



## National First Amendment Summit

September 13, 2023

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[00:00:00] **Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, president and CEO of the National Constitution Center. On September 13th, we convened a National First Amendment Summit to discuss threats to free expression in America and around the globe and to celebrate the opening of our new First Amendment Gallery. The symposium began with a keynote conversation with Salman Rushdie, and it featured three panels with some of America's greatest First Amendment scholars. Enjoy the show.

[00:00:36] **Jeffrey Rosen:** Ladies and gentlemen, welcome to the National Constitution Center. It is such an honor to welcome you to our National First Amendment teach-in and the opening of our new First Amendment Gallery. And it's so meaningful to be standing here in front of the shining words of the First Amendment. And let's inspire ourselves for the conversation ahead by now gazing at Independence Hall-

[00:01:08] **Audience:** [laughing]

[00:01:09] **Jeffrey Rosen:** ... the room where it happened, the birthplace of the Declaration of Independence and the Constitution, which gave rise to the shining protections for freedom of speech, press, religion, assembly, and petition that we're here to celebrate today. Friends, please visit the First Amendment Gallery before you leave. And when you do, in this magnificent new space, you'll see two documents at the beginning of the exhibit: Thomas Jefferson's Bill for Establishing Religious Freedom in Virginia, and Louis Brandeis' great defense of free speech in *Whitney v. California*. And you'll see at the beginning of the exhibit, Jefferson praising what he called the illimitable freedom of the human mind based on the principle that, as he put it, "The opinions of people being dependent on evidence contemplated by their own minds cannot be controlled by others."

[00:02:13] **Jeffrey Rosen:** "Freedom of speech and opinion is a natural right," he said, "because our opinions are the product of our reason. And our reason cannot be alienated or surrendered to any king or tyrant or fellow citizen. We have the right and the duty to think as we will and speak as we think," as Jefferson said, quoting the great Roman historian Tacitus. And then Louis Brandeis, in his *Whitney v. California* opinion, channeled Jefferson's beautiful words and insisted that the freedom to think as we will and speak as we think is at the core of the First Amendment.

[00:02:46] **Jeffrey Rosen:** Today, we've assembled some of the greatest scholars and thinkers about the First Amendment in America to examine the historic roots of those words, their contemporary contestations in the courts, and how they're playing out online. And I need to thank our incredible partners for having assembled this national celebration and defense of the First Amendment, and they include... I need my constitutional reading glasses to make sure I have-

[00:03:15] **Audience:** [laughing]

[00:03:15] **Jeffrey Rosen:** ... all of them. The First Amendment Watch at NYU; FIRE, the great Foundation for Individual Rights and Expression; the Freedom Forum; PEN America; and the Reporters Committee for Freedom of the Press. And I'm so grateful to Steve Solomon at NYU's First Amendment Watch for having had the brilliant idea that led to us convening today.

[00:03:42] **Jeffrey Rosen:** Friends, we are extraordinarily honored to begin our convocation by hearing from one of the great free speech heroes in the world today. It's so meaningful that Salman Rushdie has agreed to share with us his thoughts on threats to freedom of expression. No figure in the globe more powerfully reminds us of the wickedness of those who try to suppress blasphemy and heresy with violence, and the shining need to defend principles of free speech against all forces of illiberalism and suppression. And joining us to interview Salman Rushdie is a great defender of free speech and a great friend of the National Constitution Center, Suzanne Nossel, the visionary head of PEN America. Ladies and gentlemen, please welcome Suzanne Nossel and Salman Rushdie.

[00:04:41] **Suzanne Nossel:** Thank you, Jeff. Thank you. Hello. Hi, Salman.

[00:04:51] **Salman Rushdie:** Hi. Hello, everybody.

[00:04:55] **Suzanne Nossel:** Great to see you.

[00:05:00] **Salman Rushdie:** It's very nice. You could sit down.

[00:05:12] **Suzanne Nossel:** It's great to be here for this auspicious event. And thank you so much to Steve and Jeff and everybody who has made it possible. So Salman, to begin, I think of that incredibly inspiring moment when in your first appearance publicly since the attack, you came to the PEN America Gala and inspired us with your words and talked about those who helped save your life when you were attacked last summer. And you ended your remarks saying, "La lutte continue," and putting your fist up in the air. And it was sort of just this rousing moment, of a reminder that we are in this fight for the long term. And to begin with, I wanted just your overview of the horizon and what you see as the major threats to free speech and press today here in the US and around the world.

