

The NCC's 2024 National First Amendment Summit

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[00:00:00.0] Jeffrey Rosen: This week the National Constitution Center convened the 2024 National First Amendment Summit in partnership with FIRE and NYU's First Amendment watch. We convened a great group of diverse scholars for a vigorous conversation about the state of free speech in America and around the world. Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit, chartered by Congress to increase awareness and understanding of the Constitution among the American people. This episode features two conversations from the summit, free speech on campus, and free speech in and out of the courts. Enjoy the show.

[00:00:48.7] Jeffrey Rosen: Friends, it is an honor to welcome this extraordinary group of scholars to discuss the topic of our first panel, which is free speech on campus. We all know that this is an anxious time for campus speech, as it is for speech in general, and I can't think of three deeper and more thoughtful scholars to cast light on our current vexations than our panelists today. Let me introduce them and then we'll jump right in. Mary Anne Franks, to my right is Eugene L. And Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil Rights Law at George Washington University Law School. She's the author of the new book, *Fearless Speech: Breaking Free from the First Amendment*. She's my great colleague at GW Law School, and we're also honored to welcome a good GW contingent today to cheer her and professor Jonathan Turley on. Alex Morey is Vice President of Campus Advocacy at FIRE, where she leads the Campus Rights Advocacy Program. She's also a member of the First Amendment Lawyers Association, and we're so grateful for the partnership with FIRE. And Keith Whittington is the David Boy's Professor of Law at Yale Law School, and the author of many books including *Speak Freely: Why Universities Must Defend Free Speech*. And most recently, *You Can't Teach That!: The Battle over University Classrooms*. Please join me in welcoming our panelists.

[00:02:33.5] Jeffrey Rosen: I'd like to start with the concrete question that transfixed the Nation last year during those famous congressional hearings with the university presidents. And that's, can and should calls for the genocide of Jews on campus be protected by the First Amendment or not? We know that that, their nuanced answer to that question, it depends, while politically catastrophic was legally accurate, that the First Amendment forbids speech that is intended to and likely to cause imminent violence, and that under some context on campus, targeted calls for genocides directed at individuals may be considered harassment, but that's a non-targeted hate speech. Even the most vicious and antisemitic kind is generally protected. Keith, you've just,

you've written a great book on university free speech as well as your new book on the speech rights of Professors. Sum up what the current First Amendment says about whether or not and when calls for the genocide of Jews on campus would be protected, and then do you endorse that First Amendment framework or not?

[00:03:58.8] Keith Whittington: Well, I think you just summarized it quite nicely of thinking that there are some well-recognized exceptions to First Amendment protections for extreme and violent type political rhetoric, including a very narrow set of exceptions relating to incitement that the court across the 20th century narrowed substantially, precisely in order to protect a great deal of radical and extreme political expression in public life in general, and for many university campuses that would apply in that context as well. And likewise, we recognize exceptions for specific contexts in which people are making direct and true threats to other individuals or they're harassing other specific individuals on campus.

[00:04:40.0] Keith Whittington: I think part of what we have to be very cautious about, though, in thinking that universities ought to be patrolling their campus community for people who might be engaging in some kind of genocidal rhetoric is thinking about, one, the controversies that arise as to what counts as genocidal rhetoric. And so the very kinds of rhetoric that we're generating these controversies in Congress, including chance of, from the river to the Sea, for example, as part of political rallies on campuses. And we don't generally really want to invite government officials or campus officials to investigate exactly what kind of political rhetoric people are using at political rallies. More generally, you might think that particular kind of rhetoric is quite disturbing. But political rhetoric often is quite disturbing and the First Amendment makes a lot of scope and protection for that kind of violent political rhetoric that occurs in the public square.

[00:05:38.5] Jeffrey Rosen: Thank you so much for that. Alex, you're in the middle of litigating many of these free speech battles on campus. Do you think that the First Amendment framework that Keith has described is the right one to apply, and should a call for the genocide of Jews on campus be protected and are you at FIRE defending those calls or not?

[00:06:04.9] Alex Morey: Well, we're defending all the protected speech at FIRE. The First Amendment does a really good job of making sure that things like discriminatory harassment, properly defined threats, incitement, vandalism, things we did see on college campuses, especially in the spring semester, are not allowed. But what we also see are crackdowns on protected speech. Students out there protesting, op-eds in the student newspaper, faculty who wanna speak out on their own time and express an opinion on the Israeli Palestinian debate. We are seeing protected speech investigated. We're seeing professors have their contracts non-renewed, students facing bias response type investigations that sometimes hang over their head for a year or more.

[00:07:02.0] Alex Morey: And so it's a situation where two things can be true on college campuses. We are seeing multiple different kinds of injustices right now on campuses. What we really need to see is clarity and leadership from those who are in charge, leading from a speech protective place, giving students agency around their First Amendment rights and faculty too, and opening that discussion up. Look, Israeli-Palestinian conflict is something that students and faculty want to talk about right now, and universities are failing in marshaling their resources to

ensure that that can happen in a really robust way. Instead, they're playing controversy whack-a-mole and trying to drag people off campuses who are not fitting the orthodoxy or what the legislator wants or what the donor wants. And instead we need them to do their job and especially on public campuses protect First Amendment freedoms.

[00:08:02.7] Jeffrey Rosen: And does that orthodoxy go both ways? Are you defending both pro-Palestinian and the pro-Israel speech?

[00:08:10.3] Alex Morey: Every day Jeff.

[00:08:12.1] Jeffrey Rosen: Absolutely. Yeah, that's exactly why we're honored to partner with FIRE. Mary Anne, you have a really important new book out on Fearless Speech, and I wanna ask you about the thesis on the next round, but just on this particular question of whether calls for the genocide of Jews on campuses should be protected under your framework, would you say yes or no?

[00:08:37.2] Mary Anne Franks: I think as a law professor I have to give the law professor response, which is that it does depend. And one of the things it depends on though, or it should depend more on is a question of what that university has promised its community and what kinds of representations it's made to that community about free expression, about physical safety, about complex issues, and where you can express those complex issues and your opinions and where you can't. What I do think is failing us right now, and the reason why we're looking at all this conflict and controversy right now is that for so long, the civil libertarian discourse has essentially said the First Amendment answers everything, but the First Amendment only answers a really small question. And that's the question of whether governments can punish people for certain kinds of speech. And the answer is a lot of the time it can't, even though sometimes it can, but that's not the university's question. Public universities are a little bit of a different matter, but private universities are not government actors. And so the question of whether or not you should support the speech, not support it, punish it, promote it, allow it, control it, those are much harder questions than the First Amendment is able to answer.

[00:09:48.2] Mary Anne Franks: And so part of what we have to get beyond is thinking that the First Amendment provides those answers, or that it's the best possible way to figure out free speech in these hard conflicts within a community. Because the thing that is really incredibly upsetting about the whole debacle of the congressional hearings, is the congressional hearings themselves. The fact that one thing that the First Amendment's only job really is to say that the government cannot intervene against speech simply because it doesn't like it. What were those members of Congress doing except exactly that, calling these university presidents to task and interrogating them about their university policies, threatening them with termination, threatening them with withholding their funds, telling them you have to tow whatever our sudden orthodoxy might be. Of course, that's a changing orthodoxy with its members of Congress. Sudden concerns about antisemitism, very selective concerns about racism on campus. That should have been what we were really troubled by, is governments taking this action against higher education, the vilification of students, vilification of higher education. Those are the things that we should be really worried about.

[00:11:03.4] Jeffrey Rosen: Thank you so much for that. Keith, your important new book focuses on the speech of faculty. You give us the history of protection for faculty speech, and tell us about the Garcetti case, which allowed for the regulation of workplace related speech and examine whether or not there's an exception for campus. What is the status of faculty speech on the Gaza protest? People as we've been discussing have been disciplined on either side, and what's the right framework for whether or not professors should be able to express themselves on, for or against the Gaza War in the classroom and on campus?

