action must be tailored to the federal claim. For example, Congress moved to protect women in the Violence Against Women Act ("VAWA"), but that law was ultimately struck down.[328] The VAWA had created a private cause of action for victims of "a crime of violence motivated by gender" to allow them to

327. Take the Denver pro-police event as an example. Officers were present and did engage violent protesters. *See* Shelly Bradbury, *Anti-Police Protesters Mob Rally Supporting Law Enforcement in Denver's Civic Center*, DENVER POST (July 19, 2020), https://www.denverpost.com/2020/07/19/pro-police-rally-denver-cific-center-counter-protest/ [https://perma.cc/4S9F-GE74]. However, they did not forcibly seek to move the large violent crowd back to create a buffer zone at the event. Such a move not only can escalate the violence but also can put police officers in the position of barring nonviolent pedestrians and observers from a public event.

328. *See* United States v. Morrison, 529 U.S. 598, 602 (2000).

sue their attackers in federal court.[329] The question is whether legislation barring certain denials of free speech or creating private rights of action would face a similar fate.

While the VAWA was struck down by the Court, the precursor criminal law 42 U.S.C. § 1985(3) was upheld.[330] The statute, contained in the Civil Rights Act of 1871, allowed victims to sue in federal court for any conspiracy meant to deprive "directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" to sue their attackers for monetary damages in federal court.[331] The law was notably directed at private actors to protect a constitutional right and could be a foundation for similar measures protecting free speech. The application to the free speech areas should also satisfy the interstate component found lacking in cases like *United States v. Lopez*[332] and *United States v. Morrison*.[333] Big Tech companies and universities operate on an interstate basis in both their services and "users." Even curtailing free speech in a plaza or public space has interstate elements given the transmission of such events and the participation of figures or groups from outside a given state. Indeed, the curtailment of speech in one state has an impact nationally. Such displacement arguments are common in cases like *Gonzales v. Raich*,[334] in which the Court noted how marijuana production in one state impacted consumption or available supply in other states.[335] Obviously, cases like *Gonzales* deal with illegal drugs and how production impacts illegal drug consumption outside of a state. However, new free speech legislation needs to come with a new understanding of interstate impact of anti-free speech policies and practices. Free speech is not a self-contained, localized

329. 42 U.S.C. § 13981(c) (2012).

330. *See* Griffin v. Breckenridge, 403 U.S. 88, 104 – 05 (1971).

331. Civil Rights Act of 1871, ch. 22, § 2 (1871) (codified as amended at 42 U.S.C. § 1985(3) (2012)).

332. *See* 514 U.S. 549, 567–68 (1995).

333. *See* 529 U.S. 598, 617–619 (2000).

334. 545 U.S. 1 (2005).

335. *See id.* at 18–19.

exercise. It is part of an increasingly national and international dialogue carried out through social media and interstate communications. This is not a case, as Chief Justice John Roberts noted in *Sebelius*, in which Congress "reach[es] beyond the natural limit of its authority and draw[s] within its regulatory scope those who otherwise would be outside of it."[336] The existing regulation of both virtual and physical forums should allow for ample grounds for regulation to address the denial of free speech rights.

Moreover, any federal legislation will be limited by anti-commandeering case law. At issue is whether states can be compelled to offer greater guarantees of the exercise of free speech, including curtailing the use of "security concerns" to either cancel events or withhold law enforcement support for events. In *Murphy v. NCAA*,[337] six justices found that the Professional and Amateur Sports Protection Act ("PASPA") constituted unconstitutional commandeering by making it generally unlawful for a State to "authorize" sports gambling schemes.[338] Rather than commanding enactments or regulations like background checks, the law barred the passage of state legislation counter to the purposes of the Act.[339] The Court held that PASPA "violate[d] the anticommandeering rule" because it "unequivocally dictate[d] what a state legislature may and may not do."[340] Notably, one of the three rationales cited by Justice Alito for the anti-commandeering doctrine is that "the anti-commandeering principle prevents Congress from shifting the costs of regulation to the States."[341] As in *Murphy*, it could be claimed that free speech events (like gambling) have costs that states would have to bear, particularly by groups attracting large counter demonstrations. Moreover, such laws can be challenged as

336. Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012).
337. 138 S. Ct. 1461 (2018).
338. *Id.* at 1481 (citing 28 U.S.C. § 3702(1) (2012)).
339. *Id.*
340. *Id.* at 1478.
341. *Id.* at 1477.

forcing law enforcement operations when officials believe that protecting an event (rather than terminating the event) presents unacceptable risks to law enforcement and others. The language of any such federal law or regulations would have to accommodate such discretion while creating a default in favor of protecting free speech activities as a condition of the receipt of federal funds.

Whether addressed under state or federal law, the primary concern remains the protection of fora for political expression while avoiding the danger of government control over the content of the speech in such forums. That is why legislative efforts are most likely to succeed if directed toward violent threats and actions that target individuals or events with the intention of preventing the exercise of free speech. Federal legislation can create systems that track and highlight the record of states in protecting or failing to protect free speech activities. Such reporting laws can draw attention to the failure of local officials. Federal law cannot compel state officials to carry out such duties. It is extremely difficult to sue for the failure to arrest and virtually impossible to sue for the failure to prosecute cases.[342] Such decisions are viewed as discretionary questions.[343] The Supreme Court has ruled that:

> [I]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it

342. *See* Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, THE GUARDIAN (Apr. 17, 2021), https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis [https://perma.cc/VSQ8-4DRE]; Kyle Iboshi, *Feds Quietly Dismiss Dozens of Portland Protest Cases*, KGW8 (Mar. 2, 2021), https://www.kgw.com/article/news/investigations/portland-protest-cases-dismissed-feds/283-002f01d2-3217-4b12-8725-3fda2cad119f [https://perma.cc/QKA6-TMVA].

343. Ironically, these cases often fail after the invocation of immunity defenses, which are the focus of much of the criticism in current protests. *See* Jonathan Turley, *Chopped: Will Seattle Officials Now Claim Immunity from Lawsuits Opposing Such Defenses for Police Officers?*, RES IPSA (May 3, 2021), https://jonathanturley.org/2021/05/03/chopped-will-seattle-officials-now-claim-immunity-from-lawsuits-after-opposing-such-defenses-for-police-officers [https://perma.cc/PLB7-5BK8].

> is better to risk some error and possible injury from such error than not to decide or act at all.[344]

Prosecutorial discretion is treated as virtually absolute by the courts under these immunity cases.[345]

Federal legislation can also create federal causes of action to challenge both government and private action. The use of federal legislation to reinforce speech rights can find analogies to the Civil Rights period when local officials often failed to intervene to stop attacks on protesters or refused to prosecute the culprits. While state prosecutors and police had the authority to investigate and prosecute attacks based on race or other forms of discrimination, they failed to do so, leaving citizens to be victimized by both criminal acts and acts of nonfeasance. Federal civil rights legislation allowed the federal government to bring its own cases for the denial of constitutional protections.[346] The Justice Department continues to act in parallel or unilaterally in cases in which equal rights or civil rights are violated, particularly in cases of racist attacks.[347]

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344. Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

345. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); *see also* Kipp v. Saetre, 454 N.W.2d 639, 642–43 (Minn. Ct. App. 1990).

346. *See* Jordan Blair Woods, *Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 CHAP. L. REV. 389, 394–95 (2008).

347. *See* David A. Hall, *Ten Years Fighting Hate*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 79, 97–102 (2020) (describing prosecutions under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act). Hall notes that the majority of prosecutions under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act have been for crimes motivated by racism. *Id.* at 98; *see also* Paul Duggan & Justin Jouvenal, *Neo-Nazi Sympathizer Pleads Guilty to Federal Hate Crimes for Plowing Car into Protestors at Charlottesville Rally*, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/local/public-safety/neo-nazi-sympathizer-pleads-guilty-to-federal-hate-crimes-for-plowing-car-into-crowd-of-protesters-at-unite-the-right-rally-in-charlottesville/2019/03/27/2b947c32-50ab-11e9-8d28-f5149e5a2fda_story.html [https://perma.cc/N6U5-WXGP] (noting that James Fields Jr. faced both state criminal and federal hate crime charges for his attack at the 2017 Unite the Right rally in Charlottesville, Virginia).

There has not been a similar collateral system of enforcement for civil liberties like free speech. Despite years of expanding federal crimes and jurisdiction, this is not an area where Congress has sought to ensure parallel federal guarantees for the protections of free speech as it has for equal protection.[348]

The greatest chance for change is to focus on the denial or blocking of free speech events as a key factor for federal funds. Congress can incentivize local officials to protect speakers. Such laws should also be enforceable through citizen lawsuits. Past federal efforts have been flawed and narrow. The Restitution for Economic Losses Caused by Leaders who Allow Insurrection and Mayhem (RECLAIM) Act was introduced in the Senate in July 2020.[349] As the title indicates, the Act seems designed to have more of a political than legal impact. The law would hold state and local officials liable for damages in the type of "autonomous zones" seen in Seattle's "CHAZ" area.[350] It would allow for treble damages for citizens in such zones who are injured due to rioting and the lack of law enforcement protection.[351] It would also permit federal grant assistance to be withheld from local governments that prevent police

348. *See* Woods, *supra* note 346, at 406–16 (discussing the scope of Congress's power to protect civil rights by federal legislation under Section 5 of the Fourteenth Amendment).

349. Restitution for Economic losses Caused by Leaders who Allow Insurrection and Mayhem Act, S. 4266, 116th Cong. (2020), https://www.cruz.senate.gov/files/documents/Bills/2020.07.22%20-%20RECLAIM%20Act%20.pdf [https://perma.cc/5PBB-AYQM] [hereinafter RECLAIM Act].

350. Press Release, Sen. Cruz Introduces Bill to Hold Local Officials Liable for Allowing Violent 'Autonomous Zones', Ted Cruz, U.S. Senator for Texas (July 22, 2020), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-introduces-bill-to-hold-local-officials-liable-for-allowing-violent-and-145autonomous-zones-and-146 [https://perma.cc/ZP6T-DFNC] [hereinafter Cruz Press Release]. The Capitol Hill Autonomous Zone (CHAZ) was a self-declared autonomous zone of protesters, including the occupation of the East Precinct building. Seattle Mayor Jenny Durkan agreed to pull back police and allowed the zone to govern itself. However, after a series of violent acts and other growing problems, the city moved in to end the occupation. *See* Turley, *Seattle Autonomous Zone*, *supra* note 239.

351. *See* Cruz Press Release, *supra* note 350.

forces from protecting citizens or their property inside law enforcement free zones.[352] The law is restricted to the relatively rare situation in which autonomous zones are maintained with the consent of local or state officials.[353] Moreover, it is fraught with vague criteria, like barring the use of "authority to prohibit law enforcement officers from taking law enforcement action that would prevent or materially mitigate significant physical injury or death or damage or destruction of property caused by or related to a riot for any reason other than to prevent imminent harm to the safety of law enforcement officers."[354] That reads like an exception that would swallow the rule, since many deployment decisions are based in part on concern for officer safety. Moreover, police cannot avoid all such damage, given the need to allocate limited personnel and resources even without the existence of a riot or an autonomous zone.