[00:06:06] **Salman Rushdie:** Well, first of all, let me just say I'm really happy to be a part of this important event, and thank you for having me. The First Amendment was one of the reasons why I decided to come and live in America. It was one of the great American values that made me think, "That's a place I'd like to live, if, if those are the values of the society." And I had always assumed that that would be something which all Americans would, so to speak, hold sacred.

[00:06:43] **Salman Rushdie:** And you asked about what the problems nowadays are. I mean, if you'd asked me 10 or 20 years ago, I would probably have said that the main problems facing freedom of expression emanate from religious extremism, from of all kinds, from Islamic extremism, which I have some personal experience of, but also Hindu fanaticism in India and Christian extremism in this country.

[00:07:15] **Salman Rushdie:** The destruction of *Roe v. Wade* being an example of what that could do. I'm not sure that I would give that answer in the same way now, because, in a way, it feels like a kind of 18th century answer. It feels as if we're still fighting the Enlightenment, the Enlightenment fighting against what was then the main enemy of free expression, which was the church, more than the state.

[00:07:44] **Salman Rushdie:** I think now we're facing another old enemy, which is authoritarianism. I think there's a real rise in authoritarian movements around the world, populist authoritarian demagoguery and, coupled with that, a willingness amongst at least some part of the population to cease to value the democratic

values enshrined in the First Amendment. So I think the problem is, I would now say, political more than primarily religious.

[00:08:22] **Suzanne Nossel:** And how do you make sense of the ways in which, even in this country, these authoritarian tendencies and a readiness to, for example, ban books, enact laws that circumscribe what can be taught in the college classroom? How has that taken hold in this place that you came to as a beacon not so long ago? How do you explain it, and how do we get past it?

[00:09:03] **Salman Rushdie:** I find it bewildering, and I think it has to do with two kinds of attack that have been unleashed, not unsuccessfully in recent years. One is on the idea of education itself. I remember seeing some years ago a survey carried out amongst Republican voters in which something like two-thirds of them subscribed to the idea that universities were bad for America because they were places where people were indoctrinated with communism and so forth. That's one thing.

[00:09:46] **Salman Rushdie:** The other thing is the thing that you and I, Suzanne, have talked about a lot, which is the assault on the idea of the truth, because one of the preconditions for the rise of authoritarian strongmen is that people cease to believe in the truth. People are told so often that what everything they're being told is a lie, that they begin to internalize that. And at that point, the demagogue, the authoritarian, can rise to his feet and can say, "I am the truth. Believe me, because I am the truth." That's how dictatorships start. That's how tyrannies rise.

[00:10:26] **Salman Rushdie:** And we're seeing phenomena like that in this country, but around the world as well, you know. And those two attacks on education, on the value of education, and on the absolute value of the truth, unfortunately, have been, to some degree, successful.

[00:10:52] **Suzanne Nossel:** To shift gears a little bit. I want to talk about censoriousness emanating from the left. You know, at PEN America, we've spent a lot of time and energy trying to set out how the values of diversity, equity, and inclusion can and must be reconciled with free speech. And to us, it seems crucially important because the rising generation in this country too often sees free speech in the First Amendment as a smoke screen for hatred. And we feel... We don't explain how these ideals can fit together, how free speech protections can enable the movements that young people are waging. We are at risk of free speech losing its moorings in our society-

[00:11:32] **Salman Rushdie:** Mm-hmm.

[00:11:33] **Suzanne Nossel:** But, you know, in dialogue with you sometimes over the years, I, wonder whether you feel that's the right approach or whether you think it's something of a distraction or a detraction from the unflinching defense of free speech. Do you ultimately think these values can be reconciled?

[00:11:53] **Salman Rushdie:** I hope so. I hope so. And I do think that's the problem that you described, the problem of the kind of progressive attack on free speech is, so far anyway, seems to be a province of the very young. So there's a bit of me that thinks maybe they'll grow out of it. I do think that, you know, different countries define free expression differently. So, for example, when I was living in the UK for a long time, the UK has a thing called the Race Relations Act. The Race Relations Act makes it illegal to make racially charged remarks. You can be prosecuted and sent to jail.

[00:12:43] **Salman Rushdie:** And, when I lived in England, I didn't see anything much wrong with that. I thought, "Okay, racism is against the law. Why not, you know?" The First Amendment defines speech more broadly than that.

