



The First Amendment and the Censor's Dilemma

Thursday, February 3, 2022, 12 - 1 p.m.

Visit our media library at constitutioncenter.org/constitution to see a list of resources mentioned throughout this program, watch the video, and more.

[00:00:00] Jeffrey Rosen: Hello friends, and welcome to the National Constitution Center. I am Jeffrey Rosen, the President and CEO of this wonderful institution. Friends, as you know, we're a nonprofit and we rely on your support to put on wonderful programs like this. And I'm thrilled to share that we are launching an exciting crowdsourcing campaign thanks to our friends at the John Templeton Foundation. Every dollar that you give to support the We the People and Live at the NCC podcasts that will run the audio feed of this great program, will be matched, uh, one to one up to a total of \$234,000 to celebrate the 234th anniversary of the ratification of the Constitution. You can go to constitutioncenter.org/wethepeople, and it would be wonderful if you could give any amount, \$5, \$10 or more to signal your membership in this meaningful community of lifelong learners and your support for the programming that makes it possible.

[00:01:00] Tanaya Tauber: Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, Senior Director of town hall programs. This year, the National Constitution Center is launching a multi-year initiative exploring the history and meaning of the First Amendment anchored by the magnificent 50 ton First Amendment tablet newly installed at the center and overlooking Independence Mall.

[00:01:25] To kick off our series of First Amendment discussions, Jeffrey Rosen, President and CEO of the center, moderated a conversation about why the First Amendment matters, why it is important for the government not to suppress the expression of opinion, and whether private individuals, companies, universities and online platforms should regulate speech. Joining him is Adam Liptak, Supreme Court reporter for the New York Times, Nadine Strossen, free speech expert and author of *HATE: Why We Should Resist it With Free Speech, Not Censorship*, and Robert Corn-Revere, First Amendment lawyer and author of *The Mind of the Censor and the Eye of the Beholder*. This conversation was streamed live on February 3rd, 2022. Here's Jeff to get the conversation started.

[00:02:10] Jeffrey Rosen: Thank you so much for joining, Robert Corn-Revere, Adam Liptak and Nadine Strossen. Uh, Bob, let me begin with, uh, you, uh, because yours ... uh, your new book is just out. Why is it that we have, in America, a tradition that you discuss that government cannot control the expression of opinion and the truth can only emerge from free discussion and debate where all opinion can be expressed and reason is free to combat error? As Thomas Jefferson said, "If there are any among us who would wish to dissolve the union or to change its

republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it." You quote Holmes on behalf of that principle. Tell us why government traditionally cannot suppress opinion in America? And what has happened during the periods like the era of Anthony Comstock when government has tried?

[00:03:02] Robert Corn-Revere: Well, Jeffrey, first, thanks for hosting this, uh, this panel, um, and, and for, uh, uh, discussing, uh, my book and, and these ideas. Uh, there's, uh ... This is an invaluable platform that you have created for the exchange of ideas, so I thank you. Uh, and also it's, it's, uh, just such a pleasure to be on a panel with such stellar individuals and friends.

[00:03:25] Let me try and address your question first, by, by going back to the, uh, authorities you cited, the framers of the constitution, they had no question at all about why the, um, suppression of ideas by government was a bad idea. I mean, it was only because they had absorbed those principles that, that revolution happened in, in the first place, and they tried to enshrine those into, uh, more the Bill of Rights than the constitution itself. But the Bill of Rights were about rights, the constitution was about how you divide power.

[00:03:53] Um, it is something that they set up as the framework, but something that we learned more as a society as it went along, as we began to confront those threats to freedom of expression over time. You mentioned Anthony Comstock, who I cover extensively in the book, he was the first professional censor in American history, and for 40 years became the national arbiter of what was moral and what could be, uh ... what kind of speech could be suppressed.

[00:04:22] And he served as probably the best example, the negative example, of why free speech is so critical. Uh, that he had a stranglehold over a wide variety of information that he framed as obscenity, but that, uh, we think of today as basically the, the cultural, uh, lifeblood of, of the discussion that, uh, everyone, uh, partakes in, whether they're talking about, uh, reproductive issues, uh, uh, contraception, abortion, whether they're talking about medical health, art, literature, all of those things were in his purview of things to censor. And it was through that kind of oppressive censorship that I think Americans came to appreciate the freedoms that the framers set forth in the constitution to begin with.

[00:05:11] Jeffrey Rosen: Beautifully put. And thank you for that wonderful introduction to our topic. Nadine, let's stay on first principles. And I wanna ask you, in your view, does the principle that the expression of opinion can't be tolerated, um, is that limited to government or does it include the force of public opinion, including on the internet? I was moved this morning to read or reread Mill and saw him describe, "It's not, in constitutional countries, to be apprehended that the government, whether completely responsible to the people or not, will often attempt to control the expression of opinion, but I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate because the peculiar evil of silencing the expression of opinion is that it is robbing the human race posterity as well as the existing generation. Those who dissent from the opinion steal more than those who hold it."

[00:06:04] And basically Mill is saying that because truth can only emerge from an open discussion among people who disagree, neither private parties nor the government should be able

to use their course of force to suppress opinion. Is that right? And, and you- you're ... Uh, sorry for the long wind up, but you're [crosstalk 00:06:21].