[00:11:41.9] Keith Whittington: Well, unfortunately, I think there's a lot of uncertainty as to both what the right legal framework is that's currently applied to faculty in these situations, and also what the policy framework is on a lot of university campuses more generally. Part of what's already come up in this conversation is when you think about universities, is they're very complex speech environments, and we see speech occurring in lots of different contexts, and those contexts matter. So not only the context of a specific instance of speech, but also the context in which speakers are taking place and faculty are part of that. So what faculty are saying in a classroom, for example, is governed by a very different set of norms and expectations than what faculty might be saying at a political rally on campus as well. And we expect faculty to conduct themselves rather differently in those two kinds of situations. I think what's critical, especially in a classroom context, is that we protect the ability of faculty to be exploring controversial and difficult ideas. They're germane to the content of their class. And that we don't want either university officials or politicians or various outsiders suppressing the ability of faculty to lead their students through those difficult conversations about controversial ideas that people are gonna have real disagreements within the context of those classes.

[00:12:56.9] Keith Whittington: At the same time, university has a legitimate stake in making sure the faculty are in fact sticking to the subject matter of their class, that they're conveying professionally competent ideas in that context. And certainly they're not actively harassing or threatening their students in those particular contexts. When faculty go outside the classroom though, and they're speaking on the public square, or they're writing blog posts or commenting on social media and the like, they ought to be entitled to a very robust set of protections relating to their ability to speak freely as citizens more generally that's comparable to what we would expect people much more generally to be able to enjoy and including students and other members of the campus community. But we've seen lots of instances as well where faculty are being singled out and punished because of things they're saying in the public square. Precisely because they're employees, you have this additional set of leverage that universities and sometimes politicians can make use of in order to try to suppress speech they don't like.

[00:13:54.7] Jeffrey Rosen: Thank you for that. Tell us about some particular cases involving Professor Speech that FIRE is dealing with. You said you've defended both pro and anti-Israel speech, but what are some examples of professors who've been disciplined and how are you defending them and what's happening to them?

[00:14:12.2] Alex Morey: Well, FIRE has, we've got some recent statistics from our research department. That's something like, 100, over 100 deplatforming attempts. Some of those faculties have happened since October 7th. We have had a number of students about that high, about 160 students sanctioned. And then when it comes to faculty we are seeing faculty at public

universities and private schools that have been sanctioned, some of our worst schools for free expression, we had Columbia University, where there are concerns about faculty at schools like Columbia. We had at Harvard, we have seen several faculty sanctioned that we have been looking into. So quite a number there.

[00:15:13.6] Jeffrey Rosen: What would examples of the Harvard sanctions be? Is it what people say on social media or what are people being punished for?

[00:15:22.3] Alex Morey: I am having a hard time recalling right now.

[00:15:24.9] Jeffrey Rosen: There's so many of course.

[00:15:25.9] Alex Morey: Some of the more concerning things that we have seen with faculty when it comes to our litigation, for example, would be the Stop WOKE Act in Florida. We're litigating on behalf of Adriana Novoa, who is wanting to teach various concepts around race and gender in Florida schools. And we are seeing various laws against, excuse me, the Stop WOKE Act is trying to ban certain concepts around race and gender and how faculty can teach around that. And when faculty might accidentally teach the wrong type of thing, which can include topics around Israel-Palestine, et cetera, trans rights issues. For example, the University of Florida is liable for up to \$80 million potentially in getting their funding yanked.

[00:16:28.2] Jeffrey Rosen: Very important work. And the Stop WOKE Act is something that Keith also discusses in his book. Mary Anne, I'd love for you to share with our audience the thesis of your new book *Fearless Speech*. You argue that far from supporting democratic values, traditional free speech protections have often protected white supremacists, including the Klan case that led to the landmark *Brandenburg* decision. And that many of the great advances for liberty from the young protestors who were executed for denouncing the Nazis to civil rights protestors have not relied on the First Amendment and in fact have been opposed by it. So share the thesis and what you think a better framework for analyzing free speech questions is.

[00:17:17.2] Mary Anne Franks: Thank you. So the title of my book is intended to promote a kind of concept of freedom of speech that is different from what I think the kind of orthodoxy is, at least in the United States when it comes to freedom of expression. That there are all these cliches that we have about freedom of expression, about how it's about protecting both sides, or that it's about how we just need to have more speech to counteract bad speech. And we also tell ourselves a lot of really comforting myths about the First Amendment, about how it's always protected radical speech or how it's protected people who are fighting for democracy or equality. And the truth is, if you look at our history that isn't really what happens. When you think about what happened for the abolitionists who were advocating for the end of slavery, their presses were burned to the ground. They were shot by mobs.

[00:18:05.7] Mary Anne Franks: You think about the women who were advocating for women to have the right to vote. They were attacked in front of the White House. They were hauled off to jail. The First Amendment didn't show up for any of these people. Now, the First Amendment does show up sometimes in certain cases. Very often though, when it does do that, it's showing up for the very people that are trying to leave out women and trying to leave out non-white

people, that are trying to hold onto power in a way that is very much the history and tradition of our country, which is mostly in the hands of a few people. So what we see is that the First Amendment's neither necessary nor is it sufficient to protect freedom of speech in any kind of radical revolutionary sense. So what I'm intrigued by are those very stories of people who couldn't rely on the First Amendment in order to speak the truth, the kinds of people who were in fact on the receiving end of harassment and threats and any number of other kinds of abuses because the First Amendment protected their attackers, that's what I'm most interested in, those kinds of courageous speakers.

[00:19:06.1] Mary Anne Franks: And I'm hearkening back to an ancient Greek concept when I'm doing this. This isn't something I've come up with on my own. This is the ancient Greek concept of parrhesia, which could be translated as free speech, but is better translated as fearless speech. And the ancient Greeks had specifications for what counted as that kind of speech. When they talked about the kind of speech that was essential to democracy, they didn't just mean the kind of speech where you just say what you want with no consequences, or everybody says whatever they want. They said the kind of speech that is actually essential to democracy is the kind that is candid, that is courageous and critical. And what that meant was, and this is partly through an analysis that we get from philosophers like Michel Foucault, who have said what they really mean by that fearless speech is someone has to speak to someone who has more power than they do, and they have to criticize the person who is in more power, and they have to take that kind of risk to themselves, but not imposing that risk on other people.

[00:20:06.7] Mary Anne Franks: So if you look at our typical First Amendment heroes, you know, the neo-Nazis or the Klan, there may be a lot of reasons to say it's good on balance that the government didn't punish them or shouldn't punish them for their speech. But those are not good examples of freedom of expression if we care about democracy, because those are people who want to deny democratic rights and the freedom of speech to other people. We have lots of other examples that we could be thinking about of people who tried to criticize those who are in power. We have lots of examples of people who have actually stood up and in some cases, heckled Nazis, right? Dorothy Thompson is one of the people in my book and that huge Madison Square rally in 1939, 20,000 people showing up for the Nazis. Dorothy Thompson, the journalist showing up in her evening gown on her way to another event and heckling the Nazis, right? Making fun of them, calling them out, insulting them, getting hustled out by armed guards. That's the kind of thing I think is really inspiring. This is the kind of speech that is truly courageous. That's the kind of speech that actually guarantees something about democracy.

[00:21:10.1] Jeffrey Rosen: Thank you so much for that. Keith, in your books on university free speech and also on the rights of faculty members, you defend the First Amendment tradition, and I wonder if you'd like to do that now. It is true that it was a case involving Ku Klux Klan members that led the court to recognize that principle, that speech can only be banned if it's intended to and likely to cause imminent violence. Why do you think on balance that the tradition honorably defends values that are core to the mission of the university, and do you think that it should continue to be defended?