[00:13:00] **Salman Rushdie:** And when I moved to America, I came to appreciate that. I came to think, "Okay, let's hear all the voices so that we can... so that we know where the bastards are, you know, so that we can fight back against them." But I can understand both arguments. And I do think to this day in the UK, people on the left and the right value in the Race Relations Act. It's seen as being worth it.

[00:13:27] **Salman Rushdie:** So I think one of the things that maybe might be worth debating in this convention is that question about whose definition of free expression works best in the current climate. For example, in Germany, it's a crime... Holocaust denial is a crime. And, I mean, you can see why, given the history of Germany.

[00:13:53] **Salman Rushdie:** I still... My view is that that's a real mistake that Holocaust denial doesn't disappear by being made illegal. And, in some way, it acquires a kind of... It acquires the glamour of taboo. You know, forbidden things are glamorous. And, I think Holocaust denial should be presented as being astonishingly unglamorous, which it is.

[00:14:21] **Salman Rushdie:** So what I'm saying is that there isn't simply a thing called free expression. There's... individual Western societies have made up their own minds about where that line should be drawn. And I've always liked the very broad definitions of the United States. I do think there are problems arising out of new technology. There are problems based on what the internet makes possible, and there are problems based on what social media make possible.

[00:14:54] **Salman Rushdie:** So the abuses of free expression that are rampant on the internet and on social media do create a problem for us. And I think it's - I'm not even sure what my answer to that is. But it's something we need to seriously think about.

[00:15:15] **Suzanne Nossel:** Yeah. I wanted to. I mean, when you mentioned Holocaust denial, one thing that comes to my mind is, in addition to the points you raised about why it's problematic to try to suppress it and how that doesn't ultimately work, it also becomes a template. And when I worked at the US State Department, we were trying to fend off an effort at a global ban on the defamation of religion.

[00:15:39] **Suzanne Nossel:** And one of the prime arguments that the Islamic countries brought forward was that, in many countries, Holocaust denial is banned. And if you're going to ban, you know, that which is offensive to Jews and might fan anti-Semitism, why won't you ban that which is offensive to us and might fan anti-Muslim sentiment? And we always, as the US, had a very good argument which is: we wouldn't permit the banning of Holocaust denial in this country. And, you know, that ultimately, I think, made a big difference. It would have been a much harder fight to win, you know, if that prohibition was universal.

[00:16:11] **Suzanne Nossel:** But I want to come back to the question of social media because I think this is a real dilemma. I think we all basically accept far more restriction. The notion that far more restriction of speech on social media is legitimate, that the kind of community standards that a platform like Facebook or Instagram has. or the rules of the road that Twitter traditionally had, allow those platforms to be functional, allow a real give-and-take that doesn't become just a race to the bottom in terms of vitriol and disinformation, taking over the platform, doing what you described in terms of an underpinning of authoritarian societies where you can't ferret out the truth. There's no route to truth. It's so flooded with disinformation, no one can figure out what to believe.

[00:16:59] **Suzanne Nossel:** But the question is there have also been very staunch kind of backlash against some of those restrictions, people arguing that speech is being suppressed on conservative versus liberal lines, that important topics about the vaccines and COVID and the origins of COVID have been suppressed, the interplay between government and social media companies.

[00:17:27] **Suzanne Nossel:** So I wonder, Elon Musk is sort of throwing those rules out the window and making his forum much more of a free-for-all. Is your instinct that that's the right answer or that we somehow have to muddle through and develop these kind of ever-more elaborate rules to try to govern what is and isn't permissible on social media? And I ask you also as someone who's active on Twitter and on Facebook and does engage in dialogue in this forum.

[00:17:55] **Salman Rushdie:** I mean, I engage a little bit. What I have found is that, increasingly, it's become an unpleasant place to be. I feel that whatever you should call this, I mean, X, -

[00:18:15] **Suzanne Nossel:** [laughs]

[00:18:15] **Salman Rushdie:** ... Feels like a room you don't want to be in, a room full of people you don't want to talk to. And, so, I go on relatively little. I do sometimes think that all other media, broadcast or print, all other media are subject to a certain kind of regulation, which is to say, editorial regulation. That's to say that books, television programs, radio, films are held to be editorially responsible for their content. And this is why publishing companies have book editors as opposed to just pushing out anything that anybody sends them.

[00:19:01] **Salman Rushdie:** This is why newspapers have book editors. And, for example, in the fight that we were involved in about the Charlie Hebdo murders, the editorial decisions of a magazine like that are, are often disagreed with by members of the magazine. But somebody, the buck stops somewhere. That there is, in the end, an editor's desk who has to make choices. And that is true of every single other medium that has ever existed, print or broadcast.