[00:06:21] Nadine Strossen: No, it's, it's brilliant. Every time I reread John Stuart Mill, I continue to be inspired and, and marvel at how applicable his insights are even to the most contemporary issues. That said, Jeff, I'd like to preface my answer by saying, I defend what happen to be first principles, not because they are described as first principles. Indeed, consistent with Mill's philosophy, as reflected in our constitution, as, as Bob explained, we should question everything including the First Amendment itself and how it is interpreted. So one of the values that I find in all of the ferment and questioning criticism of the First Amendment is that it enables us to revisit, uh, what is the logic? Is it still justified?

[00:07:11] And to the best of my ability, uh, all of us have our confirmation biases, but to the best of my ability, I try be open-minded as I grapple with these questions. And yet I continue to be convinced that Mill was right and that Oliver Wendell Holmes was right, uh, when he used that famous marketplace of ideas me- ... He didn't a- actually use the phrase, marketplace of ideas, but he said, "The best test of truth is the ability to survive, uh, in the, in the competition of ideas."

[00:07:42] And, and I think neither one of them was saying that truth will necessarily emerge, they're not saying that falsehoods are not going to thrive. So the ... one of the arguments we continue to hear today, oh, but there's so much disinformation and it lasts for so long, and, you know, you can't guarantee that truth will emerge from free speech. And that's absolutely correct, but I can guarantee you this, truth is never going to emerge as a result of government control and government suppression. Government is always going to have an incentive to suppress ideas that are critical of, guess what, government, uh, government officials, government policies, and, uh, the majority of the community who wield the political power.

[00:08:37] So over, and over, and over again I keep coming back to the reality that especially if you care about individual rights, especially if you care about equal rights for individuals and groups who have traditionally been marginalized, or excluded, or, or oppressed, you especially need free speech because you cannot count on majoritarian forces in society or government power to protect individual and minority rights.

[00:09:09] Jeffrey Rosen: Oh, beautiful. You cannot count on majoritarian forces or government power to protect minority rights, so beautifully stated. Adam, Nadine introduced this distinction between truth and lies, and she said, "Although it's not necessarily true that, uh, truth will emerge from every debate, nevertheless, we cannot rely on government power or majority force to adjudicate." Under what circumstance does American law allow for the punishment of lies?

[00:09:37] I just found two cases, which I hadn't known well that I just wanted you or America's expert in this, and I just wanted to tee it up. Uh, there was the Alvarez case which said that, uh, "You couldn't be prosecuted for falsely saying that you won the medal of honor because restrictions on speech are almost always unconstitutional when they're based on content, and even a lie is protected because that's a content based restriction." And then there was a

Washington Supreme court decision that said that a political candidate couldn't be punished for telling deliberate lies about her opponents, uh, because courts were not able to negotiate the line between fact and opinion. So that's the line I wanna ask you about. Are ... Under ... Are there any circumstances where courts are allowed to just say what's a fact and what's an opinion and what's a lie or not? And give us a sense of the lay of the land.

[00:10:24] Adam Liptak: And that's a great question. Uh, thank you for having me Jeff. And let me just pause for a second to congratulate Bob on a really good book. Uh, I, I had ... I, I read it with trepidation because there's a kind of book that everybody writes all the time, which is just a march to the major First Amendment cases. This is actual history full of, uh, colorful anecdotes and vivid figures, and is a great read and is, is just such a good way and to get into some of the questions that we're probing here.

[00:10:58] The courts should be wary of playing the role of deciding what's, uh, true or false, but there are settings in which the First Amendment allows courts to do that. In the context of defamation, uh, deliberate falsehood that causes harm to reputation can certainly be sanctioned, uh, punished, notwithstanding the First Amendment. And in other settings, securities regulation and so on, courts have a role to play in making sure people are telling the truth.

[00:11:29] But courts should be particularly nervous if one of two things are in play. In the Alvarez case, nobody thought it was a great idea for this knucklehead to be lying about having received a medal for which others had bled and died. But the court essentially suggested, there are better ways than brute force of the law to address this question. For instance, just have an internet registry of who's gotten the medals or not. And this guy, as I remember, he was a, a water commissioner or something and said this in the context of a, a political campaign, should simply be called out by the truth which the government can supply. So that's a relatively easy case.

[00:12:14] And then as for politicians telling lies about each other, that's not a good thing obviously, but it's a hell of a thing for the courts to be the arbiters of truth in political campaigns. And this goes back to the distinction you and a Nadine were talking about, the government can't be trusted to decide who's right and who's wrong, and what to censor and what not. But in the private sphere, it becomes much more complicated and you would hope that civil society can respond and help citizens employ their own critical faculties to come to the truth.

[00:12:55] You know, this is a, a panel of people who basically come from the same outward outlook, uh, that was commonplace in our generation, less commonplace now, of having called it a libertarian view of free speech. Let everyone say what they like and people can be trusted to separate truth from lies. I think lately that conception has been tested, so I suspect as this conversation goes forward, we're going to look at, even as we agree that government censorship, very pro- problematic, that responses on the private side may be a little more complicated.

[00:13:32] Jeffrey Rosen: Well, thank you very much for that. Thanks for helping us understand the reluctance of the law to police truth and lies when it comes to the government, and also for noting the homogeneity of views on the panel, and perhaps that is a ... uh, something we need to remedy in future panels. It's ... I think the National Constitution Center is playing a crucial First

Amendment role in bringing together people of different perspectives. This is such a rarity in this polarized time that it's important to test the truth of the First Amendment first principles, and we will certainly do that moving ahead.