The one aspect of the RECLAIM Act that is both practical and constitutional is limiting or barring funding to jurisdictions with a history of lax protection of free speech events. Yet, even with federal conditional funding, there is only so much that the federal government can do to protect citizens from the anti-free speech views of their elected officials. Citizens always have the recourse of legal actions for the denial of constitutional rights. However, there are additional, subtle ways that state and local officials can undermine free speech.

Trying to address free speech through state-focused legislation may seem like a Sisyphean task. As noted, there are constitutional and practical limits to what Congress can do force local officials to be more protective for free speech activities. That is why Congress should also reinforce the traditional areas where free speech has flourished: on college and university campuses.

352. *See id.*
353. RECLAIM Act, *supra* note 349.
354. *Id.*

C. Protecting the Educational Space

Any effort to reinforce free speech values in the United States must focus on universities, which play a vital role as enclaves for political and intellectual discourse. These schools serve as incubators for new ideas and transformative movements. It is a reciprocal relationship: free speech is the very oxygen that sustains intellectual discourse. As Justice Douglas stated in his famous dissenting opinion in *Adler v. Board of Education*,[355] "[t]he Constitution guarantees freedom of thought and expression to everyone in our society. . . . [N]one needs it more than the teacher."[356]

Clearly, some of the efforts discussed earlier to protect virtual and physical spaces will impact free speech activities on campuses. However, colleges and universities have some unique elements that should be addressed separately, including the need to protect other values like academic freedom.

The shift in attitudes toward free speech in the United States is no more evident than on college campuses where free speech is often portrayed more as a growing danger than as a defining right. As the source of much data used by informed citizens, educational institutions have a pronounced impact on our society and our democratic institutions. Efforts to punish academics who hold opposing

355. 342 U.S. 485 (1952) *overruled by* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

356. *Id.* at 508 (Douglas, J., dissenting).

historical,[357] legal,[358] scientific,[359] or social views[360] erode faith in higher education and the reports produced from our universities. The vacuum created by censorship and blacklisting does not stay unoccupied. Preferred viewpoints fill the space and face less challenge or scrutiny.

1. The Counter-Millian Movement in Academia

From a Millian perspective, the lack of diversity of opinion reduces academia to recitation of "dead dogma, not a living truth."[361] Intellectuals benefit from dissenting and opposing views by refining their own views. Otherwise, "[b]oth teachers and learners go to sleep at their post as soon as there is no enemy in the field."[362] Not only have many in academia ignored Mill's narrow view of harm, but they have also used the very definition that he abhorred to reduce diversity of thought and expression.

The effort to bar speech in conferences and publications is often justified by claiming that opposing views are simply unworthy of

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357. *See* Jonathan Turley, *American and South Korean Professors Fight for Academic Freedom in Controversy over "Comfort Women" Publication*, RES IPSA (Mar. 6, 2021), https://jonathanturley.org/2021/03/06/american-and-south-korean-professors-fight-for-academic-freedom-in-controversy-over-comfort-women-publications [https://perma.cc/Z2PH-YZDV] [hereinafter Turley, *Fight for Academic Freedom*].

358. *See* Jonathan Turley, *The Rising Generation of Censors: Law Schools Are the Latest Battleground over Free Speech*, RES IPSA (July 8, 2021), https://jonathanturley.org/2021/07/08/the-rising-generation-of-censors-law-school-are-the-latest-battleground-over-free-speech [https://perma.cc/8K7D-3TX4].

359. *See* Jonathan Turley, *Berkeley Physicist Resigns After Colleagues Block UChicago Professor from Speaking at Science Event*, RES IPSA (Oct. 20, 2021), https://jonathanturley.org/2021/10/20/berkeley-physicist-resigns-after-colleagues-block-uchicago-professor-from-speaking-at-science-event [https://perma.cc/KL6B-2T2G].

360. *See* Jonathan Turley, *Harvard Professor Under Fire in Latest Attack on Free Speech*, RES IPSA (July 9, 2020), https://jonathanturley.org/2020/07/09/harvard-professor-under-fire-in-latest-attack-on-free-speech [https://perma.cc/9BRH-YM97].

361. MILL, ON LIBERTY, *supra* note 56, at 64.

362. *Id.* at 105.

being considered or tolerated.[363] While academia has long valued a diversity of opinion, the spectrum of such diversity has narrowed dramatically. The dwindling number of conservative or libertarian faculty members accelerates this trend by pushing their views further and further outside the "mainstream" of academic thought. That trend also makes it more difficult for new conservative faculty applicants whose writings are dismissed as fringe or not "intellectually rigorous."[364] In this self-sustaining cycle, the biased selection of faculty becomes the biased curtailment of viewpoints. The isolation of academics then diminishes not just their speech but also their ability to continue in academia. It increases the view of accepted truth among academics, due to a greater uniformity of viewpoints and values. As Mill warned: "All silencing of discussion is an assumption of infallibility."[365] This concern was raised recently in the termination of St. Joseph's University mathematics professor Gregory Manco. Manco was suspended after critics disclosed anonymous comments that he made outside of school on social media critical of reparations.[366] Many found his statements to

363. *See, e.g.*, Jonathan Turley, *Speaking Event for Historian Jon Meacham Canceled at Samford University*, RES IPSA (Oct. 30, 2021), https://jonathanturley.org/2021/10/30/speaking-event-for-historian-jon-meacham-cancelled-at-samford-university [https://perma.cc/JFH2-788B]; Jonathan Turley, *MIT Cancels Lecture by UChicago Professor Who Criticized Diversity Programs*, RES IPSA (Oct. 5, 2021), https://jonathanturley.org/2021/10/05/mit-cancels-lecture-by-uchicago-professor-who-criticized-diversity-programs [https://perma.cc/U66Z-VWJ2].

364. *See, e.g.*, Bradford Richardson, *Democratic Professors Outnumber Republican Professors 10 to 1: Study*, WASH. TIMES (Apr. 26, 2018), https://www.washingtontimes.com/news/2018/apr/26/democratic-professors-outnumber-republicans-10-to-/ [https://perma.cc/ZU3G-4H4V].

365. MILL, ON LIBERTY, *supra* note 56, at 31–32.

366. Jonathan Turley, *St. Joseph's University Professor Suspended for Criticism of Reparations on Social Media*, RES IPSA (Feb. 25, 2021), https://jonathanturley.org/2021/02/25/st-josephs-university-professor-suspended-for-criticism-of-reparations-on-social-media [https://perma.cc/3DZ7-3BKX] [hereinafter Turley, *St. Joseph's Professor*].

be insulting and offensive. These were views expressed in his private time on a social media site.[367] He was ultimately cleared because he was exercising his free speech rights.[368] However, the university then refused to renew his contract.[369] The university issued a statement that was more of a shrug than an explanation of the grounds for the action: "a non-renewal does not affect an individual's eligibility for future employment opportunities with the University."[370] Few other universities would risk hiring him after St. Joseph's criticized and suspended him for his public comments. The result is not just removing him from teaching but also warning other faculty that even anonymous comments can be grounds for their isolation and eventual removal.[371] It is certainly tempting in such cases to dismiss such speech as "low value" and unworthy of protection. This allows for a consensus to form over what viewpoints or speech are tolerable. However, the fact that professors like Manco are in the minority is irrelevant. Indeed, many share Manco's view of reparations, but Mill would protect him even if he

367. *See* Jonathan Turley, *St. Joseph's University Refuses to Renew Contract for Professor Who Prevailed in Free Speech Fight*, RES IPSA (July 30, 2021), https://jonathanturley.org/2021/07/30/st-josephs-university-refuses-to-renew-contract-for-professor-who-prevailed-in-free-speech-fight/ [https://perma.cc/DM7D-B9NC].

368. *Id.*

369. *Id.*

370. *Id.*

371. Another such controversy arose at Georgetown University Law Center where conservative Professor Ilya Shapiro was suspended after a horrendously badly worded tweet was condemned as racist. Shapiro was criticizing President Biden's pledge only to consider black females for his first appointment to the Court. While supporting a liberal Indian-American jurist, Shapiro opposed the appointment of what he described as a "lesser black woman." He later deleted the tweet and apologized. He was then suspended for months before being reinstated. However, he resigned after the Dean essentially cited a technicality for not firing him based on the starting date of his employment. Shapiro objected that the message was that he would be fired if he made further controversial statements. Jonathan Turley, *Shapiro Resigns from Georgetown After the Law School Reinstates Him on a Technicality*, RES IPSA (June 8, 2022), https://jonathanturley.org/2022/06/08/shapiro-resigns-from-georgetown-after-the-law-school-reinstates-him-on-a-technicality/ [https://perma.cc/LQD6-F3KU].

was the sole reparations critic left in academia: "If all [of] mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[372]

There is an alarming trend of teachers being investigated, fired, or sanctioned[373] for expressing contrary views at every level of the educational system.[374] However, the most chilling examples of intolerance have come from campuses of higher education. The extensive "cancelling" of speeches and events on campuses often involves rejecting the classical view that free speech protects all speakers, even those who are viewed as advancing harmful ideas. For example, a protest leader who succeeded in blocking a conservative speaker at UC Berkeley voiced an increasingly common

372. MILL, ON LIBERTY, *supra* note 56, at 30.

373. These cases also involve official condemnations that can severely damage a professor's standing and career. *See, e.g.*, Jonathan Turley, *Princeton Facing Possible Legal Action After Labeling Professor Racist for Opposing Race-Based Faculty Perks*, RES IPSA (Sept. 30, 2021), https://jonathanturley.org/2021/09/30/princeton-facing-possible-legal-action-after-labeling-professor-racist-for-opposing-race-based-faculty-perks [https://perma.cc/U4NV-JT5U]. In the case of Princeton Professor Joshua Katz, the university rejected calls to fire him for questioning a plan to award faculty benefits based on race. However, it then re-opened a previously adjudicated matter (for which Katz had already been punished) and terminated him on those grounds. Jonathan Turley, *Chasing Katz: Princeton Moves to Fire Classics Professor Who Criticized Anti-Racism Measures*, RES IPSA (May 21, 2022), https://jonathanturley.org/2022/05/21/chasing-katz-princeton-moves-to-fire-classics-professor-who-criticized-anti-racism-measures/ [https://perma.cc/F7T4-JM3H].

374. *See, e.g.*, *Principal on Leave for "Tone-Deaf" Black Lives Matter Post*, ASSOCIATED PRESS (June 15, 2020), https://apnews.com/4b54b83811cb6267441f10b2489295f6 [https://perma.cc/89L7-2YKH] (describing how Vermont principal was put on administrative leave for tweet that supported Black Lives Matter but criticized the "coercive measures" of the movement); Beth LeBlanc, *Walled Lake Teacher Fired After His Trump tweets Files Federal Suit Against District*, DETROIT NEWS (Feb. 25, 2021), https://www.detroitnews.com/story/news/local/michigan/2021/02/25/walled-lake-teacher-fired-after-trump-tweets-files-federal-suit/6806605002/ [Walled Lake teacher fired after his Trump tweets files federal suit against district] (noting that high school coach was fired after praising Trump and criticizing liberals on Twitter).

refrain in an editorial: "I don't think that anyone's free speech is being impaired. I think sometimes the free speech amendment is used as a way to frame violent conversations as a matter of free speech."[375] When a University of North Carolina student assaulted pro-life advocates on campus in 2019, she gave another common explanation for violent protests: that seeing certain opposing views is "triggering" and hurtful.[376] The rationalization of disruptive or violent conduct on campuses seeks to shift responsibility to the speaker for causing disorder. By declaring opposing views harmful or threatening, the range of responses is expanded to include measures of "self-defense." This construct converts speech into a discretionary right, subject to how it is received or interpreted by other individuals or groups.