[00:19:34] **Salman Rushdie:** Now, we have this new thing which functions like the Wild West, where you can ride into Dodge with a gun because, "Hey, we believe in freedom." [laughs] So the question is whether some of the principles that govern all other media can somehow be applied to these new media.

[00:19:58] **Salman Rushdie:** And I'm, by no means, equipped to answer how, because it's a really difficult problem. But I do think there's something that needs to be really thought about, because it's not true in any other form of expression that you can just shoot your mouth off without consequences.

[00:20:17] **Suzanne Nossel:** Right. I mean if you go back to the early days of the internet, that ability that it affords to just shoot your mouth out immediately and reach an audience sometimes hundreds of thousands or even millions, if what you've said or what you've shown is potent enough. That was seen as a great boon to free expression, those-

[00:20:40] **Salman Rushdie:** Yeah.

[00:20:40] **Suzanne Nossel:** ... barriers, having to get the New York Times op-ed editor to green light your piece, [laughs] or get a publishing contract. You know, there was another route. And that was celebrated, and it has enabled an enormous amount of expression. But, now, we face not just social media, but with AI and large language models. You know, the very nature of these services is that immediacy, is the fact that there's no intermediary. There's no editor that you send it to. These posts are not reviewed before they make it out into the world.

[00:21:10] **Suzanne Nossel:** With chat GPT, it's automated. You could never execute on that in any other way. And so, I guess, what do you think about that balance? Do you think there's still something to that idea that the accessibility of these platforms and the reach that you can attain is a positive that, as a society, we need to try to preserve-

[00:21:32] **Salman Rushdie:** Yeah.

[00:21:33] **Suzanne Nossel:** ... or has it tipped over, and so that it's really more negative than positive at this point, and, we ought to try to rein them in and make them look more like book or magazine publishing?

[00:21:45] **Salman Rushdie:** You know, I think both things are true. I think it is true that things like Twitter have value. For example, with a rapidly breaking news story, you very often find out what's happening faster on something like Twitter than you do from any other source. Also, in various moments of political upheaval, such as I'm thinking of, for example, the Arab Spring, the use of Twitter was incredibly important to the demonstrators in that moment, and got the news out to



the rest of us in the world about what they were trying to do and what they stood for and et cetera.

[00:22:28] **Salman Rushdie:** So there's no question that there is value. The question is how that can be protected from drowning in a kind of sea of vitriol and lies. And this is the question that we face because I think it's a question that has enormous democratic consequences. And I wish I knew the answer. But, at least, I can ask the question.

[00:22:55] **Suzanne Nossel:** I want to ask you a little bit about institutions and both how you see these threats to free speech affecting our democratic institutions, elections, the functioning of a body like the United States Congress the role of the executive branch, and a presidency kind of amid these buffeting tensions and the erosion of truth. What is at stake and how can we fortify our institutions?

[00:23:29] **Suzanne Nossel:** Sometimes, I get frustrated because the conversation about democracy often doesn't even seem to reference free speech. It's all about free and fair elections. And, of course, that's incredibly important and voting rights. And yet, free speech is underpinning that I feel is almost sort of being lost in this mortal debate over how we save our democracy.

[00:23:54] **Salman Rushdie:** Yeah. Well, it is a mortal debate. And I think one of the problems is that you have essentially only one major political party that seems to believe in democratic values now. And you have another one that seems to be doing everything it can to undermine them. When you have the large majority of Republican voters believing that the last election was stolen as they do. Every time they're asked, it's very large majority of Republican voters believe that Donald Trump won the last election and that he was cheated of his victory.

[00:24:34] **Salman Rushdie:** Now, if the assault on the truth has reached that level of success, then, we're in real trouble. And, I've always believed, and I think just about, I still believe, that the answer to speech is more speech, that the answer to wrong speech is better speech. And I do think that that's what we have to get better at doing. We have to get better at combating this, this tidal wave of misinformation, disinformation by telling the truth.

[00:25:11] **Salman Rushdie:** And I mean, when we had our PEN meeting at the United Nations one of the things that I was trying to say there was that what's happening actually is a very, quite a literary thing. It's a battle of narratives that

you have all over the world false narratives being propounded quite cold-bloodedly in order to make possible certain kinds of actions in the present moment. And Make America Great Again has always made me want to ask when exactly was that? [laughs] What was the date, to which we are looking backwards?