[00:21:46.2] Keith Whittington: Well, I think we should recognize that it's been an imperfect tradition of trying to defend free speech principles in the United States across our history, and

that there are important lessons to be drawn from this ongoing struggle to defend speech. One of the challenges of defending speech that we find with American democracy as a whole, and certainly we see it played out in social science studies of average voters and average citizens across the 20th century, for example, is that people in principle like the idea of free speech very much. But if you start probing them with specific examples of speech that they personally find repellent, because of the substance of the ideas, they tend to start trying to find qualifications. They try to find exceptions. They try to back off those defensive free speech. So the real challenge is how do we adequately protect the speech of those who are on the margins of society, who are making the most outrageous kinds of arguments from the perspective of conventional wisdom. And what counts as outrageous arguments from the perspective of the mainstream of American politics is going to shift over time.

[00:22:51.0] Keith Whittington: There were times in which the abolitionists were the ones who were on the outside of the mainstream society and tried to persuade the majority to come to their views. There were times in which labor unions were in that position. There were times in which socialists and political radicals were in that position. There were times when pornographers and countercultural figures and literary figures were in that position. But there are also times when Nazis and KKK members and others who find themselves on those margins of society and trying to engage in speech people want to suppress in various ways. And the fact is, if you're going to try to create this blanket of protection across society as a whole, such that you can protect speech on the margins of society, sometimes that's gonna mean you're gonna protect some Nazis.

[00:23:35.7] Keith Whittington: It can protect some Klan members, but also it means you're gonna protect some abolitionists. You're gonna protect some suffragists. And the question is, is there an alternative that would work better, that would allow you to only protect the speech that's really the good speech, and exclude the speech that's really the bad speech. And I think our history and the history of the world more broadly suggest if you start empowering government officials to pick and choose which speech they want to protect because they think it's really valuable and which speech they want to suppress because they really think it's pretty bad and people shouldn't have to listen to that, the result is not gonna be good for democracy or for the margins of society or for the progress of society more broadly.

[00:24:18.8] Jeffrey Rosen: Alex, how is speech doing on campus? It's, of course, always under siege, and this is a time when we're seeing more mobilized protests than at any time since the '60s. Our schools, of course, there are many excesses on all sides, but are schools broadly applying a version of the First Amendment framework or not? Both when it comes to the protest in time, place and manner, and also the speech of students and faculty. Give us a sense on the ground of how things are going.

[00:24:50.9] Alex Morey: Yeah. Well, it's not good. I think we all feel it, right? Because what comes off of college campuses, you know, moves into our society. Colleges are training the next generation of leaders. Public university campuses, as Keith mentioned before, have to provide the First Amendment. They don't always, whether in their policies or practices. And then the vast majority of private institutions make First Amendment like promises. So they are pulling students and faculty into their academic community with the promise of free debate, free inquiry.

October 7th was a game changer of a moment when it came to putting the practices and the principles and the policies that universities either did or did not have in place into practice. And obviously the vast majority of administrators really failed that test.

[00:25:45.6] Alex Morey: They were kind of making things up as they went along in terms of, you know, were they applying time, place, and manner regulations fairly? Well, one policy says this, another policy says that. We were seeing the specter of viewpoint discrimination hanging over the application of some time, place, and manner policies where schools were, you know, seemed like they were targeting, for example, more pro-Palestinian speech than others. So we see this understanding from schools that they want to be seen as bastions of free expression. They say usually in their overarching mission statements that this is core to their universities. And yet when other controversies pop up, those seem to take precedence and the First Amendment free speech norms take something of a backseat. So we absolutely are seeing on campuses that are supposed to protect the First Amendment, particularly on public campuses, we are still nonetheless seeing some of these authoritarian tendencies. Tendencies toward orthodoxy, towards, you know, re-educating students and faculty, making them take things off their syllabi or, you know, having them do training that require them to express certain viewpoints that are totally antithetical to the First Amendment. Totally antithetical to the kinds of heterodoxy that we wanna see in the academy, and yet they're there.

[00:27:21.4] Jeffrey Rosen: Applauding First Amendment values is always good at the NCC and that question of coerced speech and compulsory allegiance to orthodoxy is a crucial area that FIRE is defending. Mary Anne, say more about your important framework, which is really a significant contribution to the debate at the time when many students and others are looking for an alternative to the traditional framework. How would it apply in particular cases on campus? Are there kinds of speech that is protected under the traditional framework that would not be protected under yours? And because you don't think the First Amendment is the main protector of fearless speech, what are other ways of promoting it on campus?

[00:28:07.6] Mary Anne Franks: Yeah. I think before that can become clear about why it is that we'd need a different theory or a different direction, we have to be a lot more honest about what we're facing right now. So when we look at the kind of chaos we're seeing on college campuses, we're looking at the chaos that we're facing as a nation. That's all happened while the First Amendment has been in place. That's all happened while people keep saying every administration, every government official, every member of congress, every university president is saying we care about the First Amendment. Elon Musk loves the First Amendment, right? Ron DeSantis loves the First Amendment.

[00:28:39.2] Alex Morey: Sort of.

[00:28:39.9] Mary Anne Franks: UVA loves the First Amendment, and so much so that it gets ranked first in FIRE's rankings this year. UVA who sent out state troopers to their student protestors and to their faculty, had them beaten, had them pepper sprayed, decided they were going to no longer have tours that explained that Thomas Jefferson was an enslaver. That's the university that we're saying is at number one for college speech? That's a very unusual way to look at freedom of speech, I think. So when I talk about the problems with the First Amendment,

I'm saying that when we hear a lot of First Amendment fundamentalists say things like, well, what would be the alternative? Aren't you worried that the next thing will happen is they're gonna go after the people you do like? What do we think is happening right now? When has it ever been true that we have actually protected the speech of people who were truly at the margins of society? The Nazis are not at the margin. They're right there at the center, right? When we're talking about the people who were always silenced, who were never protected by the First Amendment, that has always been the people arguing for racial justice, gender justice, other forms of justice, right?

[00:29:42.0] Mary Anne Franks: Keep in mind all those great labor communist cases from the early parts of the 20th century, they all lost, right? It wasn't until the Nazi showed up that people started winning, and that's not a coincidence. So I think we have to stop telling ourselves this fairy tale, that there's this concern that if we do differently, this bad thing will happen. The bad thing is happening right now. The bad thing is happening just as the First Amendment is still there. It hasn't been knocked off of its pedestal. And Ron DeSantis says he loves the Chicago principles, he loves the First Amendment, and now he's loving the First Amendment so much that he is threatening channels in Florida to say, you can't run an abortion ad that I don't like, right? Ron DeSantis says, I love the First Amendment so much that I'm going to strip out certain topics from the curriculum.

[00:30:26.0] Mary Anne Franks: I'm going to ban discussions of diversity, right? We've got a former president who's now running for president again, saying, I'm going to ban everything that I don't like. That's all happening right now. Protesters are not being protected, student demonstrators are not being protected. People who are speaking out in a way that is actually courageous are not being protected right now. It is a false promise to say, oh, protect all the Nazis, it'll protect everybody else too. No, it protects the Nazis and it doesn't protect the other people. That's the deal we're given. So if that's the deal we're given, my argument is we can do better than that. And we can do better than that first by saying, first of all, let's acknowledge that the First Amendment is limited for a reason. It's only about the government. It's one thing to say you don't want to put people in jail for having bad ideas, that's fine.