Faculty across the country face rising threats of punitive action for espousing unpopular views. A recent study showed nearly two hundred instances of professors being disciplined or fired for protected speech.[377] For example, Harvard Professor Steven Pinker was the subject of a campaign to fire and remove him from a leading academic society because he questioned, on Twitter, whether police

375. Sonali Kohli & Nina Agrawal, *UC Berkeley Cancels Ann Coulter Appearance, Citing Safety Concerns After Violent Protests*, BALT. SUN (Apr. 19, 2017), https://www.baltimoresun.com/la-me-edu-ann-coulter-20170419-story.html [https://perma.cc/X8VP-F8C8].

376. *See* Caleb Parke, *Liberal Student Arrested for Punching Pro-Lifer on UNC Campus, Triggered by Images of Aborted Children*, FOX NEWS (May 9, 2019), https://www.foxnews.com/us/liberal-student-arrested-punching-pro-lifer [https://perma.cc/6B8V-H7NT].

377. David Acevedo, *Tracking Cancel Culture in Higher Education*, NAT'L ASS'NS OF SCHOLARS (Mar. 2, 2021), https://www.nas.org/blogs/article/tracking-cancel-culture-in-higher-education [https://perma.cc/3BJL-QFES]; *see also* Eric Kaufmann, *Academic Freedom Is Withering*, WALL ST. J. (Feb. 28, 2021), https://www.wsj.com/articles/academic-freedom-is-withering-11614531962 [https://perma.cc/4CL7-WCM9].

shootings were due to systemic racism or a long pattern of excessive use of force by police departments.[378] Harvard Professor J. Mark Ramseyer not only faced calls for his termination in 2020 but also demands that a journal publishing his work be banned because of his research positing that Korean "comfort women" from World War II were likely contracted, not forced, by the Japanese military.[379] University of Chicago Professor Harald Uhlig was targeted for criticizing the Black Lives Matter movement and the Defund the Police campaign.[380] University of Pennsylvania Professor Carlin Romano was targeted because he questioned language on a proposed statement on systemic racism.[381] Cornell Professor William Jacobson, who is also a conservative commentator, faced calls for his termination after criticizing the Black Lives Matter movement.[382] Another was suspended for criticizing reparations.[383] One professor was stripped of his directorship over a program after

378. Michael Powell, *How a Famous Harvard Professor Became a Target over His Tweets*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/15/us/steven-pinker-harvard.html [perma.cc/S9TC-6MF2].

379. Turley, *Fight for Academic Freedom*, *supra* note 357.

380. Jonathan Turley, *Writers and Academics Call for Removal of Chicago Professor for Criticizing BLM and Defunding Police*, RES IPSA (June 11, 2020), https://jonathanturley.org/2020/06/11/writers-and-academics-call-for-removal-of-chicago-professor-for-criticizing-blm-and-defunding-police [https://perma.cc/MVH6-SMYH].

381. Petra Mayer, *National Book Critics Circle Board Members Resign over Racism Allegations*, NPR (June 15, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/15/877385352/national-book-critics-circle-board-members-resign-over-racism-allegations [perma.cc/FZZ8-9PW2]; *see also* Jonathan Turley, *Penn Professor Faces Call for His Removal After Questioning an Anti-Racism Statement*, RES IPSA (July 23, 2020), https://jonathanturley.org/2020/07/23/penn-professor-faces-calls-for-his-removal-after-questioning-an-anti-racism-statement [https://perma.cc/T3Q5-UUUD].

382. Nick Givas, *Cornell Professor Who Criticized Black Lives Matter Faces Student Boycott*, FOX NEWS (June 17, 2020), https://www.foxnews.com/us/cornell-professor-criticized-black-lives-matter-faces-student-boycott [perma.cc/CV8Q-YKCF].

383. Turley, *St. Joseph's Professor*, *supra* note 366.

questioning affirmative action in medical admissions[384] while another was put under investigation (and required police protection) after tweeting criticism of "white shaming" and claims of systemic racism.[385] At Yale, a law professor (who was protested for defending Justice Brett Kavanaugh) was reportedly sanctioned without basic due process protections or notice.[386] Another law professor was put under extended investigation and suspension after he criticized the Chinese government as the likely source of COVID-19.[387]

These are only a few of the growing number of examples of intolerance on campuses, which include cases in which professors

384. Crystal Phend, *Anti-Affirmative Action Paper Blows Up on Twitter*, MEDPAGE TODAY (Aug. 4, 2020), https://www.medpagetoday.com/publichealthpolicy/medicaleducation/87903 [https://perma.cc/F8LH-6ZCP].

385. Martin E. Comas, *UCF Protesters Demand Professor Be Fired for Racist Tweets*, ORLANDO SENTINEL (June 14, 2020), https://www.orlandosentinel.com/news/seminole-county/os-ne-ucf-professor-negy-racist-tweets-20200614-pqznqg-safnhqbd36eb2pign4si-story.html [https://perma.cc/J2BX-2QQW].

386. Jonathan Turley, *Persona Non Grata: Yale Professor Who Defended Kavanaugh Is Reportedly Sanctioned Without Notice or Explanation*, RES IPSA (Apr. 12, 2021), https://jonathanturley.org/2021/04/12/persona-non-grata-yale-professor-who-defended-kavanaugh-is-reportedly-sanctioned-without-notice-or-explanation [https://perma.cc/6FZX-D96E].

387. Jonathan Turley, *USD Law Professor Under Investigation for Column Criticizing Chinese Government*, RES IPSA (Mar. 22, 2021), https://jonathanturley.org/2021/03/22/usd-law-professor-under-investigation-for-column-criticizing-chinese-government [https://perma.cc/9QMK-LC72]. This intolerance for opposing views, even of a pandemic, is not confined to this country. In Sweden, a leading medical researcher ended further work on the virus after a campaign against him. His transgression was to report on findings that children could go back to school safely and were not either at significant risk of transmittal or contraction of the virus. However, unlike in this country, there was a national movement to protect academic freedom from such canceling campaigns. Jonathan Turley, *Sweden Moves to Protect Academic Freedom After Professor Quits Covid Research Due to Harassment*, RES IPSA (Mar. 2, 2021), https://jonathanturley.org/2021/03/02/sweden-moves-to-protect-academic-freedom-after-professor-quits-covid-research-due-to-harassment [https://perma.cc/8EGX-4YMJ].

have been physically assaulted or threatened by protesters.[388] For faculty members, the choice is stark. If they voice dissenting views or even support dissenting colleagues, they risk being "tagged" as racist or intolerant.[389]

What is striking about many of these instances is that other professors have supported the campaigns for the termination or punishment of colleagues with opposing views. While most professors do not condone violent or threatening conduct, the most extreme

388. *See, e.g.*, Katharine Q. Seelye, *Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html [https://perma.cc/B9FS-PBVV].

389. Such controversies can lead to the loss of many of the things that define and give meaning to an academic career, from publication to speaking opportunities. It may even result in termination or coerced resignation. The impact of such losses is evident in the most extreme cases, where faculty have taken their own lives. *See, e.g.*, Jonathan Turley, *Princeton Professor Commits Suicide After Termination of Contract—Raising Questions over His Treatment by University*, RES IPSA (Apr. 22, 2011), https://jonathanturley.org/2011/04/22/princeton-professor-commits-suicide-after-termination-of-contract-raising-questions-over-his-treatment-by-university [https://perma.cc/23G3-C3PX]. For example, a conservative North Carolina professor faced calls for termination over controversial tweets and was pushed to retire. Jonathan Turley, *North Carolina Professor Triggers a Free Speech Fight over Inflammatory Tweet*, RES IPSA (June 9, 2020), https://jonathanturley.org/2020/06/09/north-carolina-professor-triggers-a-free-speech-fight-over-inflammatory-tweet [https://perma.cc/9UW9-7ESA]. Dr. Mike Adams, a professor of sociology and criminology, had long been a lightning rod of controversy. In 2014, Adams prevailed in a lawsuit that alleged discrimination due to his conservative views. He was then targeted again after an inflammatory tweet calling North Carolina a "slave state." That led to his being pressured to resign with a settlement. He then committed suicide just days before his last day as a professor. Joshua Rhett Miller, *UNC Wilmington Professor Mike Adams Died by Suicide: Cops*, N.Y. POST (July 28, 2020), https://nypost.com/2020/07/28/unc-wilmington-professor-mike-adams-died-by-suicide-deputies [https://perma.cc/VKQ9-Q2VG]. Such cases obviously are complex and often involve other preexisting or aggravating conditions. However, they also reflect the tremendous loss to an intellectual that is losing academic opportunities due to his or her viewpoints.

faculty voices have advocated violent action[390] or making life a "living hell" for those with opposing views[391] or causing "Republicans . . . to suffer."[392] There is a range of such "direct actions" from professors who have led protests, from "shutting down"[393] speeches to physically[394] or verbally assaulting[395] people with opposing views

390. Jonathan Turley, "*A Desire That They Suffered Until Their Last Breath": Alabama Professor Under Fire for Hateful Comments Following Rush Limbaugh's Death*, RES IPSA (Feb. 19, 2021), https://jonathanturley.org/2021/02/19/a-desire-that-they-suffered-until-their-last-breath-alabama-professor-under-fire-for-hateful-comments-following-rush-limbaughs-death/ [https://perma.cc/D63R-EP7P] (detailing various calls for violence in academia).

391. Jonathan Turley, *"Living Hell": Clemson Professor Prompts Others to Find the Home Address of Public Letter Author*, RES IPSA (Aug. 8, 2020), https://jonathanturley.org/2020/08/08/living-hell-clemson-professor-under-fire-after-prompting-others-to-find-the-home-address-of-critic [https://perma.cc/5F7V-W2FJ].

392. Jonathan Turley, *"Republicans Need To Suffer": Drake Professor Triggers Free Speech Debate with Hateful Tweets Against Men and Conservatives*, RES IPSA (Jan. 30, 2021), https://jonathanturley.org/2021/01/30/republicans-need-to-suffer-drake-professor-triggers-free-speech-debate-with-hateful-tweets-against-men-and-conservatives [https://perma.cc/TF3E-KSQR].

393. *See, e.g.*, Jonathan Turley, *University of New Hampshire Professor Identified in Effort to Disrupt Free Speech Event*, RES IPSA (May 30, 2018), https://jonathanturley.org/2018/05/30/university-of-new-hampshire-professor-identified-in-effort-to-disrupt-free-speech-event [https://perma.cc/J9M5-4QYH] (describing incident in which professor shouted at a speaker, "We don't want you in the LGBT community. Get the f**k out."); Ryan Blessing, *Police: QVCC Administrator Stole Conservative Commentator's Notes*, THE BULLETIN (Dec. 13, 2017), https://www.norwichbulletin.com/story/news/courts/2017/12/13/police-qvcc-administrator-stole-conservative/16844162007 [https://perma.cc/8MA5-ECJ3] (detailing incident in which professor and administrator were shown stealing notes of conservative speaker to stop event).