[00:14:05] All right, Bob, uh, let's put on the table some of the extraordinary First Amendment controversies that are transfixing the country. There was a piece in *The Atlantic* just the other, *Banning Bad Ideas Won't Make Them Go Away*, and there were two examples offered, six Republican legislators in South Carolina are co-sponsoring a proposal to ban the ideological coercion and indoctrination. And in order to refrain from judging, stereotyping or scapegoating, the legislature would prevent certain books from being read or ideas from being taught. And at the same time, the author says, "The GOP lawmakers are not alone in wanting to banish objectionable attitudes, at Princeton in 2020, 350 faculty members signed a letter demanding that the administration constituted committee to discipline racist behavior incident research and publication on the part of the faculty."

[00:15:01] You can take one or both of those controversial examples, but let's start with the raft of bills that would either remove books like *Maus* from, uh, the curriculum or regulate what can be taught. Are those consistent with the First Amendment or not? And then if you want to turn to the private examples, you can do that too.

[00:15:20] Robert Corn-Revere: Well, Jeffrey, the, the issue becomes a little bit more complicated when it gets to political control over curriculum because, uh, for elementary and secondary schools, uh, primarily, uh, public schools, they are under the control of school boards, um, universities, uh, set curriculum as well. But government schools, whether, uh, higher education or, uh, elementary and secondary schools, also have to comply with the First Amendment.

[00:15:45] Uh, I think for the examples that you cite showing legislatures, uh, now getting involved in dictating on a granular level, uh, what books should be read, what should be taught, it is a cautionary tale that we should have learned over the years that it's generally a bad idea whenever the legislature gets involved in dictating content. We saw that during the 50s with, uh, demanding loyalty oath and with, uh, trying to control who could be professors at universities because they might have socialist leanings. Uh, and now we, we see a, uh, a pushback on, uh, issues that we're facing today in terms of social justice. Again, it is, uh, generally a bad idea. And depending on the nature of the, uh, restriction being imposed, can also be a First Amendment violation.

[00:16:32] Uh, you brought up the example of *Maus*, which just last week, a, uh, school board in, in Tennessee, in McMinn county voted to take *Maus* off the, uh, off the eighth grade curriculum. And again, this is a perfect example of that. Um, *Maus*, for those who don't know, is the, uh, graphic novel by Art Spiegelman, uh, about the Holocaust depicting, uh, the, uh, the Jewish victims as mice and the Nazis as cats. It's a, a ... He's a Pulitzer prize winning author, the book is widely acclaimed. It again, shows that you have public officials acting because they think the ideas for some reason are unacceptable or dangerous. Uh, some of the, uh, reasons

given by the school board members during the vote over to remove Maus from the curriculum just seemed lunacy, nonetheless, uh, that was done.

[00:17:23] But the bright side, and this gets back to that culture of free expression that we originally were talking about, the reaction to that has been really pretty heartening in that now Maus, uh, because of this controversy, is at the top of Amazon's, uh, best seller list. Uh, number one in history, number one in world war II history, number two in, in, uh, history generally, uh, uh, I'm sorry, in, uh, in their best seller category. And so the efforts to suppress the ideas, uh, tend to make them more popular, which is something that I explore in my book with something I call the Comstock effect where those things that Anthony Comstock acted to suppress actually made them more notable and, and more popular. And it's something that led the culture to push back against censorship efforts.

[00:18:14] Jeffrey Rosen: Thanks for that. That's a wonderful expression, the Comstock effect, which as you said, you built off of the idea of the, the Streisand effect, where, where Streisand by objecting to a story about her only increased the attention paid to it. And you very hopefully, uh, focus us on the dangers of government curriculum control.

[00:18:31] Nadine, tell us whether you have concerns about not only government efforts to suppress unpopular opinion, but also private efforts on campus, and I, I brought up the Princeton example? But although the First Amendment does- doesn't apply to private entities, do you believe that what has been called cancel culture, an attempt to suppress some popular opinions, violates free speech values? And how should we think about those efforts, um, compared to government efforts to regulate curriculum?

[00:19:04] Nadine Strossen: First Amendment controls and limits on government repression of speech are essential, necessary, but not sufficient for us to meaningfully enjoy free speech in our democratic society. Uh, as you pointed out, a century ago, more than a century ago, John Stewart Mill, uh, wrote his entire *On Liberty* focusing not on government censorship, but on social pressure, on peer pressure. In the early 19th century, when Alexis de Tocqueville visited this country, he wrote very powerfully about his concern that in a democratic society populous pressures would lead to suppression of individual freedom, including free speech.

[00:19:52] Now, the First Amendment as cons- ... uh, befitting the National Constitutional Center will teach a lesson that many people don't know that the constitution, including the First Amendment free speech guarantee, only restrict government. So even the most powerful, private sector entities with an enormous amount of power over communications are not constrained by the First Amendment. They may be subject to other constraints. So you give the example of Princeton, most private universities, certainly including Princeton, make in effect contractual commitments to respect and honor the free speech rights of their students, faculty, other members of that community and organizations that defend free speech on campus, such as FIRE located right here in Philadelphia, Foundation for Individual Rights and Education. To the best of my knowledge, have never lost a free speech lawsuit against a private university, uh, but that is based on the university's contractual commitments.