[00:31:12.2] Mary Anne Franks: But for a university, for a college campus, that's just such a strange place to start. And I say that as a professor. If I in my classroom are saying, let's just talk about all the things that you're allowed to talk about that people can't be thrown in jail for, that's not a good classroom discussion. That's a boring discussion and probably a pretty chaotic one. College campuses, universities are unique places where you have opportunities to talk about interesting ideas, valuable ideas, yes, controversial ideas, but not just any idea. There's got to be some distinction made between what is actually quality versus just quantity. Those are the hard decisions that we can't avoid by simply backing up and saying, oh, first Amendment or Counter speech, or any of those other myths or any of those other cliches. They are hard questions where you have to take into account that you are a community that is trying to do something together.

[00:32:01.7] Mary Anne Franks: Hopefully, it is trying to sift through history and politics and find something like truth and find something like democracy. Find something like equality. But if you're going to do that, you're going to have to have constant conflicts all the time. Conversations about what the rules of the classroom might be or the rules of the campus might

be. Because in the absence of that, all you get is the most powerful people speaking all the time over everyone else. And so much so that if we think about just the context of journalism or think about freedom of expression around the globe, the United States rates 26 out of 161 countries for freedom of expression. 55 when it comes to press freedom out of 180. Why do we think that we're doing the best, or why do we think the First Amendment is working so well when the evidence all around us is telling us that we're actually failing?

[00:32:57.6] Jeffrey Rosen: We just have three minutes left, but this is such an important topic and this is such an important panel that I wanna ask each of you for just a few sentences on why you think it's important for universities to protect free speech and how they should protect free speech. Keith?

[00:33:14.3] Keith Whittington: Look, I think it's essential to the mission of what we understand universities to be doing is trying to operate on the cutting edge of human knowledge and expand that range of knowledge outwards. Universities have to be places where we can ask very difficult and controversial questions. Where we can leave open the possibility we're gonna get very controversial answers that politicians and other powerful figures are going to disagree with and dislike. And universities simply aren't gonna be able to accomplish the core thing that universities have been trying to accomplish over the last century if we take that away. And so the real question going forward is, are we going to preserve universities as places that are going to protect free inquiry and protect free speech more broadly, or are we not? And there's certainly plenty of people out there in the political arena, both on the left and the right who would like to restrict universities dramatically and take law speech off the table. And I think those of us who care about universities as well as those of us who care about free speech ought to be concerned with how we protect these values more in the university context. How we push back against that kind of pressure the universities are now facing.

[00:34:20.0] Jeffrey Rosen: Thank you so much. Alex, why is it important to protect free speech and how should universities protect free speech?

[00:34:25.1] Alex Morey: Because universities are cranking out our future leaders and what students are learning, not just in the classroom, but when it comes to how we interact with our peers. How do we solve disagreements in society? How do we approach big problems? Do we do it by, you know, jailing or punishing or banishing our ideological opponents or can we harness the power of our birthright? All of us have the First Amendment birthright in the US. To come at these discussions in an authentic way, we'd need at every level in universities, starting with leadership, people who really genuinely understand these values. Who, you know, aren't just on a power trip, who aren't just running a university like a corporation, who aren't just political Lackeys, but people who really understand that what they're doing in this institution is something really special for our democracy. And that will trickle down in the policies, in the practices, in the training that students are provided and in the resources that students and faculty get to really express themselves. And we will see a difference if our university leaders can do this.

[00:35:42.8] Jeffrey Rosen: Wonderful, Mary Anne, last word in this great discussion to you. Why and how should universities protect free speech?

[00:35:49.7] Mary Anne Franks: The why should be easy. Of course we do want universities to be those places where people can exchange ideas and sift through all of the things about the history, the complexity, the controversies. We really want those spaces to be protected that way. But what we also have to remember and keep in mind all the time, truly not take our eye off the ball on this is that universities, higher education generally are under attack by the government. It is not as many people were trying to convince all of us to believe for the last few decades. It's not snowflake students and it's not cancel culture, and it's not any of those things. It's the government that has declared war on higher education. And specifically we have to talk about how it is actually the right wing government, right? It is Republicans as a party platform saying, we don't want to have higher education to be this critical enterprise.

[00:36:40.4] Mary Anne Franks: We want to be critical, right? A dirty word. We have a vice presidential candidate for the Republican party saying the professors are the enemy. We have a former republican president who basically said, these institutions need to be destroyed if they're not going to agree with the things that I want them to say. That is the threat. That is the threat to college campuses. So what we need from administrators, what we need from the university structure is to recognize that that is the threat and to stop giving them that kind of support. Stop listening to the people outside of the community who are trying to tell you what you need to do, because it's the community that matters. It's the students that matter. If the students are being overly passionate, if the students are making mistakes, that's on us as part of our pedagogical enterprise to try to work with this, to try to model good behavior, to try to make sure that we have those robust places where people can have these great conversations, but we shouldn't be answering to members of Congress and we shouldn't be answering to big donors. We should be answering to our students. And I hope that that is something that we can all reorient ourselves around if we care about colleges, campuses, freedom of expression at universities.

[00:37:55.0] Jeffrey Rosen: Now, a conversation about free speech in and out of the courts. Friends, it is such an honor to welcome our last panel, another extraordinary group of scholars of diverse perspectives, and I'm so excited for our conversations. Let me introduce them and we'll jump right in. Nadine Strossen, is John Marshall Harlan, professor of law Emerita at New York Law School, senior Fellow with FIRE. Her most recent books are HATE: Why We Should Resist it With Free Speech, Not Censorship, and Free Speech: What Everyone Needs to Know. Jonathan Turley, my great GW colleague, is The J. B. And Maurice C. Shapiro, professor of Public Interest Law, Director of the Environmental Law Advocacy Center, and Executive Director of the Project for Older Prisoners at George Washington University Law School. His new wonderful book is The Indispensable Right: Free Speech in an Age of Rage. And Kenji Yoshino is Chief Justice Earl Warren Professor of Constitutional Law at New York University School of Law. He's the director of the Meltzer Center for Diversity, Inclusion and Belonging. He currently serves on the oversight board for Meta, and his most recent book is Say the Right Thing: How to Talk About Identity, Diversity, and Justice. Please join me in thanking our panelists.

[00:39:26.0] Jeffrey Rosen: Jonathan, congratulations on the success of your new book, The Indispensable Right: Free Speech in an Age of Rage. You eloquently argue that free speech is a natural right that must be protected as crucial to our autonomy and individuality as citizens. And you also argue that some of the greatest threats to free speech today come not from traditional

venues, but from online environments. Tell us more about the thesis of your book and why you think that online speech is so imperiled.

[00:40:00.2] Jonathan Turley: Well, thank you very much for having me in this beautiful facility to talk about such a great subject. The book does start with a sort of threshold question that I suggest that people need to answer. Part of the point of the book was looking at the periods and personalities that have helped shape our view through history of free speech to try to explain why we're still struggling with it, why we have this sort of slippery slope that we've been on for decades. And one of the things that I suggest is that we've never really resolved what free speech is. What I argue is that at the beginning of our republic, the most revolutionary part of the American Revolution, was a different view of free speech. It was the greatest break from Britain. And it was a view that free speech is a human right, which is very different from what Britain maintained.

[00:40:58.9] Jonathan Turley: That was lost early on, and it was lost to a sort of function, what I call a functionalist view of free speech. And it goes something like this, you've probably heard it today, which is that free speech is protected where it advances democracy, where it has this function of making democracy better. And there is a difference there. Certainly free speech does that and much, much more. But if you believe that free speech is a human right, it moves that center of gravity in terms of these trade-offs that we often make with free speech. And I believe that those trade-offs are often wrong. And that if you believe that free speech is a human right, then it's not just your right to speak in the sense that it's good for democracy, but rather that free speech makes people completely human, that you need to project part of yourself and the world around you through expression. And if that's what you believe, then it changes this dynamic.