[00:25:59] **Salman Rushdie:** Was it, for example, when there was slavery? Was it before women had the vote? Was it before the civil rights movement? Exactly which is the American greatness to which we must return? Because, of course, it's just simply, a golden age myth. And the thing about the golden age is that it never existed. And, the myth of the golden age is always used to justify actions in the present.

[00:26:28] **Salman Rushdie:** In England, the Brexit catastrophe was the result of another golden age myth, which is that England used to be this glorious country, and it could be that glorious country again if only we could get rid of all these foreigners. And that didn't work very well, because, of course, they neglected to mention to their population, their electorate, that the reason England was so prosperous was that it had spent 200 years plundering the rest of the world.

[00:26:56] **Salman Rushdie:** In India now, there's a golden age myth, which is that India was a wonderful place before the Muslims arrived and that if it could go back to that purely Hindu nation, everything would be better. This allows all kinds of sectarian violence to be taking place in the present day.

[00:27:20] **Salman Rushdie:** So wherever you look, you see narratives being pushed, which are dangerous narratives. And we are the keepers of narrative. It's our job, journalists and writers, and we have to just become a whole lot better at providing counter-narratives.

[00:27:39] **Suzanne Nossel:** We have to wrap in a minute, but I want to push you a little bit on that and ask, what does it actually look like to construct and promulgate a narrative that can... Yeah, I take your point about the golden age, but I also think about how we began this conversation. You're saying that you came here in part because of the First Amendment and, the-

[00:28:06] **Salman Rushdie:** Yes.

[00:28:06] **Suzanne Nossel:** ... this hall and this museum is about the Constitution, and I think we're all here in part because we actually do believe there's something

valuable. Maybe, there was no perfect moment, but there were some ideas and then some institutions that work better than just about any alternative that you could imagine when they were working at their best.

[00:28:30] **Suzanne Nossel:** So how do we... As we look forward, what is the narrative that we can construct about the future that has some hope of getting people beyond, what you've described to me, as people being defined by what- that which offends them? What is the-

[00:28:48] **Salman Rushdie:** Mm-hmm.

[00:28:49] **Suzanne Nossel:** ... affirmative narrative or, where should we look? Where do we group to begin to construct that?

[00:28:54] **Salman Rushdie:** I don't know. It's very hard to get people to celebrate the positive. Much easier to get them to denigrate what they think of as negative. It's an unfortunate characteristic of human nature, that it's easier to attack than to defend.

[00:29:12] **Salman Rushdie:** And if what we're trying to do is defend values, which you rightly say, I'm sure everybody assembled in that room believes in all you can do is do it. And what you have to do is win the arguments. And that means having people who are good at arguing. And to do that, it's not going to be overnight. It might be a generational thing. And you have to persuade young people that it's worth it.

[00:29:42] **Salman Rushdie:** I mean, it seems to me the danger to me is young people ceasing to believe in First Amendment values and preferring the idea that all sorts of speech should be prevented because they don't like it, or it represents values which they don't hold. But the whole point... I mean I've said this to any number of student audiences, and they always look a little bewildered, that the defense of free speech begins when somebody says something you don't like, that it's perfectly easy to defend speech with which you agree or which seems to me to be irrelevant.

[00:30:28] **Salman Rushdie:** When you discover if you're in favor of free speech is precisely when somebody says something you don't like. And the more extremely you don't like it, the more it questions whether you believe in free speech or not. So, free speech is the defense of speech you don't like.

[00:30:45] **Salman Rushdie:** And we have to persuade people of that in this age of offendedness. This age of outrage identity that has to come to an end. It's too easy to define yourself by what outrages you. It's necessary for us to understand that you have to allow the speech of those you don't like.

[00:31:14] **Suzanne Nossel:** Well, Salman, you embody the courage to say that which others may not like and to hold your ground come what may and no matter what. And so, your courage is inspiring, and you've charged all of us to turn around this narrative is potent. So, thank you so much for joining us here today and being with us.

[00:31:41] **Salman Rushdie:** Oh, thank you so much. I feel happy to have been able to do it. Bye-bye.

[00:31:41] **Audience:** [applause]

[00:32:08] **Jeffrey Rosen:** Friends, at the end of his extraordinary conversation with Suzanne Nossel, Salman Rushdie challenged us to defend the First Amendment principle that we must protect the thought we hate, as Justice Holmes called it, and that, in America, speech can only be banned if it's intended to and likely to cause imminent violence. That's the principle that comes from the *Brandenburg* case. It was articulated by Brandeis in *Whitney*, and it makes America, as Salman Rushdie said, the most speech-protective country in the world.