[00:21:01] Uh, as a practical matter, we are never going to enjoy free speech re- regardless of the legal protections if we are realistically frightened that we are going to jeopardize our means of employment, if we're gonna jeopardize our professional careers, if we're gonna jeopardize our personal reputations, if we're gonna be ostracized and stigmatized by our peers. That leads to an outbreak of self-censorship. And every public opinion survey in the recent past has sadly shown that no matter how many free speech guarantees first ... the First Amendment may provide us, there are still so many important subjects that we dare not talk about, not because we think we're gonna get arrested by the government, but because we think our lives are going to be ruined.

[00:21:57] And sadly, that self-censorship covers the most important issues, issues about race, issues about gender, issues about other compelling public policy concerns. So this private sector pressure is as damaging to democracy, democratic self-government as it is to individual liberty.

[00:22:21] **Jeffrey Rosen:** So powerfully expressed. You talk about, uh, what's known in America as the chilling effect, but that passage in Mill just left out at me this morning, "Our merely social intolerance kills no one, roots out no opinion, but induces men to disguise them or to abstain from any active effort for their diffusion. And, uh, with us, heretical opinion, uh, can't be suppressed because people are afraid of criticism."

[00:22:45] Adam, help us think through the hard question about the legal framework for punishment for incredibly unpopular speech, both what it ... you know, maybe what it should be and what it is. So if someone expresses an opinion that leads to calls for cancellation, what's the right answer? Should the person be strongly criticized, because we're, we're ... we've all talked about how complete freedom of criticism is crucial to the emergence of truth, but not fired or is it both legal and appropriate to fire for private em- employers to fire people for their unpopular opinion? How should we think about that?

[00:23:21] **Adam Liptak:** So the short answer in, in general, and there's a web of laws that applied in, in different settings, the short answer is it's legal but not appropriate, it's at odds with free speech values. And one point to be made about the university setting where so much of this comes up is universities claim to have a commitment not only to First Amendment values, but to academic freedom, and at the root of academic freedom is the idea that people can test all sorts of different ideas. But there's a bit of a conundrum here because cancel culture is a spectrum, and the beginning of the spectrum is perfectly appropriate, if you hear something with which you disagree, you should criticize it. The response to speech that you view as bad is speech that you view as good. The question is, at what point does that cross a line?

[00:24:19] I think it surely crosses a line when someone suffers not only disagreement, shaming, humiliation, but a concrete harm, the loss of a job, the loss of a professional opportunity. But I don't know exactly where the needle should go when someone is criticized to the point where they're socially ostracized, they're not welcome in polite society, but they haven't really suffered a concrete professional harm. And I'd be interested in Bob and Nadine's view, because I don't have a settled view myself. Uh, we, we all surely start with the proposition that a response to speech you disagree with ought to be more speech, but is there a quantity of that additional speech that drives the initial speech out of existence?

[00:25:13] Jeffrey Rosen: Well, that's a very powerful way of putting it, so let's discuss. Bob, Adam is asking whether there's a degree of the amplification of criticism that might literally ... you might not lose your job, but you'd be so socially ostracized that you're silenced. Does the internet do that? Mill is worried about Victorian public opinion, but that was gossip and it was enforced socially. Now, millions of people on Twitter and Facebook piling on and criticizing unpopular speech may make it very difficult for someone to, uh, continue to be heard, um, you know, even if they're not fired. So my question to you, and, and let's take a round on this is, to what degree has the amplifying platform of the internet called into question the framers' enlightenment faith that the answer to bad, bad speech is good speech, and that ultimately reason will emerge from a fair fight between truth and error?

[00:26:13] Robert Corn-Rev...: Well, there's, there's a lot there to that question. I think the place to start with it is with Nadine's book, uh, HATE, [inaudible 00:26:20] how to combat it with free speech, not censorship. Uh, I, I think that premise is still valid even with the amplification of social media platforms. That when you hear, a- as Adam just said, when you hear something that is disturbing or that you think is bad speech, then you should speak out. The question though is how you follow that up, what, what, what you call for with your good speech. If you call it for someone to lose their job, if you call for someone to be driven out of society, uh, then I think you have, uh, more of a problem.

[00:26:51] And it, it really comes down to a couple of things. One is, there is the law of free speech, which is a floor which protects us all as a matter of law, and then there's the culture of free speech, where the question is whether or not people are willing to have a society in which people can have their say, both things that you agree with and things that you violently, uh, disagree with, uh, and then allow those different ideas to play out. Now, will that mean that truth will always emerge? No. As Nadine said earlier, that, that is a process where we are staking our, um ... uh, putting our faith in the idea that ultimately as a process we are more likely to reach truth, uh, as, as each of us defines it, uh, by letting each person have their say.

[00:27:40] Um, and what we do know is that the opposite of that, where you have some sort of authoritative selection, what is going to be true, doesn't work out. And, uh, the, the question is, who are you going to allow to be the arbiter of truth? Dealing with Twitter mobs, that's a matter of, of hopefully you can cultrate people to, uh, be less, um, draconian in, in what they call for. Um, but it also requires a certain amount of fortitude, uh, that people have to learn to stand up against that kind of, that kind of pressure. It reminds me of something that Dave Chappelle said about, uh, Twitter mobs, he said at first he was really bothered by all the reactions he got on Twitter and then he realized, Twitter isn't really a place.