[00:42:00.3] Jeffrey Rosen: Many thanks for that. Kenji, you serve on the Meta Oversight Board, and you've done such important work in helping analyze free speech questions for Meta from a nuanced and distinct perspective that can really teach all of us much about how to analyze free speech questions. In other contexts, we had a great podcast on how you've looked at questions, including Holocaust denial. You heard the first panel, which debated the question of whether or not calls for genocide against Jews should or should not be protected. How does the Meta Oversight Board analyze questions like that? And maybe give us some examples of the way that you balance different values.

[00:42:46.3] Kenji Yoshino: Yeah, absolutely. So this may be a less familiar tribunal than many are accustomed to. I do teach constitutional law for a living, so I'm usually more focused on the Supreme Court of the United States. But because I serve on Meta's Oversight Board, let me say a few words about that. So this board was created in 2020 to help Meta resolve some of its thornier content moderation issues with the understanding that I think as Jonathan has argued eloquently elsewhere, that in many ways, these large social media platforms are state-like in structure and so therefore need their own tribunals and their own sets of standard. So this is a 21-member body that is looking at Meta's content moderation policies and evaluating them against human rights standards, including the human rights standard of expression and voice. However, just to riff a little bit off of what Jonathan said, we could all agree that voice is a human right. And I thought it was beautifully put in the way that you did, Jonathan, to say that the capacity to express ourselves completes us as human beings. But there are other human rights as well, like the right

to privacy or the right to safety or the right to authenticity or the right to dignity that are also rights that are competing with that right of voice. So from Meta's perspective, voice is paramount. So in that sense, it has a very US focused jurisprudence.

[00:44:15.8] Kenji Yoshino: But it does balance the right of speech against those other values that I just articulated in ways that are more kind of contrarian, I would say, to First Amendment jurisprudence. So I think this is just listening to the applause in the earlier sessions. It's a very, very pro sort of conventional First Amendment crowd. So let me sort of give you the good news and the bad news from that perspective for the Meta Oversight Board. So the good news is that in many instances, the Oversight Board has tried to say, voices are valued no matter whence it comes. So I think some of our most successful cases arise because we can do something that the federal courts here cannot do, which is that we can bundle cases. So we can wait and watch for cases that appear on both sides of the speech spectrum ideologically, bundle them together, and make it almost a test case for why you should be speech protective across the board regardless of ideology. So let me give two examples of that. One example is pro and anti-abortion speech cases where we had some posts for and anti-abortion. We bundled them together and we said speech should be protected. All of these posts should be left up because this is a debate that people should be having.

[00:45:37.4] Kenji Yoshino: What was great about that is that no one could say, as they often do in Supreme Court cases, that whichever side lost on the speech issue, whoever's speech got taken down, would say my speech rights are being violated and this is just ideological and it's just about whose ox is getting gored because we said look here are kind of equal and opposite forces we believe the debate should go on on both sides of this and so we protected speech on both sides and it was amazing how well received that decision was because the sort of questions almost answered themselves because you had this balanced set of equally a passionate views on both sides. Another even harder case for us where we did really hold our collective breaths was not a formal bundle, but linked cases coming out of the Middle East conflict. So there was a harrowing video that came out of Gaza where a hospital had been bombed. And then an equally harrowing video that came from the Israel side where a woman was pleading with her captors not to kidnap her.

[00:46:40.7] Kenji Yoshino: And so we linked those two together and we said both of these should be left up because even though they're quite disturbing and I would challenge anyone to look at this and not be viscerally moved by it, the value here was in thinking about why those videos were performing a function so the friends and families of the individuals in the Al-Shifa hospital deserved to know that they were there in a media desert during the fog of war it's very hard to get that kind of information. Similarly the family and friends of the woman in Israel deserve to know that she was a captive and they could look at the circumstances of her capture and perhaps help locate that individual or get the word out about who had captured her. So that's the good news. Because in both cases, what we did was to say, there are vehement opinions on both sides. Here are visceral, disturbing views on both sides in the Middle East conflict case, but we're gonna protect all of them, leave them all up.

[00:47:43.1] Kenji Yoshino: I think where it gets more complicated from a kind of traditionalist First Amendment perspective are instances where we balance away the speech right and say that

another value trumps. So the Holocaust denial case, Jeff, that you mentioned is a very good example of that, where we said, look, Holocaust denial is a form of hate speech, and so we are actually going to protect. We're gonna force the individual to take down the speech in order to protect the interests of Jewish individuals who are gonna be harmed by Holocaust denial. So my colleagues can correct me or disagree with me, but as I read First Amendment jurisprudence, mere falsity is not enough under the Alvarez case in 2012 to have something be unprotected by speech. But of course, this is not a governmental actor. This is what Mary Anne Franks was saying on the last panel. So, Meta has the capacity to weigh the First Amendment value against other values differently. And in this particular case, we weighed the, we said that Meta was right in order to take down the Holocaust denial.

[00:48:50.0] Kenji Yoshino: Another example of this would be a trans flag case where there was a flag that was erected on a post and it was in Poland. The caption was, self-hanging curtains, spring cleanings. It's clearly a kind of urging trans people to kill themselves as we saw it so it came up under Meta's suicide and self-injury policy and under its hate speech policies as well and we said that that needed to go come down under Meta's hate speech policies that protect individuals based on gender identity. So in those two instances one about disinformation one about hate speech, Alvarez on the first amendment side with regards to misinformation and then cases like RAV and the hate speech side of the Collin's case Nazis get to March in Skokie or you get to burn a cross on your yard and that can't be sanctioned by the government. We chose differently from the ways in which the Supreme Court did. And in the pre-call with Nadine, whom I highly respect, there's a big question that I was happy to get agreement on from her, which is to say, and you can retract this. I'm not holding you to this. But she said, "I actually think private actors should have the running room to depart from First Amendment norms because they're not the government."

[00:50:03.5] Kenji Yoshino: If we actually poke at that and say, why is it that private actors should get more running room in this area? I think it would have to do with things like the sanctions that are being imposed are less, like Meta cannot throw you in jail, or cannot sanction you in ways that governments can sanction you. And then alternatively, Meta as a private actor has speech interests of its own as Paul Clement argued in the NetChoice case before the Supreme Court, this is like, there's no perfect analogy to social media, frankly, but he said the social media platforms are like anthologists who are curating content. So it's a lot of content, but there is a curation involved and that's entitled to its own free speech interests. So to sum up, Meta Oversight Board is a kind of quasi kind of independent Tribunal that thinks about these thorny content moderation issues for the 3 billion plus users who are on Metas platforms. There's some good news for the First Amendment kind of enthusiast, with regard to the decisions that we've arrived at. And so far, as you look at the Middle East complications of abortion rights cases, that's very much traditional textbook First Amendment protection. But then other places, like in the domain of misinformation or in the domain of hate speech, we've departed from US canonical First Amendment doctrine by saying speech is less protected in these contexts than it would be in the US Supreme Court or a governmental actor involved.

[00:51:29.2] Jeffrey Rosen: Thank you so much for summing up that important work so well. Nadine, I'm so eager for your reaction to Kenji's description of the work and the particular decisions of the Meta Oversight Board. I think you were asked to serve on the board and you

chose not to do that. You are, whenever I have a question of what traditional First Amendment doctrine would require, I ask, what would Nadine say? So I can't wait to hear both what you think of the particular balance that Kenji describes the board striking and also whether you think it's a good idea to have social media companies delegate to brilliant and thoughtful scholars like Kenji and others the ability to strike these balances or whether you think that broadly traditional First Amendment values should apply.