394. *See, e.g.*, Joshua Rhett Miller *California Professor Pleads No Contest to Assault on Pro-Life Students*, FOX NEWS (Nov. 23, 2015), https://www.foxnews.com/us/california-professor-pleads-no-contest-to-assault-on-pro-life-students [https://perma.cc/DN5P-WQ3S] (describing case in which University of California Professor was charged with assaulting pro-life display and table on campus after leading her students from a class).

395. *See, e.g.*, Mackenzie Mays, *Fresno State Prof Says He Did Nothing Wrong, Won't 'Pay a Dime' for Erasing Anti-Abortion Messages*, FRESNO BEE (Nov. 10, 2017), https://www.fresnobee.com/news/local/education-lab/article183987576.html (detailing incident in which professor berated pro-life students, denied they had a right to free speech on campus, and erased their chalk messages).

on campus.[396] This includes faculty members associated with violent antifascist groups.[397]

Students have faced similar backlash over expressing opposing or unpopular views. For many years, there have been questions raised over ill-defined speech standards, including "microaggression" rules, and their impact on free speech for students.[398] There is no empirical study on the range of such controversies, but few would disagree that they are on the rise around the country.[399] The rise in intolerance for dissent has come at a time of falling support for free speech and the expectations of both students and faculty. Polls show a sharp decline of support for free speech and a rise in students who say that they do not feel comfortable sharing their views.[400] For example, a poll found that seventy percent of students

396. One of the early and most notable examples of this trend of intolerance was the videotaping of Missouri Professor Melissa Click telling protesters to get rid of a student journalist. *Ex-Mizzou Professor Melissa Click, Fired over Protest Clash, Gets New Job*, NBC NEWS (Sept. 4, 2016), https://www.nbcnews.com/news/us-news/ex-mizzou-professor-melissa-click-fired-over-protest-clash-gets-n642711 [https://perma.cc/X3W4-WM22].

397. One such faculty member is college professor Eric Clanton, who pleaded guilty after assaulting various people at a free speech rally by hitting them in the head with a heavy bike lock. Emilie Raguso, *Eric Clanton Takes 3-Year Probation Deal in Berkeley Rally Bike Lock Assault Case*, BERKELEYSIDE (Aug. 8, 2018), https://www.berkeleyside.com/2018/08/08/eric-clanton-takes-3-year-probation-deal-in-berkeley-rally-bike-lock-assault-case [https://perma.cc/W3SP-67B5].

398. In one case, Georgetown University student Bill Torgerson was the subject of a formal resolution of condemnation by the Student Senate as well as a bias complaint from the university. The reason was a column on his own website espousing conservative views on current issues. *See* Ethan Greer, *GUSA Senate Condemns Blog Written by a Georgetown Student*, GEORGETOWN VOICE (July 8, 2020), https://georgetownvoice.com/2020/07/08/gusa-senate-condemns-blog-post-written-by-a-georgetown-student [https://perma.cc/6CC5-8DFK].

399. One survey of 800 college students found one in three believed violence was justified to oppose "hate speech." Jonathan Turley, *Poll: One in Three College Students Believe Violence Is Justified to Stop "Hate Speech"*, RES IPSA (Nov. 5, 2018), https://jonathanturley.org/2018/11/05/poll-one-in-three-college-students-believe-violence-is-justified-to-stop-hate-speech [https://perma.cc/K79E-TE6N].

400. *See, e.g.*, *Harvard Youth Poll Finds Majority of Young Americans Support Impeachment and Removal of President Trump*, HARV. KENNEDY SCH. (Nov. 18, 2019),

said that they experienced political bias and that students believe that only one percent of their faculty are conservative.[401] A poll at Pomona found nearly nine out of ten students said that "the climate on . . . campus prevents students/faculty from saying things they believe because others might find them offensive."[402] Nearly two-thirds of faculty members felt the same.[403] Seventy-six percent of conservative and moderate students strongly agree that the school climate hinders their free expression.[404] The poll showed a sharp difference in the freedom expected from students based on their ideology. The rate of conservative and moderate students expressing fear about expressing their views was "nearly 2.5 times higher than very liberal students."[405] Another poll of 800 full-time undergraduate students found that a majority "felt intimidated" in

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https://iop.harvard.edu/about/newsletter-press-release/harvard-youth-poll-impeachment-nov18-2019 [https://perma.cc/KUD9-ELBX] (finding that only 35 percent of young Republicans felt comfortable sharing their political opinions with professors) [hereinafter *Harvard Youth Poll*]; JENNIFER LARSON ET AL., UNC FACULTY REPS., FREE EXPRESSION AND CONSTRUCTIVE DIALOGUE AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (Mar. 2, 2020), *available at* https://fecdsurveyreport.web.unc.edu/files/2020/02/UNC-Free-Expression-Report.pdf [https://perma.cc/SBN6-HDKQ]; *Perceptions of Speech and Campus Climate: 2018 Gallup Survey of Pomona Students and Faculty*, POMONA COLL. (Feb. 8, 2018), https://www.pomona.edu/public-dialogue/survey [https://perma.cc/XCN4-EJXA] [hereinafter *Gallup Survey*]. According to a Knight Foundation survey, 41 percent of students believe that hate speech should not be protected. *Free Expression on College Campuses*, KNIGHT FOUND. (May 13, 2019), https://knightfoundation.org/reports/free-expression-college-campuses [https://perma.cc/3DXX-TP7G].

401. Jennifer Harper, *Inside the Beltway: Yale Students Report That Just 1% of Their Professors Are Conservative*, WASH. TIMES (May 4, 2017), https://www.washingtontimes.com/news/2017/may/4/inside-the-beltway-yale-students-say-1-of-professo [https://perma.cc/9RDW-WF9E]; *see also Survey: 70% of Yale Students Often Experience Political Bias in the Classroom*, WILLIAM F. BUCKLEY, JR. PROGRAM AT YALE (May 3, 2017), https://www.buckleyprogram.com/post/survey-70-of-yale-students-often-experience-political-bias-in-the-classroom [https://perma.cc/SB9S-RKFU].

402. *Gallup Survey*, *supra* note 400.

403. *Id.*

404. *Id.*

405. *Id.*

sharing their views due to the expressed views of their professors and other teachers.[406] As with the growing intolerance among professional journalists, this trend is evident among student journalists and editors.[407] Similarly, university administrators have called for limits on free speech and have supported often vague limitations on speech.[408]

These controversies are offered not as a survey of all such incidents but rather as a sufficient sampling to show there is a legitimate concern over the exercise of free speech at every level of our educational system.[409] There is a growing narrative, as reflected in

406. James Freeman, *Most U.S. College Students Afraid to Disagree with Professors*, WALL ST. J. (Oct. 26, 2018), https://www.wsj.com/articles/most-u-s-college-students-afraid-to-disagree-with-professors-1540588198 [https://perma.cc/35JC-8J82].

407. *Free Speech Is Not Violated at Wellesley*, WELLESLEY NEWS (Apr. 12, 2017), https://thewellesleynews.com/2017/04/12/free-speech-is-not-violated-at-wellesley [https://perma.cc/R2PG-Y5CK] ("Shutting down rhetoric that undermines the existence and rights of others is not a violation of free speech; it is hate speech . . . . [I]f people are given the resources to learn and either continue to speak hate speech or refuse to adapt their beliefs, hostility may be warranted.").

408. *See, e.g.*, Douglas Belkin, *Why Northwestern President Morton Schapiro Favors Safe Spaces*, WALL ST. J. (May 16, 2017), https://www.wsj.com/articles/why-northwestern-president-morton-schapiro-favors-safe-spaces-1494987120 [https://perma.cc/L452-5VR4] ("You want to protect the First Amendment, obviously, but it isn't absolute."). Some presidents have expressly denounced the "disingenuous misrepresentation of free speech" and declared that they will not protect speech that can "spread hate or create animosity and hostility." Ric N. Baser, *Hate Speech Does Not Equal Free Speech*, SAN ANTONIO EXPRESS-NEWS (Dec. 13, 2017), https://www.expressnews.com/opinion/commentary/article/Hate-speech-does-not-equal-free-speech-12428780.php [https://perma.cc/VQ2T-XQ5E] (discussing letter declaring that colleges will not protect inappropriate or hostile speech).

409. The list of classes, events, and speeches canceled due to hecklers and "shout downs" would be too long to list, but one of the most illustrative was a sociology class that was canceled due to protesters at Northwestern University. The Sociology 201 class by Professor Beth Redbird examined "inequality in American society with an emphasis on race, class and gender." To that end, Redbird invited both an undocumented person and a spokesperson for the Immigration and Customs Enforcement. It is the type of balance that should be valued on every campus. Instead, protesters blocked the doors for the class with the ICE representative. The University intervened and, after securing a promise that the protesters would not disrupt that class, allowed the protesters inside.

many of these controversies, that free speech itself is a danger and that certain views constitute harm for the purposes of proscriptive or defensive action. It is also important not to overstate the role of movements like Antifa in these controversies. The ultimate responsibility for the erosion of free speech values in our country cannot be attributed to these extremist groups. That ignoble distinction rests with academics, journalists, and others who actively support actions taken against those with opposing views or stand silent as their colleagues are harassed, investigated, or fired for their views. The attack on free speech is not nearly as damaging as the lack of active support for free speech, a dangerous passivity that has created the vacuum in which these groups operate and flourish. It is the antithesis of the intellectual mission of higher education and precisely the self-destructive path of orthodoxy denounced by Mill: "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."[410]

The courts have routinely ruled against universities for the denial of free speech as well as the denial of due process.[411] However, many universities seem to prefer litigation to reforming policies curtailing free speech. Even with free speech groups opposing these cases, universities drive up the costs and force delays by requiring students and faculty to litigate basic free speech values. In the past,

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They then shouted down the class until it was canceled. Notably, the students responsible proudly gave their names to the campus newspaper, and the University took no action against them other than expressing disappointment. Mariana Alfaro, *Students Protest ICE Representative's Visit on Campus*, DAILY NORTHWESTERN (May 17, 2017), https://dailynorthwestern.com/2017/05/17/campus/students-protest-ice-representatives-visit-to-campus [https://perma.cc/Y974-6FJD].