[00:28:34] Jeffrey Rosen: Friends, as you know, we're a nonprofit and we rely on your support to put on wonderful programs like this. We are launching an exciting crowdsourcing, uh, campaign, thanks to our friends at the John Templeton Foundation, every dollar that you give to support the We the People and live at the NCC podcasts will be matched, uh, one to one up to a total of \$234,000 to celebrate the 234th anniversary of the ratification of the constitution. Uh, you can go to constitutioncenter.org/wethepeople, and it would be wonderful if you could give

any amount, \$5, \$10 or more to signal your membership in this meaningful community of lifelong learners and your support for, uh, the programming that makes it possible.

[00:29:28] Nadine, you do discuss in your book, HATE, the appropriate response to un-popular speech, and I wonder, to what degree do you think the internet has or has not unsettled the enlightenment faith that truth will emerge from the combat of, of reason and error? And I, I, I just found the other day, John Adams talking about the 18th century definition of candor. In the 18th century, candor meant not being truthful as it does now, but it meant forgiving small faults, not piling on in criticism of public debates. And this became very keen at a time when people were writing broadside essays in the newspapers more and criticizing each other more, and Adams and the other founders are saying, "In order to have a meaningful debate, we've got to just be charitable toward each other and not assume the worst and not vilify our opponents."

[00:30:22] Nadine Strossen: Thank you so much for that historical perspective, Jeff, because, uh, if you look at the history of communications media, at least as far back as the printing press, every time there's a powerful new communications media, it is always scapegoated as the alleged problem of whatever the biggest societal issue is of the day. And I think it's really important not to lose sight of or take for granted the enormous positive that has resulted from the internet. Absolutely unparalleled opportunities and realities for every person in the world to communicate with every other person in the world. In the first half of the 20th century, there was the famous saying by a journalist that, "Oh, free A.J. [Wivling 00:31:13], freedom of the press only belongs to he who owns a printing press."

[00:31:17] Now, virtually everybody who has a, a cell phone has a printing press his or her pocket. And that has been used not only to spew a lot of negative information and disinformation, but so much positive, including incredibly powerful counter speech opportunities online, opportunities for movements that really only got off the ground in a meaningful way thanks to the power of social media. Everything from the Black Lives Matter movement, to the metoo movement, to all kinds of political candidates for young minority female, first time candidates who didn't have to go through all the fundraising and organizing.

[00:32:01] Uh, studies that have been done, including by, you know, experts at the Oxford Internet Institute and other academic institutions, have said, you know, all of the concern about filter bubbles and echo chambers are not really backed up by evidence, that people who get their information online tend to look at more different sources and more different perspectives and take advantage of opportunities for fact checking that simply don't exist on other media.

[00:32:32] Jeffrey Rosen: Thank you so much for that reminder of the marvelous opportunities for the internet, for the explosion of the great ... all the knowledge of the world, uh, at our fingertips and the degree to which it's, uh, mobilized social movements and enhanced public debate. And Adam, I want to ask you about, first of all, the distinction between misinformation and disinformation. I heard David Rubinstein the other day ask, "What is the difference between misinformation and disinformation?" In trying to answer him I wondered if one was ... uh, disinformation was deliberate lies told by government or bots, and misinformation was sharing of mistaken opinion. I'm not sure, do you have a better distinction? And then is the spreading of

misinformation and disinformation on the internet a problem that requires a legal response or not?

[00:33:18] Adam Liptak: Your distinction is probably right. Disinformation is, uh, the intentional dissemination of wrong information and misinformation is simply being mistaken. I wish I could share Nadine's optimism about the internet. When it, when it came into, you know, widespread existence, I was completely on board, I thought, this will democratize speech, and it will give people access to more sources of information, and it will result in a better informed citizenry which will make wiser choices. I don't know that you can really make that case. And I do think that there is a siloing effect, and I don't think we would have, for instance, the quantities of vaccine misinformation or disinformation had we lived in the society that many of us grew up in where you had a couple major newspapers, a couple of news magazines, three networks, and an agreed upon basic factual understanding that people shared from which you could make arguments one way or the other. I do think we live in a different world, uh, it has the positives Nadine talked about, but it may have some negatives too.

[00:34:44] As for what are the proper responses? Well, I ... You know, we- we- we've established that none of us think the government has a role, uh, but we may move to this new area which is also quite difficult to think about, is the enormous power of the platforms that carry this information, misinformation, disinformation, and what power do they have and should they have? Uh, my going in proposition is that Facebook is a publisher like the New York times, and it can make choices, and it can ban some speakers and some subject matter areas, and that's something that the First Amendment approves of. But it's not hard to make the counterargument that the gate keeping function of the major tech platforms is so large that it may be ought to worry us that they will not use their power wisely.

[00:35:40] Jeffrey Rosen: Great. Thanks for putting that problem on the table. Not that the problem is great, but you're, you're putting it on the table is great. And Bob, let's, uh, take up Adam's question. Let's assume that he's right, as I think he is, um, that, uh, Facebook and Twitter have the power to suppress the expression of opinion or to decide that some opinion is more good than others, is it a good idea?