[00:52:13.9] Nadine Strossen: Okay, excellent series of questions. And first of all, Kenji, of course, I defend the free speech and other First Amendment rights, including freedom of association of private sector actors to make their own decisions about what speech, what speakers to platform, and what not to platform. That is an enactment and promotion of First Amendment values itself. And so I disagree with those state governments that tried to restrict and rein in content moderation policies of these platforms. To me, that is analogous to trying to restrict decisions that are made by newspapers or by television stations or others who are in the business of deciding what speech to air and what not to air. And I think it's wonderful. I was very skeptical about the oversight board initially, and I've been, as I told Kenji, very pleasantly surprised for this reason. To my mind, the board has been much more supportive of traditional First Amendment values than I had expected. And what's really interesting about that, Jeff, is that the board is appropriately not even adhering to or trying to adhere to First Amendment values.

[00:53:57.1] Nadine Strossen: But what it is saying it is adhering to, and every opinion goes through an analysis, are the international human rights free speech values that are in the International Covenant on Civil and Political Rights and a couple other international treaties that have been ratified by virtually every country in the world, including the United States, which made a couple of reservations and exceptions. But there hasn't been much case law under this international human rights free speech regime. And now we are starting to generate a very impressive body of interpretation, which is very speech protective. And some experts on international human rights free speech law, some of whom are serving with Kenji on the Meta Oversight Board, have argued that there is a rationale, if you look at the language and the original intent and all the sources of interpretation of those treaty provisions, that there is a lot of speech protective rationale there. And just as for most of our history, we did not have a very speech protective interpretation of the First Amendment, as Mary Anne talks about the failure of the First Amendment to be implemented, to be respected. And that is exactly when crusading reformist voices that were advocating for human rights were repressed because the First Amendment was not enforced. And we saw an evolution toward more speech protective enforcement.

[00:55:45.8] Nadine Strossen: And I think what the Oversight Board is doing, from my perspective, that's very positive, is an evolution toward a speech protective interpretation of the international human right guarantee, with some exceptions. And Kenji pointed to a couple of cases that came out differently from what they would have under US law. Let me talk about the Holocaust denial situation, a case that is a very urgent concern to me as the daughter of a Holocaust survivor. I could not be more opposed to Nazism. I could not be more in favor of people understanding what happened under the Holocaust and refuting the myths and lies that are perpetrated by Holocaust deniers. I continue to believe, though, that censorship, deplatforming in

this situation is not the effective way to counter myths and lies and denial about the Holocaust. What we are trying to do is to change people's attitudes, to try to persuade people, to try to inform people. And you don't do that through punishment. Social scientists and historians have shown that if people have conspiracy theories, those theories tend to be reinforced by the punishment, not repudiated by the punishment. And I speak from a personal desire to have more information and more, which comes out through the debate as opposed to through suppression. But let me quote the experts. The leading historians of the Holocaust, including Deborah Lipstadt, who serves an official position in the Biden administration.

[00:58:02.3] Nadine Strossen: I don't know what the title exactly is, but I am an ambassador against anti-Semitism. And she has staunchly opposed, as have all the leading historians on the Holocaust, staunchly opposed suppressing Holocaust denial. Not because they want the denial to be accepted, but for exactly the opposite reason. Let the arguments come out there. It gives a chance to come out with the evidence and to refute it. So I completely agree with Kenji, and I think Mary Anne and the former panel were making the points very strongly that as important as freedom of speech is under American law and under international law, it certainly is not the only human rights value. I was national president of the ACLU, which defended all fundamental freedoms for all people, not only First Amendment freedoms. But based on that experience, based on my study of history and experience in this country and around the world, I remain convinced that the most effective way to advance all the other human rights and to counter all of the hatred and all of the discrimination and the genocide and the holocaust is through more free speech.

[00:59:37.9] Nadine Strossen: What is it that finally brought about abolition of slavery? What is it that finally brought about civil rights in this country? It is the exercise of free speech. And so I keep saying that I continue to believe this because I try very hard to be open-minded. If I saw evidence that suppression of Holocaust denial would actually be effective in countering anti-Semitism, I would be open-minded to that. And more importantly, the United States Supreme Court would, because the Supreme Court rightly has not said free speech is absolute. A restriction on free speech can be justified if it is shown to be necessary to advance a countervailing, compelling goal, which certainly suppressing anti-Semitism and other forms of discrimination are.

[01:00:39.6] Jeffrey Rosen: Many, thanks for that. Jonathan, there's so much in your important book about online speech. And you discuss the Twitter files where Jack Dorsey, the previous head of Twitter, suppressed election-related speech. Tell us about your analysis of Twitter's performance with the Twitter files, as well as the performance of Elon Musk, who is now being accused of suppressing his critics and broadly how you think that under your framework we should think about a platform like Twitter? How is it doing and how could it better protect free speech?

[01:01:24.4] Jonathan Turley: Well, that's a great question. I have to admit as a threshold matter that I'm less supportive of the record at Facebook and Meta on free speech. And I don't view myself as a free speech enthusiast. I think that there's something more to free speech than being an enthusiast. But the role of social media has created a new sort of paradigm for free speech. It's new in the sense that there's new technology. Free speech has always had this

struggle with new technology. The Supreme Court has always fallen behind on technology. You sort of saw that in the Murthy and Moody cases where the justices were really flailing about on how to deal with social media. The Twitter files were a game changer. I testified in Congress repeatedly before the Twitter files, and members of Congress repeatedly confronted me and said, Professor, you don't have any proof that there's any coordination between the government and Twitter and Facebook. It's all speculation. And I would say, by the way, we actually do have proof. It's in my testimony. But if you're asking whether we have the internal files of Facebook and Twitter, the answer is no, because they won't turn it over while insisting that they believe in transparency.

[01:02:53.4] Jonathan Turley: And then Musk bought Twitter. And he bought Twitter promising to take down the censorship system at Twitter, which he did. That doesn't mean that he hasn't engaged in controversial acts since then, and I certainly wouldn't support that. But when he released the Twitter files, I testified almost immediately after that. And some of the same members that had just told me there's no evidence of coordination turned on a dime and said, well, of course we're censoring. We have to censor. The government has a role here because these are dangerous voices and they're threatening other rights. And one of them, Representative Goldman, said, Professor, what you don't seem willing to accept is that we're allowed to censor because the internet's a crowded theater and people are crying fire. And I said, Congressman, I don't know if it occurs to you, but that line of Holmes that you're citing is coming out of the Schenck opinion. And it was used to send a socialist to jail for protesting the draft by passing out a flier that cited the United States Constitution. That's the line you're citing. That's the case you're relying on.

[01:04:04.6] Jonathan Turley: And by the way, Holmes moved away from that, and certainly the Supreme Court moved away from Schenck. Is that the standard you want? Is that what's gonna guide us into this future with this new technology? And he immediately cut me off and said, Professor, we don't need a law lecture. And I said, I think you do. Now, the thing is, I think you do because you're the same voice. These are the same voices we've heard since the beginning of the republic. Every generation believes that they have some existential threat that allows them to silence their neighbors. They're the same voices. And they're making the same arguments. In fact, my book talks about them using some of the same terms that were used at the beginning of the republic 'cause free speech is something that's easier to behold at a distance. It's easier to say, "Oh my gosh, I can't believe what happened in the McCarthy period. People were censored and blacklisted." And you say, well, "How about the censorship and blacklisting going on now?" Oh, no, no, no. Well, we didn't have disinformation. Well, it doesn't just, it's not a magic term that you can just say disinformation and wave it.