410. MILL, ON LIBERTY, *supra* note 56, at 30–31.

411. *See, e.g.*, Young Am.'s Found. v. Stenger, No. 3:20-CV-0822 (LEK/ML), 2021 WL 3738005 at * 15 (N.D.N.Y. Aug. 24, 2021); Meriweather v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021).

these cases have often floundered on standing or jurisdictional grounds. One of the most maddening barriers has been the need to show concrete harm other than the loss of free speech to secure judicial review.[412] Free speech is often treated as an abstraction in such damage calculations. It is a bitterly ironic problem since universities increasingly cite the harm posed by unregulated free speech to justify limitations while treating the denial of free speech as a *de minimis* cost for students or faculty.[413]

That may change with a major 8-1 ruling of the Supreme Court in *Uzuegbunam v. Preczewski*.[414] In *Uzuegbunam*, the Court was faced with a former Georgia Gwinnett College student who wanted to share his religious views with other students on campus.[415] He was twice prevented by campus police from handing out religious literature and told by the director of the college's Office of Student Integrity that he had to apply for a permit and confine his speech to two designated "free speech expression areas."[416] Yet when Uzuegbunam received a permit, he was then again prevented from speaking because a security officer told him that students had complained that he was disturbing the peace.[417] The college forced Uzuegbunam to go to court and initially claimed that such religious speech constituted incitement akin to "fighting words."[418] After Uzuegbunam litigated that question, a familiar thing occurred: the

412. *See, e.g.*, Lopez v. Candaele, 630 F.3d 775, 789 (9th Cir. 2010); Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 548 (4th Cir. 2010); *see also* Jennifer L. Bruneau, Comment, *Injury-in-Fact in Chilling Effect Challenges to Public University Speech Codes*, 64 CATH. U. L. REV. 975 (2015).

413. Zoe Tidman, *Government 'Exaggerating Threat to Freedom of Speech to Push Through New Laws,' Says University Union*, INDEPENDENT (May 14, 2021), https://www.independent.co.uk/news/education/education-news/free-speech-university-laws-ucu-b1846076.html [https://perma.cc/7AAM-28TG].

414. 141 S. Ct. 792 (2021).

415. *Id.* at 794.

416. *Id.* at 797.

417. *Id.* at 794–95 (a second student also claimed to have been prevented from speaking under the policies).

418. *Id.* at 797.

college eliminated the policies and sought to dismiss the lawsuits as moot.[419] It is an all–too-common pattern where universities and colleges force students or academics to go to court and then later drop the cases when it is clear that the institution may lose. This time the Court declared that enough was enough. In an opinion written by Justice Thomas, the Court held that nominal damages are enough to allow citizens to litigate the loss of free speech rights.[420] In his lone dissent, Chief Justice Roberts offered a classic floodgates argument that "[g]oing forward, the Judiciary will be required to perform this function whenever a plaintiff asks for a dollar. For those who want to know if their rights have been violated, the least dangerous branch will become the least expensive source of legal advice."[421] Chief Justice Roberts' floodgates argument led to a sharp rebuke by Justice Thomas, who wrote:

> That this rule developed at common law is unsurprising in the light of the noneconomic rights that individuals had at that time. A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation. . . . By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.[422]

The ruling on nominal damages will minimize one of the barriers that keeps courts from considering constitutional and contractual claims in defense of free speech rights. The decision does not remove other requirements of particularized injury or standing. However, the Court found nominal damages could meet redressability demands. The Court held:

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419. *Id.*
420. *Id.* at 802.
421. *Id.* at 807 (Roberts, C.J., dissenting).
422. *Id.* at 800 (majority opinion) (citations omitted).

> Applying this principle here is straightforward. For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because "every violation [of a right] imports damage," nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.[423]

Even with such new precedent, the courts are unlikely to turn the tide on speech limitations. Such challenges are easier against public universities while private universities can litigate hazy contractual claims with the small percentage of litigants willing to go to court.

Absent some greater protection of expressive activities, enclaves of free speech will continue to collapse. For many faculty and students, the "circle" of permissible or tolerated speech continues to shrink. This is a literal physical reduction when schools impose "free speech zones" designed to bar free speech in all but a small, sometimes remote space on a university's campus. More often it is the loss of a sense of freedom to express opposing thoughts on subjects of race, police abuse, or other issues that conflict with majoritarian values. Diversity of viewpoints is the most cherished characteristic of higher education, but, as the Pound writings indicate,[424] we are again facing a period of reinforced orthodoxy on our campuses. It is easier for those with minority viewpoints to be silent than to deal with the outcry if they try to speak. The chilling effect of these protests and campaigns is the artificial appearance of uniformity or agreement. This results from a straightforward calculation. Fighting for the free speech rights of a minority of faculty or students costs a great deal of money and strife. Conversely, maintaining a hostile environment for such dissenting views allows for the appearance of neutrality while the costs are borne silently by

423. *Id.* at 802 (citation omitted) (alteration in original).

424. *See* Pound *supra* notes 41, 43.

those too intimidated to speak out.[425] It is not just the exclusion of many students and faculty from the full participation in intellectual discourse and learning that is troubling, but also it is the loss of "ethical confrontation." It is precisely those confrontations that bring depth and vigor to higher education. Even Professor Jeremy Waldron, who has advocated speech regulation, has noted "[i]f nobody is disturbed, distressed, or hurt in this way . . . the intellectual life and progress of our civilization may be grinding to a halt."[426] If a faculty member cannot question the statistics on police abuse or question the impact of affirmative action, universities become little more than echo chambers for orthodoxy.

2. Legislating Diversity in Education Spaces

Historically, while political figures have sought to limit free speech, this right has been protected on our campuses as an essential element of our intellectual mission of free and open discourse. By defending free speech rights on campuses, Congress can guarantee protected enclaves for free speech even in those jurisdictions where local officials are not inclined to support the exercise of this right. Local enforcement is the best way to stop violence at protests. Federal civil actions could be used to compel cities to meet this responsibility in cases in which there is a pattern of police "standing down" or declining to protect permitted events. Yet, as noted earlier, it would be difficult to federally compel what are often treated as discretionary acts by local officials. That is why the focus should be on, to adopt a Millian term, protecting "circles" of protected speech and academic freedom. Indeed, as the Supreme Court stated

425. Again, many faculty and students are now unsure of what they can say and thus say nothing. One recent Harvard study found only thirty-five percent of Republican or conservative students felt comfortable expressing their views. *Harvard Youth Poll*, *supra* note 400; *see also* LARSON ET AL., *supra* note 400 (study at the University of North Carolina funding that conservative students were 300 times more likely to self-censor their political views).

426. Waldron, *supra* note 84, at 115, 124.

in *Sweezy v. New Hampshire*,[427] these circles or enclaves of protection are the very thing that sustains a healthy democratic system: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[428]

Various states have already responded to controversies over free speech, particularly regarding the use of "free speech zones" on campuses that have been criticized for isolating student advocates. Free speech zones curtail the "ethical confrontation" value of free speech, confining exposure to such opposing views in a way that minimizes any potential disruption or insult. Some states have attempted to force greater ideological diversity on faculties that rarely hire conservative professors, as discussed below. The greatest limitation on state legislative measures is that it is most effective with public institutions, which are already subject to direct protections under the First Amendment. When professors have barred certain views in class, or when universities have barred speech on campus, there have been corrective measures based on the First Amendment.[429] While most private universities receive considerable federal funds, private universities are not generally dependent on state funding and are not subject to limits based on state action.[430]

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427. 354 U.S. 234 (1957).

428. *Id.* at 249–50 (overturning a contempt citation of a university professor who had refused to answer questions about his possible support for the Communist Party).

429. *See, e.g.*, Jonathan Turley, "*Giant Warning": Iowa State Professor Attempts to Ban Students Who Question Black Lives Matter, Abortion, or Other Forms of "Othering"*, RES IPSA (Aug. 19, 2020), https://jonathanturley.org/2020/08/19/giant-warning-iowa-state-professor-under-fire-for-banning-students-who-question-black-lives-matter-abortion-or-other-forms-of-othering [https://perma.cc/69Q5-SYDD].

430. Some have noted, however, that even private universities have developed a reliance on federal funds that can challenge their status and independence on a practical level. *See* Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2008), https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities/?sh=48c3c6857bc5 [https://perma.cc/RX8H-FYV4].

The first intellectual diversity state law was enacted in South Dakota. After a number of controversies over conservatives being harassed or barred from speaking on campus, the legislature passed "An Act to Promote Intellectual Diversity at Certain Institutions of Higher Education."[431] The four sections of the Act speak of general commitments to free speech and diversity, including a "commitment to the principles of free expression . . . in an environment that is intellectually and ideologically diverse" and require a commitment to—and annual reports on—ensuring "intellectual diversity and free exchange of ideas."[432] The law was opposed by some faculty and groups on the grounds that it was an intrusion upon academic freedom, even though the provisions included viewpoint diversity protections for faculty in hiring and teaching.[433] There is certainly a danger that laws could intrude upon academic freedom, even in the cause of supporting academic freedom and diversity of thought. Yet, universities would be more credible advocates for academic freedom if they had not reduced conservative voices to a small percentage, if any, on most faculties.[434] Moreover, the opposition to these laws rarely have anything to suggest beyond the status quo despite growing concerns over ideological intolerance and diversity.

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431. H.B. 1087, 2019 Leg. (S.D. 2019).

432. S.D. CODIFIED LAWS §§ 13-53-50, 13-53-53 (2021).

433. Molly Worthen, *Can We Guarantee That Colleges Are Intellectually Diverse?*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/opinion/sunday/college-intellectual-diversity.html [https://perma.cc/7PGQ-C7YT]; Lisa Kaczke, *Concerns Linger as South Dakota Universities Implement New Intellectual Diversity Law*, ARGUS LEADER (Oct. 30, 2019), https://www.argusleader.com/story/news/politics/2019/10/30/south-dakota-universities-implement-new-intellectual-diversity-law-sue-peterson/2501504001 [https://perma.cc/UW5L-ZJB4].

434. *See* Natalie L. Kahn, *'An Endangered Species': The Scarcity of Harvard's Conservative Faculty*, HARV. CRIMSON (Apr. 9, 2021), https://www.thecrimson.com/article/2021/4/9/disappearance-conservative-faculty [https://perma.cc/8D8F-AJ24]; Jon A. Shields, *The Disappearing Conservative Professor*, NAT'L AFFS. (Fall 2018), https://nationalaffairs.com/publications/detail/the-disappearing-conservative-professor [https://perma.cc/BZ8V-XSDM].

Free speech zones have also been the source of state legislation. In the case of Texas Tech, the free speech zone was confined to a twenty–foot-wide gazebo.[435] Western Michigan University moved its free speech zone behind a campus building.[436] Even greater concern is raised by the selective use of such zones. For example, the University of Houston would deem certain forms of speech to be "potentially disruptive" and confine those groups to zones.[437] That turned out to include pro-life groups but not some of their opposing groups.[438] Courts have ruled in favor of free speech rights over such restrictions by treating campuses as public forums.[439] In the Texas Tech case, the court took a dim view of not only the zones (which the university changed before the ruling) but also the underlying speech content regulations, stating that the court was

> of the opinion that application of the Speech Code to the public forum areas on campus would suppress substantially more than threats, "fighting words," or libelous statements that may be considered constitutionally unprotected speech, to include much speech that, no matter how offensive, is not proscribed by the First Amendment.[440]

These decisions, however, did not slow the legislative outrage over universities confining or abridging the exercise of free speech. As of August 2020, at least seventeen states have banned free speech

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435. *See generally* Roberts v. Haragan, 346 F.Supp.2d 853 (N.D. Tex. 2004).

436. Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 951 (2006), (citing *Your Right to Say It . . . But Over There*, CHI. TRIB., Sept. 28, 2003, at 3).

437. Pro-Life Cougars v. Univ. of Houston, 259 F.Supp.2d 575, 577–78 (S.D. Tex. 2003).

438. *Id.*

439. *See, e.g.*, Hays County Guardian v. Supple, 969 F.2d 111, 119 (5th Cir. 1992).