[00:36:02] And I'll give an example, which always struck me, uh, that the New York times wrote about a year or so ago, someone who'd become a QAnon conspiracy theorist, she'd started by looking at yoga videos and quickly went down the rabbit hole and became a QAnon person, and she was a high school and college classmate of mine. She was a very well educated, delightful young woman when I knew her. Would become a conspiracy theorist, uh, according to the piece because she ... the algorithms just kind of made her, uh, uh, go down the rabbit hole and she became addicted to the affirmation of the QAnon groups and, and started embracing conspiracy theories.

[00:36:36] So are, are, are the platforms well equipped to deal with this sort of problem, granted they have the power to do so? Should they attempt to decide that some kind of conspiracy theories are bad for people and try to suppress them, or does the history of suppression of opinions suggest that it's likely to be ineffective as well as a bad idea?

[00:36:53] Robert Corn-Revere: Well, I think to answer your question directly, I think it is a good idea for platforms to try and set their own terms, set their, their rules of use and to try and find a way to cope with the fact that they're dealing with vast volumes of information. Uh, Adam makes a good point when he says that, uh, we're facing, uh, or we're all living in a time when we have a global medium, first time in human history where anyone on the planet can communicate on a global scale, has access to all kinds of other informations. Uh, but at the same time, it has broken down the traditional intermediaries that we had for information back in the days when we only had three networks or a handful of newspapers in a, in a given area, um, and now we have these vast amounts of information. And it does require us to come up with ways of dealing with this new reality.

[00:37:42] I think we're in the middle of this grand social experiment right now where we have developed these capabilities, but are still trying to work through just how to deal with them. I think Jonathan Rauch addresses this in his new book, *The Constitution of Knowledge*, where he talks about how, uh, journalism became journalism during the 20th century by reacting to sort of the excesses of yellow journalism in the 19th century. And we developed professional standards, uh, journalistic, uh, organizations to enforce those standards, all private entities that were looked for a way to, uh, come up with ways to evaluate, ways to find a way toward truth and to have professional standards. We have scientific organizations that do the same thing with the scientific process and establish norms for those. All those things go to what Rauch calls a constitution of knowledge and how we are in the process of having to develop new norms as we have these new technologies.

[00:38:42] Uh, I think the efforts that certain platforms are making to, uh, try and verify information are promising, transparency is a good thing. Facebook's sort of effort to have a Supreme Court, uh, that evaluates their moderation decisions are all steps in that direction. I think it's going to take us a while to, uh, to determine, uh, how to cope with this new reality. Um, but there's also an obligation on the, the part of citizens to try and come up with a way to live in this environment. And that requires, and this isn't a silver bullet, it's, it's a long term solution, we need much better education. We need civics education, education in history, and most importantly, education and critical thinking skills so that people have a way to deal with these volumes of information that are available.

[00:39:32] And the platforms play a role, they, they will have their own standards as well, um, but all of those things have to come together for us to, as a ... [laughing] as humanity, to cope with these tools of communication.

[00:39:45] Jeffrey Rosen: Thank you for your crucial call out to civics, um, of course that's why the Constitution Center exists. And I'm increasingly persuaded that one of the most important things we do is simply bringing together people who disagree for civil dialogues, because it's so rare in America for that to happen, that modeling and providing for that interplay of ideas is at the core of a First Amendment enterprise.

[00:40:08] Nadine, do you share Bob's optimism that expert bodies like the Facebook Supreme Court or other, um, or others might fully distinguish between, uh, fact and fiction? Uh, Ross

Manille Coin the Q&A, which is exploding with wonderful questions, thank you friends for them, says, "What about Spotify and Joe Rogan?" Rogan, after all said, uh, the understanding of what is, uh, truth when it comes to vaccine changes and we've got to be open to having on controversial views in order to make up our own minds. So do you think that the platforms should distinguish between truth and falsehood or not?

[00:40:46] Nadine Strossen: I think it's impossible to distinguish between truth and falsehood in a meaningful sense. I mean, absolute concretely verifiable or falsifiable facts are really not what we're talking about, those are trivial. What we're talking about are disagreements about interpretation, about analysis, about opinion. I completely agree with the Supreme Court when it said, "There is no such thing as a false idea." You know, one person's truth about, you know, let's say masks or some other aspect of public health policy is somebody else's, not falsehood, but from a scientific perspective, it's a contestable fact that is subject to new analysis, new information, new experience. We've seen the very same scientists change their opinions, as well they should, when new evidence comes in. So I think even in terms of the goals that are said to justify suppressing disinformation, such as public health, I think we actually endanger public health by, uh, rooting out differing perspectives that might in fact ultimately prove to have health benefits.

[00:42:01] I think the bottom line, purely from a pragmatic perspective if, if nothing else, is the civics education and media literacy that Bob talked about. For this reason, Jeff, as Bob's book demonstrates, even the strictest censor, not only in our country, but around the world throughout history, has never succeeded in completely restricting whatever information or expression is considered to be dangerous, we are never gonna completely eradicate. So we to prepare ourselves, and our children, and our students, and our society to deal with potentially dangerous information, to build up an immunity, so to speak, uh, to use the, the virus example, to not be swayed by something just because we see it on the internet. But to be ... to have skip and questioning toward everything, as we said at the very beginning, even about the First Amendment and what all of us are saying about it.