[01:05:09.3] Jonathan Turley: The fact is, this is the most dangerous anti-free speech period in our history. 'Cause we've never seen an alliance with the government, media, academia, corporations like this one. And that's where I'm not very supportive of Facebook, now Meta. For a while, Facebook was running a commercial trying to get people to embrace what they call content moderation, which is an unbelievably Orwellian term for censorship. And it actually was directed at young people, at all these young millennials. It was incredibly creepy. And it was trying to get young millennials, 'cause they viewed that as the soft spot, to try to get them to accept content moderation. And this went on, this commercial campaign went on for a while. But

the point is, it's all the same thing. Even though the technology is new, it takes a lot to get a free people to give up freedom. It's really harder than you think. They have to be really afraid, or they have to be really angry. And what happens is that rage rhetoric, which has existed in our country since the beginning, and my book talks about that, becomes state rage. That rage rhetoric becomes an excuse for every government to crack down. And the question is whether each generation is willing to give up that part of their freedom. So when I talk about Twitter and Meta, I know, I think that they have been gross in how they have restricted free speech.

[01:06:47.4] Jonathan Turley: I just gave a speech at the University of Chicago not long ago. And in the front hall was a bunch of scientists that had been fired and censored and blocked on social media. Many of them were vindicated. Some of them are the leading scientists in their field. And after I spoke to them, I said, how many of you have actually been reinstated? These are people who now the CDC is supporting the things that they wrote about and led to their being suspended. And now one of them, they've all been put back on Twitter, but they're not on their faculties and associations anymore. That's why this is a dangerous anti-free speech period. And so no, I don't believe in those trade-offs because I've heard them before.

[01:07:33.8] Jeffrey Rosen: Kenji, of course, any response that you're moved to make?

[01:07:38.2] Jonathan Turley: Or you can just agree.

[01:07:40.2] Nadine Strossen: No.

[01:07:41.2] Jonathan Turley: That is an option.

[01:07:42.7] Jeffrey Rosen: And then I think you are convinced that the meta model of an independent board of experts is an effective one for social media. Tell us why. What are the characteristics or institutional arrangements that you think is necessary to make it a success? And do you believe it could scale to other platforms and other venues as well?

[01:08:02.2] Kenji Yoshino: Yeah, I do want to respond to my esteemed colleagues before I move to your question, if I may, Jeff. So, I mean, first to Nadine, I think that the Holocaust denial case, 'cause I'll get in trouble with my fellow board members if I let this slide, we did that as a hate speech case, not as a misinformation case. So in some ways, it's probably not the most apposite. I realize this is my fault because I answered Jeff's question with this, but it's probably not the most apposite thing for us to join the issue with on disinformation. I would say we could take it up as a hypothetical, but that's not what that case was about. I think when I think about disinformation and where we've done things that are countercultural, I think about the altered video of the President Biden case where we saw President Biden touching his granddaughter because he was pinning a "I voted" sticker to her. And this was manipulated in such a way where it was slowed down and it was put on loop and it made it look like he was touching her inappropriately. So that's misinformation, right? And we said that this should be taken down and in fact we criticized Meta for having a misinformation policy that was not capacious enough to take that down.

[01:09:15.6] Kenji Yoshino: And I hear the idea that whenever we say this is misinformation or disinformation so let's take it down, the response of saying, no, no, no, the response to misinformation under canonical First Amendment ideas is more speech. It's not to censor speech, it's to censure speech, right? And so we should always err on the side of more speech. So I understand that argument. I think, Nadine, you said if there's new data or new studies, like I have an open mind. So the new study, one of them that I would want to offer to you is the MIT study that says social media is just different, right? Because if you tell a lie on social media, that will actually propagate much more swiftly than true speech. So this old million John Stuart Mill and liberty idea of if truth grapples with error on a fair field of debate, then truth will always prevail. I cut my teeth on that. I grew up on that. I believed in it. Hook, line, and sinker. I was a devout believer in that and in the marketplace of ideas. When we get to the social media landscape, that predicate, at least we have to question whether it holds true anymore, because a falsehood makes its way around the world before the truth can get its boots on time three billion users, right? So in that landscape, I think we have to really think about this marketplace of ideas to say, yes, the marketplace of ideas is wonderful if it's working, but there are occasionally market failures with regard to disinformation.

[01:10:39.6] Kenji Yoshino: So unless there's a different view, that you would have with regard to the Biden speech, I don't know if you would say we were wrong to take that down or not, because it's election misinformation and there might be other ways in which you could actually shoehorn it within the US First Amendment jurisprudence. But I can't really see a way of doing that, but we nonetheless took it down and I stand by that decision.

[01:11:04.0] Nadine Strossen: I have been following the studies that have been done on social media disinformation and what is the most effective way to counter it. And there are a lot of studies, an increasing number of studies, that are negating the conventional wisdom. And one I want to mention because one of the social scientists who worked on it was from the University of Pennsylvania. But these are all international studies that have been reported in the last year or so, which show that the most effective way to counter disinformation online is through using artificial intelligence. And they're using terms like the debunk bot. There was recently a very exciting study that came out at the beginning of September that showed that the power of artificial intelligence, of course, is not only to make disinformation more credible, but also the rebuttal to disinformation more effective. In particular, People who believe conspiracy theories or other false narratives do so for very different reasons, and this so-called debunk bot was able to figure out for each user who subscribed to a false narrative what it was that made that particular person adopt that belief, and at scale, was able to dissuade those people for reasons that were peculiar to them.

[01:12:38.7] Nadine Strossen: The New York Times did a big story about this, and it quoted social scientists who were not part of the study, who said, this is really impressive because not only is it effectively rebutting the particular conspiracy theory, but it's also making people more negative toward conspiracy theories in general, and that the effects are much more long-lasting. Now, if I could say something about Jonathan's point, I think it's really important to distinguish content moderation decisions that are made by the companies themselves. They may make very bad decisions, and I've been highly critical of many of their decisions, Jonathan. But just the way I defend freedom for speech that I dislike, I defend freedom for content moderation/editorial

decisions that I don't like. I think that's less bad than having the government take over. And that brings me to the really great testimony that you've engaged in so often, Jonathan, and that is pointing out that what is portrayed as voluntary content moderation by the companies, in fact, looks a lot like what you call censorship by proxy, where the government is putting so much power, so much pressure, on these companies, either through covert threats, sometimes not so covert threats, you better take down this information or disinformation that we dislike because it's inconsistent with our policy, that is government getting to censor through the back door. And that is no more palatable than the government doing it through the front door.

[01:14:29.5] Jeffrey Rosen: Thank you so much for that, for this superb discussion. We're almost out of time. I think it's time for closing statements, and I'll allow each of you to bring it home as you think best, but I'll ask a version of the obvious question. Jonathan, why and how is it important to protect free speech?

[01:14:49.2] Jonathan Turley: Well, I think that this is part of what I try to talk about. That is, we can't answer that question unless we can at least reach for each of us what we believe free speech is. If you believe it's a human right, it's different than if you believe this is something that has a function for democracy. Those are two very different models for free speech. Obviously, the model I suggest, which is the human rights model, allows for fewer tradeoffs. And I am unapologetic about that. The fact is, and this sort of amplifies what Nadine said, one thing I ask in the book is, point to a single censorship system that's ever worked in history. I asked that to an audience once of German academics and judges. And I said, how's it going for you? You have one of the oldest censorship systems in Europe. You've got a robust system. You arrested a guy who simply had a ringtone of Hitler on his phone on a train, okay? So how is it working for you? Because I watched the news and there's tens of thousands of skinheads and neo-Nazis walking through your towns.