440. Roberts v. Haragan, 346 F.Supp.2d at 872; *but see* Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344 (11th Cir. 1989) (rejecting constitutional challenge).

zones.[441] Some of these state laws codify the standard used by the courts, mandating that "[s]ubject to reasonable time, place and manner restrictions, a community college or university may not limit any area on campus where free speech may be exercised."[442] Other laws incorporate judicial opinions on unprotected speech but declare:

> An institution of higher education shall not limit or restrict a student's expression in a student forum, including subjecting a student to disciplinary action resulting from his or her expression, because of the content or viewpoint of the expression or because of the reaction or opposition by listeners or observers to such expression.[443]

The laws do not intrude upon academic freedom but rather protect the students and faculty from being denied their full exercise of free speech on campuses.

These state laws are largely coextensive with state jurisdiction over public schools and case law on public forums. While laws like South Dakota's have reporting obligations, most bar free speech zones while largely reaffirming the importance of free speech.[444] Although these laws are effective on some levels, specific provisions that address a wider array of limits on speech (like surcharging or indemnification rules as a precondition for speakers) are still missing from these laws. They do little to force greater transparency

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441. This includes Virginia, Missouri, Arizona, Kentucky, Colorado, Utah, North Carolina, Tennessee, Florida, Georgia, Louisiana, Arkansas, South Dakota, Iowa, Alabama, Oklahoma, and Texas. FIRE, SPOTLIGHT ON SPEECH CODES 2020, at 23 (2019), https://www.thefire.org/presentation/wp-content/uploads/2019/12/04102305/FIRE-Spotlight-On-Speech-Codes-2020.pdf [https://perma.cc/776R-CWMW]

442. ARIZ. REV. STAT. ANN. § 15-1865 (2021).

443. COLO. REV. STAT. § 23-5-144 (2017).

444. Andrew Blake, *Florida Lawmakers Ban 'Free Speech Zones' on College Campuses*, WASH. TIMES (Mar. 6, 2018), https://www.washingtontimes.com/news/2018/mar/6/florida-lawmakers-ban-free-speech-zones-college-ca [https://perma.cc/YPW5-GTE8].

and accountability at universities. Allowing for some form of outside review of challenges to the denial of free speech activities is a vital protection against heterodoxy on campuses. Most importantly, state laws show a limited ability to influence schools beyond state institutions. The greatest influence may be found in the federal government.

The federal government already plays a prominent role in higher education. The federal government spends billions of federal dollars on grants, projects, consultancies, and other support for academics and their institutions.[445] It also spends billions on federal loan guarantees for tuition and costs of students. Increasingly, however, many Americans are expressing concern about whether they can attend these schools and still participate in public debates as conservatives, libertarians, or simply individuals who hold contrarian views.[446] That has led to calls for the federal government to act to guarantee viewpoint diversity. On March 19, 2019, the Trump Administration issued an executive order entitled "Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities."[447] Most of the provisions concern transparency on issues of financial aid and employment. The order does not force equal transparency on free speech policies, controversies, or cases. Just as students can gain needed information on issues like "the prices and outcomes of postsecondary education,"

445. DATA LAB, FEDERAL INVESTMENT IN HIGHER EDUCATION, https://datalab.usaspending.gov/colleges-and-universities [https://perma.cc/ER4K-EJE4] (last visited Feb. 13, 2022) ("In 2018, higher education institutions received a total of $1.068 trillion in revenue from federal and non-federal funding sources. Investments from the federal government were $149 billion of the total, representing 3.6% of federal spending.").

446. *See, e.g.*, Christa Case Bryant, *At College Decision Time, Conservatives Face Tough Choices*, CHRISTIAN SCI. MONITOR (Apr. 23, 2018), https://www.csmonitor.com/EqualEd/2018/0423/At-college-decision-time-conservatives-face-tough-choices [https://perma.cc/2VT4-JJHV] ("Will the institution welcome, or at least tolerate, our viewpoints? To hear many conservatives tell it, the answer on many campuses is increasingly, 'No.'").

447. Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 21, 2019).

they could also benefit from information on the relative levels of protection afforded to free speech and viewpoint diversity. Nearly all universities publish aspirational statements of how they favor free speech,[448] but the demonstrated practice of many universities is often diametrically opposed to their stated policies.[449] As academics, we would like to believe that it is the quality of education that draws students to our institutions. Ideally, students should be picking on the basis of what a school can offer them in terms of intellectual development. The most important element to intellectual growth is freedom of thought and speech. Yet, students have no means to see which schools have the worst free speech practices or the greatest number of related complaints. Missing are any meaningful provisions to support the core statement on free speech that the federal government endorses—namely, to "encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."[450]

The federal government's "encouragement" will have little influence on academic institutions, particularly private institutions, absent a coercive element to reinforce these values.

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448. *See, e.g.*, *Statement on Free Speech and Expression*, BOSTON UNIV., https://www.bu.edu/about/about-free-speech-and-expression [https://perma.cc/L29J-VZFM] (last visited Feb. 13, 2022) ("Freedom of speech and expression are central to the mission of Boston University. The University has a responsibility to allow and safeguard the airing of the full spectrum of opinions on its campuses and to create an environment where ideas can be freely expressed and challenged.").

449. While Boston University has a strong statement in favor of free speech, *see supra* note 448, it has been given a "red" speech code rating on free speech by FIRE. *School Spotlight: Boston University*, FIRE, https://www.thefire.org/schools/boston-university [https://perma.cc/G6EN-S2CG] (last visited Feb. 13, 2022). According to FIRE, "[a] red light university has at least one policy that both clearly and substantially restricts freedom of speech." *Id*.

450. Exec. Order No. 13,864, 84 Fed. Reg. 11,401 at § 2(a) (Mar. 21, 2019).

Congress has already explored the limited use of such conditions for funding universities.[451] For example, the Free Right to Expression in Education Act would "conditio[n] funds under Title IV of the [Higher Education Act] on public colleges and universities allowing expressive activities in outdoor areas on campus."[452] The law, however, is both vague and limited in its scope, particularly in the exclusion of private universities. While the First Amendment does not bind private universities, Congress can condition federal funds, including use of federal funds supporting grants and tuition, on the satisfaction of minimal conditions. For example, Congress conditions the receipt of some funds on schools allowing access for ROTC programs and military recruitment under the "Solomon Amendment."[453] The Court upheld this law as within the authority of Congress over the qualification for federal funding.[454] The Court held that such a condition "neither limits what law schools may say nor requires them to say anything. . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."[455]

Once again, any federal effort to protect free speech and other rights must be narrowly tailored and enforced to avoid curtailing free speech in the name of protecting it.[456] That does not mean, however, that the government cannot refuse to directly support such

451. *See* WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10438, FREE SPEECH ON COLLEGE CAMPUSES: CONSIDERATIONS FOR CONGRESS 4 (2020).

452. *Id. See* H.R. 1672, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1672/text [https://perma.cc/FHG5-DHZV], for the full text of the proposed bill.

453. 10 U.S.C. § 983 (2022).

454. Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR), 547 U.S. 47 (2006) (holding the Solomon Amendment's requirement of providing access to military recruiters involved conduct, not speech).

455. *Id.* at 60.

456. Content-based discrimination is a threat to both free speech and the free exercise of religion. For that reason, I have long opposed the use of the tax code and other des-

institutions. There is obvious cause for blocking the use of federal subsidies and grants, for example, for universities that discriminate against applicants on the basis of race, religion, or other such classifications. The recent executive order on free speech protections on campus does not have the weight or authority of an actual federal law.[457] It generally requires that listed agencies "take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies."[458] The executive order cannot be viewed as imposing meaningful limits for universities and colleges in the absence of a clear legislative foundation. While twelve federal grantmaking agencies were instructed to coordinate with the Office of Management and Budget to certify that schools receiving federal funds complied with the policies, including free academic inquiry, private institutions lie outside of their grasp.[459] Instead, private institutions were simply encouraged to comply with their "stated institutional policies" on freedom of speech.[460] The executive order also does not address federal aid for tuition, which would have the greatest coercive

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ignations to punish organizations based on their religious beliefs or free speech expression, even for organizations with offensive views. *See, e.g.*, Jonathan Turley, *The Patent Office Goes out of Bounds in Redskins Trademark Case*, WASH. POST (June 20, 2014), https://www.washingtonpost.com/opinions/the-patent-office-goes-out-of-bounds-in-redskins-trademark-case/2014/06/20/e0001ee8-f7bd-11e3-8aa9-dad2ec039789_story.html [https://perma.cc/H7DZ-E5L8]; Jonathan Turley, Faithful Discrimination: *Are Non-Discrimination Policies Themselves Discriminatory?*, RES IPSA (Apr. 16, 2010), https://jonathanturley.org/2010/04/18/faithful-discrimination-are-non-discrimination-policies-themselves-discriminatory/ [https://perma.cc/VB7W-ALKU].

457. *See* Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER EDUC. (Mar. 22, 2019), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk [https://perma.cc/39V7-AWWB].

458. Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 21, 2019).

459. *Id.*

460. *Id.*

impact for both private and public institutions. The standards for respecting and defending free speech are not onerous and should be easily accepted. They merely require schools to guarantee what they currently promise.

Congress can require that universities adopt a list of basic protections for the exercise of free speech as a precondition for any federal funding, from grants to tuition support. I have previously proposed ten possible commitments for universities—categorical imperatives for free expression.[461] Many should not have to be codified. For example, at one time, requiring the expulsion or termination of students or faculty for physical assaults or attacks would have seemed ridiculously obvious. There could be no greater con-

461. *See The Right of the People Peaceably to Assemble: Protecting Speech by Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley). The list includes (1) guaranteeing that speakers appear on campus under the same costs and conditions, regardless of their views (or opposition to their views); (2) committing to disciplinary action of students or faculty who block classes, lectures, or speeches by violent acts or threats of violence; (3) committing to the expulsion or termination of students or faculty who physically assault speakers or others seeking to exercise free speech or the right to peaceful assembly; (4) committing to disciplinary action of students or faculty who block classes, lectures, or speeches through disruptive conduct inside classrooms, halls or other spaces reserved for such presentations; (5) enforcing a presumption that the exercise of free speech outside of the school (including statements on social media) for faculty or students is generally not a matter for school sanctions or termination; (6) committing to due process of students and faculty who are disciplined for exercising free speech rights, including the right to discovery of patterns of bias or inconsistent treatment in other controversies; (7) barring restrictive "free speech zones" and other exclusionary zones for free expression (other than rules barring demonstrations, disruptions, or exhibits in classrooms, halls, or other spaces used for lectures, presentations, and events); (8) barring student governments or organizations from sanctioning or censuring fellow students for their exercise of free speech without a clear and narrowly tailored standard as well as the approval of a university body; (9) barring faculty from sanctioning, censoring, or retaliating against students for their political, social, or religious statements or values (subject to protected exceptions for religious-based institutions); and (10) barring faculty from requiring that students adhere to, adopt, or endorse political, social, or religious positions as a condition for any class, program, or benefit (subject to protected exceptions for religious-based institutions).

tradiction for an institution of higher education than having a professor attack someone on campus. However, we have seen such physical attacks by both students and faculty go without action from administrators. One of the most egregious cases involved a University of California professor who pleaded guilty to assaulting pro-life advocates and destroying their display on campus.[462] Not only did many faculty members and students support the professor, but also some rejected the right of one of the attacked advocates to speak on campus and even compared pro-life advocates to terrorists. Not only was the convicted academic kept on the faculty, but other schools also honored her leadership in advocacy.[463] Much like the failure of local officials to prosecute criminal acts, the failure of universities to take action against violent faculty and students serves to increase the threatening environment for dissenting voices on campuses. The message is clear: if you are physically attacked for controversial views, the university might not take action. This view fuels both the violence and the resulting intimidation for faculty and students alike.