[00:43:01] Jeffrey Rosen: Wonderful. So powerfully put. Adam, Nadine just said that the Supreme Court is right to say there's no such thing as a false opinion. Mill said the same thing, that on every subject on which difference of opinion is possible the truth depends on a balance to be struck between two conflicting sets of reasons. So Nadine concludes from this that the platforms are no better equipped than government officials or other expert bodies to decide what opinions are true and what or not, that's something that can only emerge from public discussion itself. Do you agree or disagree?

[00:43:34] Adam Liptak: Well, let me, let me pause at a counter example or a question. The major platforms have banned, uh, Donald Trump, in part because Donald Trump, and I don't think this is an opinion, I think it's a lie, uh, he says that, uh, Joe Biden didn't win the election. Many people believe that, they're wrong to be leave it. I don't have a problem with those platforms taking that action in the face of that lie. I don't think that's a false opinion, I don't think it's a false idea, I think it's a pernicious lie. And I would like to trust the American people to make sensible distinctions using their critical faculties, but sometimes I'm persuaded by a

comment attributed to Winston Churchill, who said that the best argument against democracy is a five minute conversation with the average voter.

[00:44:30] Jeffrey Rosen: [laughing] Wonderful quotation and a great comment from our friend Mark Rotenberg who says, "Great discussion, but one comment on the platforms many who didn't share the views of former President Trump were nevertheless concerned when Twitter deplatformed him, notable in particular was the reaction of European leaders who didn't like Trump, but were even more concerned about the near total control over political speech by private companies. They said there should be a legal basis for such decisions. Did the Europeans have the better ... the First Amendment argument in that incident?" Uh, Bob, what do you think?

[00:45:01] Robert Corn-Revere: [laughing] I ... The direct answer to the question is, no, the Europeans don't have a better idea. And, and the idea of allowing the government to control or influence the decisions of platforms, even if done in the name of free speech values, uh, generally, uh, uh, universally, uh, tends to fail. Various states have tried to take action against social media platforms to try and brand them as common carriers or to pro- prohibit them from fact checking politicians, uh, those efforts so far have been found to be unconstitutional, and I think that's the right answer.

[00:45:38] Um, you know, [laughing] responding a little bit to, to Adam's, uh, pessimism, uh, uh, about, uh, the greatest argument against democracy as a con- ... a five minute conversation with the average voter, uh, yo- you know, hard to disagree with that sentiment, but the question is, what do you do about it? Uh, do you allow the government to become the arbiter of truth and to set the rules for, for platforms? Uh, I think the answer there is, again, a five minute conversation with anyone who's thought about it [inaudible 00:46:08]. Uh, that's pretty much a bad idea. Uh, and all you have to do is look at all of the, uh, examples in history of government disinformation.

[00:46:17] For us who lived through the Vietnam era, uh, the Gulf of Tonkin Resolution, uh, the Pentagon Papers illustrate, uh, the, the dangers of letting government try and be the arbiter of, of truth, and to, to set the rules. An- and you can, you know, extend that to today with information about COVID. Say, for example, uh, when, um, the government was saying that no one should give credence to the rumors that the ... that COVID emerged from a leak at the, the Wuhan labs, and certain social media platforms followed that lead and were, uh, taking information down that, uh, suggested that. And then we find out that, uh, President Biden, uh, was conducting or had authorized an investigation to determine whether or not COVID had leaked from the Wuhan labs. Um, again, I think it illustrates the, the need for there to be choices made by a diverse range of platforms and not to have it dictated by simply one government decree.

[00:47:16] Jeffrey Rosen: Thank you for that. Nadine, do you think that, uh, permanent deplatformings of public figures are justified, or only temporary deplatformings, or no deplatformings? And has the internet changed, uh, the faith of Brandeis that if there be time enough to expose through discussion the falsehood and fallacies to avert the evil by process of education, the remedy to be applied is more speech, not enforced silence? That's the, the claim that things have changed is that the internet has sped up deliberation so much that you have to

deplatform people whose speech might lead to violence, uh, in a way that it wouldn't have pre-internet. Uh, do you agree with all that or not?

[00:47:55] Nadine Strossen: I, first of all, Jeff, I defend the platforms' own First Amendment Rights, as Adam explained, analogous to those of the New York times, or for that matter, the platform that we're operating on now to make its own decisions about, uh, which speakers and ideas to host and which not to. I would resist any government attempt to, uh, reign them in. But I would urge them to exercise this unprecedented power that they have in a way that is consistent with individual liberty and democratic deliberation. You know, I'll take another quote from Winston Churchill when he famously said that democracy is the worst form of government except for all of the others. And I think that freedom of speech is, you know, the worst way to ascertain truth or justice or any other public good, except for all of the other alternatives. And I think deplatforming, even temporarily, but certainly permanently, any powerful political leader is really inconsistent with democratic values.

[00:49:08] Uh, what is at stake is not only the free speech rights of that individual himself or herself, but also the right and interest of we the people to receive information and ideas. I wanna know what he is saying, that has independent value. In fact, you know, the, the, the more misleading and false it is, I think the more important it is to get information about that out there. And by the way, that doesn't necessarily mean that more people are going to, uh, accept those ideas or support the, the politician. Many political analysts say that a major factor swinging some of those traditional Republican, suburban voters against Trump was precisely hearing all the falsehoods, and extremities, and, you know, hate speech that he was spewing online. And so it's essential to democracy to get those ideas out there.