[01:15:51.4] Jonathan Turley: Their numbers have never been greater. But a recent poll showed that of German citizens, only 17% of them feel comfortable speaking their views in public. So you've silenced the wrong people. But the question is, maybe it is successful, because that's what censorship is, and I'm sorry, content moderation is censorship. That's what it achieves. Now, when it comes to social media companies, obviously the First Amendment applies to the government. It doesn't apply when you're an agent of the government, okay? But even putting that aside, the mere fact that you might not be directly controlled by the First Amendment doesn't mean that you're not anti-free speech. If there was no constitution or statutory rule against racial discrimination, you would still be a discriminator if you kept out people based on their race or their religion. So don't pretend that the First Amendment is the exclusive definition of free speech. In my view, Meta is an anti-free speech company. So is Twitter. And I think that history has shown that. But what I would suggest to you is this, that this is not our first age of rage. What people don't like to admit is that they like the rage. They like it 'cause it's addictive and it's contagious, but they don't want to admit that. But it doesn't matter. This country was born in rage. The Boston Tea Party was an act of rage. But it's not rage that defines us as a people. It's free speech.

[01:17:32.4] Jeffrey Rosen: Kenji, why and how is it important to protect free speech?

[01:17:34.1] Kenji Yoshino: Yeah, so I'll begin with a really narrow answer, which is that it's really important not to conflate the oversight board with Meta itself, because oftentimes the board intervenes in ways that forces Meta to protect free speech more. So if you think about the very moving conversation with which we began this evening, one of our cases was a death to Khomeini case, that originally was, it's questioned whether that should be taken down and the government certainly wanted to be taken down. And the Oversight Board ruled that it had to stay up because it wasn't a credible threat to Khomeini. It was a protest movement slogan that was critically important for political speech. So that's thought number one.

[01:18:18.9] Kenji Yoshino: Thought number two is I do sort of get really puzzled when there's a conflation between content moderation and censorship because I wonder how anyone would feel if they logged on to one of these social media platforms and they got completely unmoderated content. You would just get a chronological feed that would make no sense to you whatsoever. So if there needs to be some curation for that to even be intelligible to a human being, if you don't want pornography on your teenage daughter's platform or the like, you're engaged in content moderation. So to call all of that censorship seems to be painting with too broad a brush, something that we reserve to have a very pejorative content. Like censorship is inherently pejorative, right, in my view, whereas content moderation is something that's inevitable. So if you're calling the thing that's inevitable content moderation. All of it censorship, then I think we have a problem because there's obviously bad and good forms of content moderation. I would stand second to no one in saying that I believe that if you engaged in viewpoint discrimination on political grounds and content moderated on that basis, that would be an enormous problem. The Oversight Board would be on that in a hot second because there's no justification for that kind of moderation.

[01:19:30.6] Kenji Yoshino: But if you're saying, no, you don't get to actually have these really grisly images of exposed organs to horrify people, and we're gonna moderate that out. Or if we have a dangerous organizations and individuals policy that says, no, you don't get to praise Hamas on the website, then I think we have more of a square debate. So I think what I'm trying to say is, in the end I'm here because I deeply care about free expression. I just think that we have to think really carefully and deeply, in a vastly different social landscape. So one of my colleagues in the profession, our colleague in the profession Tim Wu, says, "Is the First Amendment Obsolete?" So reporting not endorsing and not endorsing the idea that the First Amendment would be obsolete. But he says we're in a totally different landscape with social media. Because it used to be the First Amendment model that we developed in the early 1900s, it was very, very hard to speak. And the government was a primary sensor. So you needed access to a newspaper, you needed access to a publisher in order to publish your thoughts, and there are lots of gates along the way, as there still are for traditional media, and then the primary sensor that was shutting that down was the government.

[01:20:52.9] Kenji Yoshino: Today, it's a really different landscape. Anyone with a social media account can be a publisher of their own speech, and that's a really wonderful thing from the perspective of expression. But we also need a different model that says the only threat to speech or the primary threat is not necessarily the government. I think this is out of your playbook Jonathan. It's also these social media companies and these private actors that are shutting down expression. So my brief today is not to say, oh let's get rid of the First Amendment

or let's kind of bargain away First Amendment values of speech. Is to say if we are really gonna be true to our First Amendment commitments, we have to update those commitments and understand them in a landscape that is completely different from the genesis of those First Amendment commitments in the early 1900s. The nature of technology, the fact that these posts are both infinite and infinitesimal, so any one of them might seem completely innocent, but in the aggregate, if you have a tsunami of eating disorder, prompts that are hitting your teenage daughter, as someone who has a teenage daughter, I can testify to this, it might feel really different to look at that kind of abuse on that scale. So it's those kinds of considerations that I just want to put forward to you not because I'm opposed to speech, but I think that if free speech is going to survive we're gonna have to look at these new challenges squarely in the face.

[01:22:23.8] Jeffrey Rosen: Nadine last word in this great discussion to you, why and how should we protect free speech?

[01:22:29.2] Nadine Strossen: Jeff, nobody can say it better than our mutual hero, Justice Louis Brandeis, or you quoting him from memory, that freedom of speech, which, by the way, has been advocated and activated for by human beings all around the world throughout history. People have died for this right. There seems to be an inherent human desire for self-expression, for self-exploration. That's what Brandeis talked about as the intrinsic value of free speech that seems to be universal among us human beings. There is also, as Brandeis said, the instrumental value of free speech. It is by far the most potent, demonstrably effective weapon, not always effective, not immediately effective, but it is what every single movement for human rights and social progress and equality and every other good thing has depended on freedom of speech. I could quote so many leaders of towering human rights movements and struggles. We're out of time, so I'll end with just one, which I'm sure many of you have heard, and it's representative of spokespeople for many human rights causes. But I'm quoting the great civil rights leader, Congressman, longtime Congressman John Lewis, who said, "Without freedom of speech, the civil rights movement would have been a bird without wings. Without freedom of speech, every human rights cause would be a bird without wings."

[01:24:30.4] Jeffrey Rosen: Beautiful.

[01:24:38.1] Jeffrey Rosen: Friends, I'm so grateful to you for taking the time this evening to listen to this thoughtful, deep, vigorous discussion with agreement and disagreement about the meaning of the First Amendment. What we've learned from the brilliant scholars that we've assembled is, as Justice Holmes said, "That the Constitution is made for people of fundamentally differing points of view." And the point of this discussion of how and why to protect free speech is not agreement. But the thoughtful exchange of ideas so that we ultimately more deeply understand the basic value, the central value, the foundational value that is shimmering on the wall behind you. There's so many quotations to end with. I often love Brandeis and Nadine. I'm so glad you called him out. But I'm moved to recall the inspiring words of Justice Robert Jackson, who said, if there's any fixed star in our constant constitutional constellation, it is that no official, high or petty, shall prescribe what shall be orthodox in matters of speech, politics, nationality, or religion, or compel the forced allegiance thereof. Beautiful words. Thank you so much for joining our symposium.

[01:26:14.4] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Tanaya Tauber, Samson Mostashari, and Bill Pollock. It was engineered by Advanced Staging Productions, David Stotz, and Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, Gyuha Lee, Matthew Spero, and Yara Daraiseh. Friends, I am thrilled to share, as I did last week, that the NCC has partnered with Khan Academy and launched our new Constitution 101 course. I'd love you to check it out. It brings together America's leading constitutional scholars and historians. It is deep, it is rich, it is meaningful. It has quizzes which you can test yourself with and I know you'll do great. Check it out. It's [khanacademy.org/humanities/constitution-101](https://www.khanacademy.org/humanities/constitution-101) or just google it and you'll find the link. It's great. Please check it out and if you have any feedback, please let me know. Sign up for the newsletter at constitutioncenter.org/connect. And always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, the passion, the engagement, the devotion to lifelong learning of people like you who are inspired by our mission. Support us by becoming a member at constitutioncenter.org/membership or give a donation of any amount to support our work, including the podcast at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.