The ten proposed principles do not supplant the universities in determining when violations have occurred. They do not compel university verdicts or adjudications. Instead, they create an obligation to address and document such cases. They also do not intrude into academic freedom or judgment, even when schools have limited the ideological range of the faculty. For example, there is no

462. Jonathan Turley, *Professor Miller-Young Sentenced to Probation and Anger Management Classes for Attack on Pro-Life Advocates*, RES IPSA (Aug. 18, 2014), https://jonathanturley.org/2014/08/18/professor-miller-young-sentenced-to-probation-and-anger-management-classes-for-attack-on-pro-life-advocates [https://perma.cc/8YA5-BH7A].

463. Jonathan Turley, *California Professor Who Assaulted Pro Life Advocates Is Featured by Oregon*, RES IPSA (Oct. 17, 2018), https://jonathanturley.org/2018/10/17/california-professor-who-assaulted-pro-life-advocates-is-featured-by-oregon-to-help-students-embrace-the-radical-potential-of-black-feminism-in-our-everyday-lives [https://perma.cc/N88M-2KED].

requirement of ideological diversity on faculties. It is highly doubtful, therefore, that most schools will become more ideologically diverse. The percentage of Republican or conservative or libertarian professors is already quite small on most faculties, particularly at top schools. Less than ten percent of faculty in all schools identify as conservative,[464] and Democrats outnumber Republicans by over ten times on faculties.[465] In some schools this ratio goes as high as 132 to 1.[466] It is impossible to deny that there is a bias against conservatives on faculties and on academic journals like law reviews. Liberal faculties can continue to dismiss candidates who advance opposing views as intellectually unsound or simply not as intellectually "promising" as more liberal candidates. Such "pretext" employment decisions are common factors in discrimination cases,[467] but they are generally shielded in the academic environment.[468] First, viewpoint discrimination is not a prohibited category under Title VII and other laws. Second, great deference is given to academic judgments. Indeed, universities were exempted from Title

464. Scott Jaschik, *Professors and Politics: What the Research Says*, INSIDE HIGHER EDUC. (Feb. 27, 2017), *https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means* [https://perma.cc/EVB6-KDPD].

465. Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 ECON. J. WATCH 422, 425, fig.2 (2016).

466. Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty*, 31 ACAD. QUESTIONS 186, 192–93, tbl.2 (2018), https://www.nas.org/academic-questions/31/2/homogenous_the_political_affiliations_of_elite_liberal_arts_college_faculty [https://perma.cc/FT86-P6LN].

467. Where such pretextual language has failed in gender or racial discrimination cases, it is often due to the lack of specificity. *See, e.g.*, Kahn v. Fairfield Univ., 357 F.Supp.2d 496, 501–02 (D. Conn. 2005) ("While Search Committee members made conclusory statements that Kahn was 'arrogant' or 'difficult to work with,' they had difficulty providing a basis for such conclusions. . . . Given the imprecise nature of the University's purported legitimate, non-discriminatory reasons, the evidence provided by Kahn to support a factual finding of pretext is sufficient to defeat a motion for summary judgment.").

468. *See, e.g.*, Weinstock v. Columbia Univ., 224 F.3d 33, 43 (2d Cir. 2000) ("When a college or university denies tenure for a valid non-discriminatory reason, and there is no evidence of discriminatory intent, this Court will not second-guess that decision.").

VII even for racial discrimination,[469] but that exemption was later rescinded in light of pretextual decisions.[470] There remains great deference to academic decisions, the reasons for which were most famously summed up in Justice Frankfurter's concurring opinion in *Sweezy*, laying out what he saw as the four components of academic freedom.[471] That freedom includes an academic institution's right "to determine . . . on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[472] As a result, universities can still use the same pretextual and coded language used to bar minorities and liberal candidates from conservative faculties decades earlier.[473] Where gender and racial discrimination is often shown by the relative credentials of candidates, no such protection is afforded to conservative candidates routinely rejected by overwhelmingly liberal faculties. The range of ideological diversity has become narrower and narrower.[474] The intolerance often cited by conservative scholars

469. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-l(a) (2000)) (excepting "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution").

470. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 702, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-l(a) (2000)).

471. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

472. *Id.* (citation omitted).

473. *See* Martha S. West, *Gender Bias in Academic Robes: The Law's Failure To Protect Women Faculty*, 67 TEMP. L. REV. 67, 138 (1994) ("By the 1980s and 1990s, sophisticated academics have generally learned not to express open hostility to women as women. Explicit statements of gender bias are now less common in academia.").

474. For example, a recent study by the Harvard Crimson found only 1.46% of the Harvard faculty identified as conservative. Some 79.7% identified as "liberal" or "very liberal." James S. Bikales & Jasper G. Goodman, *Plurality of Surveyed Harvard Faculty Support Warren in Presidential Race*, HARV. CRIMSON (Mar. 3, 2020), https://www.thecrimson.com/article/2020/3/3/faculty-support-warren-president [https://perma.cc/N2SA-X4KP]. One Yale professor estimated the percentage at Yale as "0%." James Freeman, *Yale Prof Estimates Faculty Political Diversity at '0%'*, WALL ST. J. (Dec. 9, 2019), https://www.wsj.com/articles/yale-prof-estimates-faculty-political-di-

and students continues due to the lack of transparency and independent review, let alone corrective action. Yet any governmental attempt to address such bias would present serious concerns over academic freedom since intellectual bias is more difficult to show objectively than is bias based on race or gender.[475]

Moreover, the proposed principles do not provide a single definition of offensive speech, despite long-standing objections to vague standards applied to students and faculty. Despite the abuse of such vague speech codes,[476] such provisions are the product of deliberations within each academic community as it deals with maintaining environments that are safe and protective for students.[477] As with the Solomon Amendment, the proposed provi-

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versity-at-0-11575926185 [https://perma.cc/VRX5-UALS]. One study showed a 95:1 ratio in Democratic over Republican donations. Jonathan Turley, *Study: Professors Donate to Democrats over Republicans by 95:1 Ratio*, RES IPSA (Jan. 23, 2020), https://jonathanturley.org/2020/01/23/study-professors-donate-to-democrats-over-republicans-by-a-951-ratio/comment-page-1 [https://perma.cc/3DXC-CM9T]. It is absurd to continue to pretend that this virtual exclusion of conservative views on faculties is anything other than a systemic ideological litmus test.

475. Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 64 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981) ("It is understandable . . . that the clarity of articulation of reasons for refusing tenure by such collegial decision-making apparatus as that involved here may differ from that given by a business employer.").

476. Georgetown's code of student conduct lists 41 behaviors that violate its code and notes that for each type of behavior: "Attempts to commit a violation will be deemed as serious as actually committing the act; [w]hen it is determined that a violation of the Code occurred at an individual's residence, all residents may be held accountable . . . [and u]nless specifically stated within the definition of a violation, intent is not an element in determining responsibility, but it will be considered in the application of sanctions." GEORGETOWN UNIV., CODE OF STUDENT CONDUCT 8 (2019-20), https://georgetown.app.box.com/s/bibfmpo93061uxmwir29 [https://perma.cc/H2C2-DFP4]. The 18th prohibited behavior in the code is "incivility," defined as "[e]ngaging in behavior, either through language or actions, which disrespects another individual." *Id.* at 14.

477. Often these rules turn on undefined terms that produce a chilling effect in the lack of clarity over their meaning. For example, Boston University issued new guidelines that, among other things, prohibited the use of the university's computer facilities "irresponsibly or in a way that might needlessly interfere with the work of others."

sions focus on the underlying conduct rather than speech. The conditions focus on guaranteeing heterodoxy and due process through the exercise of free speech. In addition, such conditions would not in any way limit protests of faculty, classes, or events, so long as such actions do not prevent others from attending the event or listening to the targeted speakers. Blocking others from speaking or preventing others from listening to opposing views is not the exercise of free speech. It is the very antithesis of free speech. The provisions would focus on the ability of opposing views and speakers to be heard on campuses. Moreover, such a threshold condition for federal funds could be linked to a process of grievance to a specially mandated board or commission under the auspices of the Department of Education or the Justice Department. This would allow for some independent body to review these controversies, particularly when students or academics are disciplined for comments outside of the classroom. University administrators have routinely failed to protect these rights and in some cases lead the attack on faculty or students with opposing views. Neither the AAUP nor the American Bar Association have arrested, let alone reversed, the rise in viewpoint intolerance. An independent board could be empowered to demand answers from universities and to require the type of supporting material often denied to students and faculty by administrators.

BOSTON UNIV., UNIVERSITY CONDITIONS OF USE & POLICY ON COMPUTING ETHICS (June 12, 2020), https://www.bu.edu/dos/policies/lifebook/computing-ethics [https://perma.cc/HC4H-XJFP]. The University warned that failure to comply with the guidelines "constitutes a violation of University policy and will subject the violator to disciplinary and/or legal action by the University, and, in some cases, criminal prosecution. In addition, the University may require restitution for any use of service which is in violation of these guidelines." *Id*. Other universities simply state that students can be punished for statements or use of computers to transmit statements that are "contrary to the mission or values of the University." W. MICH. UNIV., RESNET ACCEPTABLE USE POLICY (Dec. 1, 2011), https://wmich.edu/policies/resnet-acceptable-use [https://perma.cc/P3U3-DN7J].

The focus of such federal legislation is to expose and deter content-based discrimination of speech. However, such governmental authority would be limited. The use of such federal spending conditions is not an invitation to substitute the viewpoint bias of university administrators with that of governmental officials. The Supreme Court has already struck such a balance. The Court allowed for federal conditions in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)* in finding that the requirement of access to law schools was not compelled speech.[478] However, the Court drew a line at government interference in *FCC v. League of Women Voters*,[479] in which the Court reviewed the Public Broadcasting Act of 1967 and its prohibition of "noncommercial educational broadcasting stations . . . engaging in editorializing" if they received grants from the Corporation for Public Broadcasting.[480] That level of federal interference was found to run counter to the First Amendment and the protection of "journalistic freedom."[481] Such limitations were deemed as too intrusive and, in applying strict scrutiny, the Court found that the law could not satisfy the least-restrictive-means test.[482] In the context of universities, any standards would face similarly close scrutiny under the First Amendment. The limitation on

478. *See* 547 U.S. 47, 64 (2006).

479. 468 U.S. 364 (1984).

480. *Id.* at 366 (citation omitted).

481. *Id.* at 378–80.

482. *Id.* at 395. The Court held:

> [A]lthough the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government, this interest can be fully satisfied by less restrictive means that are readily available. To address this important concern, Congress could simply require public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding.