[00:50:03] I don't think it was any coincidence that some of the major criticisms of that deplatforming came from Angela Merkel and from Alexei Navalny, they understood that it is, as always, uh, dissenters who have a lot at stake. The ACLU issued a statement tha- ... at that time saying, "Well, we, we know that Trump can find other platforms, he's powerful, he's got connections, he's got money, but we're concerned about the grassroots activists that we represent, you know, the people of color, the LGBTQ community and others who have been marginalized and voiceless. Where are they gonna go?" Uh, and so we have to be very, very concerned about, uh, the precedent here and the impact on, on all the rest of us, not just the government officials themselves.

[00:50:52] Jeffrey Rosen: Adam, you had a piece not long ago about how Justice Thomas has called for a reconsideration of the landmark libel ruling, New York times versus Sullivan, Justice Gorsuch just joined him in that call. Tell them what Justices Gorsuch and Thomas are proposing and, and whether or not you think is a good idea.

[00:51:10] Adam Liptak: So in New York times v. Sullivan of course was the landmark decision that constitutionalized American libel law, which used to be a, a state tort action and the Supreme court said, no, uh, we're gonna impose First Amendment restrictions on at least initially public officials suing news organizations and others. And the innovation of Sullivan was that to win such a lawsuit a public official had to prove that the speaker knew what he or she was saying

was false or had serious subjective doubts about it. Very daunting standard and it was meant to create a zone in which people could try out ideas and make statements and do their level best to tell the truth, but not be subject to liable suits if they made, uh, innocent mistakes.

[00:52:07] And it arose, of course, in the civil rights era, uh, where the Northern press was covering a nonviolent protest movement which needed that coverage like oxygen to achieve its goals. And the Supreme court in that context came up with the Sullivan rule, which is one of a handful of decisions that Americans may actually know the names of. So it's quite a thing for two Supreme Court justices to say, we should get rid of it. They have slightly different arguments about why they ... we should get rid of it. Uh, Justice Thomas, an originalist, says that the framers of the constitution could not have envisioned such a rule, I think that's probably true so far as it goes. I think it would be actually easier to make the argument that they, the framers, might forbid all seditious libel cases, which is to say they might well say no government official should be able, uh, to sue for statements made about his or her public actions. But this convoluted actual malice rule from Sullivan, it's a little hard to make an originalist case for.

[00:53:24] And so Thomas who issues a, a solo dissenter separate writing three or four years ago, by himself, not a big deal, he's an i- idiosyncratic person to begin with, and this might be thought to bemusing. But then he is joined by Justice Gorsuch who makes a different kind of point, he makes a point quite relevant to our discussion. He says, "You know, in the internet era, there's so much falsehood we should rethink Sullivan, because it was one thing when you had establishment news organizations with copy editors, and fact checkers, and processes, and maybe you could trust those guys, but in the internet era maybe we need new rules."

[00:54:04] Now I think two votes is not the four votes you need to grant a case or the five votes you need to win a case, but there is some thinking in the land, and from the conservative side of the court, that maybe it's time to revisit Sullivan, which was of course one of Donald Trump's, uh, many obsessions. He said, "We need to open up the libel laws", so that he could sue news organizations who said bad things about him.

[00:54:32] Jeffrey Rosen: Well, it would be wonderful to, uh, continue, but the rule of our Constitution Center town halls is that they, like Supreme Court arguments, end on time. So I have to thank you so sincerely, uh, Bob Corn-Revere, Nadine Strossen and Adam Liptak for a superb discussion of the deeply important issues involving the suppression of opinion and free speech. Friends, I'm so grateful to you, 500, 600 people coming together at noon on a weekday to grow in wisdom and to listen to competing points of view so that you can make up your own minds about the most urgently important issues at the foundation of our democracy. Let us continue to grow in wisdom together. Let's remember inspiring words of Brandeis, "If we would guide by the light of reason, we must let our mind be bold and keep convening and learning and growing together."

[00:55:24] This is the first of a series of discussions we'll have together over the coming years with the inspiring words of the First Amendment as our backdrop, both virtual and in Philadelphia. And I'm so looking forward to our next conversation. Bob, Nadine and Adam, thank you so much for a wonderful, lengthy discussion.

[00:55:41] Adam Liptak: [crosstalk 00:55:41] Thank you.

[00:55:42] Nadine Strossen: Thank you, Jeff. And thanks, Adam And Bob.

[00:55:44] Jeffrey Rosen: Thank you.

[00:55:47] Tanaya Tauber: This episode was produced by Melody Rowell, Lana Ulrich, John Guerra and me, Tanaya Tauber. It was engineered by Dave Stotz. Visit constitutioncenter.org/debate to see a list of resources mentioned throughout this episode, find the full lineup of our upcoming shows, and register to join us virtually. You can join us via Zoom, watch our live YouTube stream, or watch our recorded videos after the fact in our media library at constitutioncenter.org/constitution. As always, we'll share those programs on the podcast too, so be sure to subscribe so you never miss an episode. If you like this show, you can help us out by reading and reviewing us on Apple podcast or by following us on Spotify. Find us back here next week. On behalf of the National Constitution Center, I'm Tanaya Tauber.