Id.

speech discrimination would focus on the guarantee of a viewpoint-neutral environment while allowing the prohibition of unlawful or unprotected speech as well as recognized and neutral time, place, or manner restrictions. Such protections protect the right to speak, not to curtail such speech by the university as well as its community members.

Courts have long protected expression on campuses and forced universities to shoulder the burden of showing how allowing free speech would undermine education. Courts have resisted balancing arguments based on the interests of the government against free speech in applying the tests from *Pickering v. Board of Education*,[483] *Connick v. Myers*,[484] and *Waters v. Churchill*.[485] For example, in *Burnham v. Ianni*,[486] the Eighth Circuit did not conduct a strict *Pickering* balancing analysis in declaring that photographs posted in the History Department at the University of Minnesota Duluth constituted expressive speech under the First Amendment.[487] The case involved speech outside of the classroom, and the Eighth Circuit held that "[t]he government employer must make a substantial showing that the speech is, in fact, disruptive before the speech may be punished."[488] Universities can curtail speech, but they must carry the First Amendment burden of showing how allowing the speech would impede education. It is not enough to simply declare free speech as harmful to those who do not share the viewpoint. As the Court ruled in 1967 in *Keyishian v. Board of Regents*, academic freedom remains not just the touchstone of higher education but a

483. 391 U.S. 563 (1968).

484. 461 U.S. 138 (1983).

485. 511 U.S. 661 (1994).

486. 119 F.3d 668 (8th Cir. 1997)

487. *Id.* at 674; *cf.* Trotman v. Bd. of Trustees of Lincoln Univ., 635 F.2d 216, 224–25 (3d Cir. 1980) (applying the public employee speech doctrine to professors challenging actions taken against them "in spirited criticism of administrative policies with which they disagree").

488. *Burnham*, 119 F.3d at 680.

"transcendent value to all of us and not merely to the teachers concerned."[489]

A narrowly tailored standard would allow ample opportunity for universities to protect against racist or offensive comments in classes or on campus. The guidelines would focus on a number of key elements, such as whether remarks were made off campus. The guidelines would monitor the ability of all viewpoints to be expressed on campus and address the use of collateral limits such as mandatory insurance or prohibitive security fees to bar certain speakers. Most importantly, the guidelines would allow a comparison between remarks tolerated and remarks censored by universities. Finally, they would give the public a basis for comparing colleges to allow for a more informed debate. The only truly independent means for such review today are the courts, but such claims are often limited if the university is not a public institution, subject to First Amendment restrictions. A federal body and system of certification would allow faculty and students at private institutions to have greater ability to challenge university actions.

Conditional federal funding can be crafted to avoid the danger of government management of universities. Federal conditions would be confined to the most basic protections afforded by free speech. Of course, if private universities want to regulate speech, they can do so, but they cannot expect the support of tax dollars for programs that discriminate against large populations of students and academics. Without some outside action, there is a risk that private institutions will increasingly become (or at least be viewed) as hostile and unhealthy environments for many students. Indeed, there is a growing concern that many students will increasingly be forced to look only to public institutions for their education due to the added protections for free speech. Aside from a few exceptions, like the University of Chicago, which maintains fierce protections

489. 385 U.S. 589, 603 (1967).

for free speech, private institutions are regularly criticized for ideological intolerance.[490] A conservative student, like the one recently ostracized at Georgetown University,[491] must often chose between remaining silent for four years, embracing accepted truths, or limiting his or her future opportunities. This Faustian choice is not acceptable to many who want to experience college without fear of abuse or retaliation. This trend will result in the balkanization of our educational programs, where private institutions become echo chambers for orthodox viewpoints, while state institutions afford free speech protections as required by the First Amendment. Academics were once united in free speech as a virtual article of faith. That has changed. What was once an atmosphere of pluralism and tolerance has become one of orthodoxy and retribution. Our failing as academics has created the dangerous vacuum that is enabling groups to silence those with opposing views.

CONCLUSION

Roughly 70 years ago, Justice Douglas gave his famous speech entitled "The One Un-American Act" about the greatest threat to a free nation.[492] He warned that the restriction of free speech "is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us."[493] The harm from loss of free

490. *See* Jonathan Turley, *Free Speech Should Not Be Big News*, USA TODAY (Aug. 30, 2016), https://www.usatoday.com/story/opinion/2016/08/29/free-speech-university-of-chicago-trigger-safe-space-censorship-diversity-microaggressions-jonathan-turley/89515984 [https://perma.cc/6325-VETT].

491. *See* Jonathan Turley, *Georgetown Student Association Condemns Conservative Student for Criticizing BLM and the* Bostock *Ruling*, RES IPSA (July 10, 2020), https://jonathanturley.org/2020/07/10/georgetown-student-association-condemns-conservative-student-for-criticizing-blm-and-the-bostock-ruling [https://perma.cc/LJ95-JXX3].

492. William O. Douglas, *The One Un-American Act*, 7 NIEMAN REP. 1, 20 (1953), https://niemanreports.org/wp-content/uploads/2014/03/Spring-1953_150.pdf [https://perma.cc/D4EK-J85E].

493. *Id.*

speech was viewed as existential for our democracy. Today, the focus of many writers and academics is on the harm of unregulated free speech. Recently, a leading cable host heralded censorship on the Internet as part of a new "harm reduction model" of both free speech and freedom of the press.[494] Free speech is now treated as presumptively harmful absent governmental and corporate regulation. The harm is often ill-defined and applied inconsistently. The premise remains that unregulated free speech can threaten the democracy as a whole or it can threaten individual students who feel unsafe due to the expression of opposing views. Rather than treating free speech as the essential element for intellectual discourse, it is often portrayed as akin to a type of controlled substance in our public and academic discourse.

The trend toward speech codes and regulation has been building for decades. Reaching that critical mass has resulted in the loss of not just a long-cherished right, but also endangered a long-awaited moment for this country. The recent protests have served to focus the nation on the transcendent issues of racial discrimination and police misconduct. It is an important moment, as we deal with the continuing scourge of racism, to achieve the promise of equal opportunity and equal treatment in our country. It is a moment that should not be allowed to pass without a robust national dialogue on racial justice. Meaningful reforms require a full understanding of the underlying facts and patterns of racism in areas ranging from law enforcement to the labor market to education. Free speech allows the exchange of ideas on such causes and solutions, distilling both facts and proposals to a viable core for reform. Without such challenging debate, we risk wasting this critical period (and unity) on reforms that are neither vetted nor viable as lasting solutions for racial justice.

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494. Jonathan Turley, *"A Harm Reduction Model": CNN's Brian Stelter Offers a Perfectly Orwellian Attack on Free Speech and Freedom of the Press*, RES IPSA (Feb. 2, 2021), https://jonathanturley.org/2021/02/02/a-harm-reduction-model-cnns-brian-stelter-offers-a-perfectly-orwellian-attack-on-free-speech-and-freedom-of-the-press [https://perma.cc/P4MR-GD5T].

Ultimately, the greatest threat to free speech in this country remains the original threat: silence. Across the country, there seems to be dwindling support—and patience—for the exercise of free speech. There is a rising anger, fueled by legitimate frustration over continuing problems of racial and economic inequality. However, there is also a comparative decline in active support for dissenting voices, a trend we have seen in prior anti-free-speech periods. During the Red Scare, Attorney General Charles Gregory declared that dissenters must speak at their own risk: "May God have mercy on them, for they need expect none from an outraged people and an avenging Government."[495] The "avenging" elements in our society are now found not just in the extremist movements but also in a growing number of writers, academics, and others who are embracing orthodoxy over diversity of thought. If we are to preserve this defining right, we may have to embrace the incongruous notion of coercing free speech. There is a role for government, even under a Millian perspective, for protecting enclaves of free expression and free thought. The alternative is to return to a state where threats and fear dictate the range of acceptable values and expression.

In many ways, we are facing the same debate that was held before the 1915 AAUP Declaration over the protection of both free speech and academic privilege.[496] That Declaration was preceded by the embrace of three defining principles in Germany, which were referenced by earlier drafts for the Declaration.[497] Those principles were Lehrfreiheit (teaching freedom), Lernfreiheit (learning freedom), and Freiheit der Wissenschaft (academic self-governance).[498] The AAUP largely dropped Lernfreiheit and Freiheit der

495. *All Disloyal Men Warned by Gregory*, *supra* note 120.

496. Seligman et al., *supra* note 90.

497. *Id. See also* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988); Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1365 (1988).

498. Seligman et al., *supra* note 90.

Wissenschaft in favor of Lehrfreiheit and academic privilege.[499] Lehrfreiheit "protected the restiveness of academic intellect from the obedience norms of hierarchy."[500] The emphasis on Lehrfreiheit made learning freedom more of an extension or byproduct of the academic freedom of faculty. As Walter Metzger has observed,

> Once excised from the profession's concept of academic freedom, *Lernfreiheit* would never be restored. . . . [T]he AAUP has never investigated a campus incident in which an alleged violation of student freedom was the sole complaint, and it has always assumed that student freedom is not an integral part of academic freedom, but is something different—and something less.[501]

Despite this emphasis on teaching over learning freedoms, the committee drafting the Declaration was clear that the protection of academic freedom was meant to free our campuses from the demands of "an overwhelming and concentrated public opinion."[502]

Such dominance would subjugate all teaching and learning to "a tyranny of public opinion."[503] The last decade has shown a curious shift in the emphasis from conditions after the 1915 Declaration. The viewpoint intolerance shown on campuses is often driven by students claiming the right to silence others (or remove teachers) is essential to *Lernfreiheit* (or learning freedom). However, learning freedom is now defined as freedom from opposing or triggering values. The result is the imposition of the type of orthodoxy that

499. Metzger, *supra* note 497, at 1269.

500. *Id.*

501. *Id.* at 1272.

502. The Committee, known as the Seligman Committee, declared that universities must remain "an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally . . . it may become a part of the accepted intellectual food of the nation or of the world." AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES (Dec. 31, 1915), https://aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf [https://perma.cc/539R-9T6Z].

503. *Id.*; *see also* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009).

the 1915 Declaration sought to deter. What has changed is that many faculty members are now either silent on or supportive of calls for such orthodoxy. Normative values in favor of free speech are no longer dominant or at least sufficient on campuses to protect the exercise of free speech by faculty and students with minority viewpoints.

The same shift toward viewpoint intolerance is evident in the physical and virtual spaces outside of the educational system. The greatest concern is that the rise of corporate censorship and deplatforming campaigns could change the expectations of the public in the exercise of free speech. As those expectations fall, greater speech regulation and curtailment may fill the void. That is the pattern seen in Europe with expanding criminalization and regulation of speech. Charting a different course will require two paradigm shifts addressed in this article. First, we must reconsider how to protect what Mill called the "circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep."[504] To the extent that we want to protect circles of free speech, the government may now prove the guarantor of—rather than the threat to—free speech. It is possible to coerce free speech through content-neutral principles that protect forums of expression. Second, we must address the distorted and expanding views of speech as inherently harmful because a viewpoint is triggering or obnoxious. The use of the harm rationale has led to rising hegemony from virtual to educational spaces. Indeed, that is the harm that should unite and motivate us in resisting viewpoint intolerance in the marketplace of ideas.

504. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 19.