[00:32:42] **Jeffrey Rosen:** And on our first panel, we're going to explore the history of that shining idea with three of America's greatest historians of freedom of speech. And I'm so excited for the conversation. We have Jacob Mchangama from the Future of Free Speech Project, Akhil Amar from Yale Law School, Steve Solomon from NYU.

[00:33:02] **Jeffrey Rosen:** And Jacob Mchangama, I want to jump right in and first say that your book *Free Speech: A History from Socrates to Social Media*, I think, is the clearest and best history of the evolution of the idea that I've read. And I want to begin by asking you, "Where did it come from?" The phrase that, "We must have the freedom to speak as we will and think as we speak," you teach, came from Tacitus, the Roman historian. And it was then picked up by Spinoza, I learned from your book, and then articulated by Cato's letters, the great Whig revolutionary theorist who inspired Jefferson. Tell us more about that evolution, how it began in Athens and Rome, and then was picked up by the Enlightenment.

[00:33:51] **Jacob Mchangama:** Well, first of all, thanks for inviting me too. I'm not an American. So, I feel like I've been given a wild card to the all-star First Amendment game here in the US. It's a great honor to be here. The First Amendment was not the first invention of free speech. I would say we need to go back to the Athenian democracy actually to find the origins of free speech. And the Athenians had two models of free speech. One was isegoria, meaning equality of political speech, all free-born male citizens had a right to speak. And then parrhesia, which is a civic commitment to the tolerance of dissent, which permeated Athenian culture.

[00:34:31] **Jacob Mchangama:** And then, you have the interesting Roman example of Tacitus. But the Roman example is a bit more top-down, elitist conception of free speech. So it was the elite, the well-educated elite, not the unwashed mob, who was supposed to exercise free speech. But it was the Roman ideals that inspired, as you mentioned, Cato's letters that came up with this great enlightenment theme that free speech is the great bulwark of liberty that made it into the Virginia Declaration which made it into Madison's first draft of the First Amendment which even made it to radicals in Russia, and was spread all over colonial America. And which also I think played a very important role in a case from 1735, the *Zenger* case, where a printer who was the printer of the first opposition newspaper in the US was attacking the governor of New York, was put on trial for seditious libel.

[00:35:28] **Jacob Mchangama:** And normally, it would have been an open and shut case, but the jury, drunk on Cato's principles, decided to acquit him even though the common law was pretty clear. And since that case, it basically became almost impossible for colonial governors to use seditious libel trials to convict people, to have juries convict them, because a culture of free speech had been inculcated. And I think that marks a huge difference from 17th century America, where you have more than 1,200 cases of people being prosecuted for speech. Where, here in Pennsylvania under William Penn himself, a former prisoner of conscience, you had pre-publication censorship and a council in 1683 presided over by William Penn sentenced Anthony Weston to be lashed 30 times for sedition speaking out against the government that William Penn presided over.

[00:36:20] **Jacob Mchangama:** So, a huge shift between the 17th and the 18th century in the understanding of the importance of free speech. And that sort of plays into developments leading up to the revolution and also afterwards.

[00:36:32] **Jeffrey Rosen:** Oh, what a beautiful encapsulation of the history of free speech. That phrase, "Drunk on Cato's letters," just sums up how the colonists absorbed the spirit of liberty. And you've so well set the stage for our conversation. Akhil Amar, you were my first teacher of constitutional law and have kindled my understanding of the Constitution and that of so many Americans. And in his Virginia bill for Religious Freedom, Thomas Jefferson offered four reasons for protecting free speech.

[00:37:04] **Jeffrey Rosen:** First, that freedom of speech is an unalienable natural right that comes from God or nature, not government. Second, that free speech is necessary for the discovery and spread of political truth. Third, that free speech is necessary to hold public officials to account. And fourth, that it's necessary for democratic self-government.

[00:37:21] **Jeffrey Rosen:** Now, not all of those were shared by all of the founders, and you've taught in your writings that it was really a concern about the collective self-determination of the people that was at the centerpiece of so many of the founders. And that evolved over the course of American history. But I want you to teach our friends how those Jeffersonian ideals were accepted or not by the different founders and who were the leading voices in the founding on behalf of free speech.

[00:37:51] **Akhil Amar:** So Jeff, it's such a great honor to be back here. And, yeah, you're right. Way back when I had black hair and you were just a lad, that's when we first-

[00:38:03] **Jeffrey Rosen:** [laughs]

[00:38:03] **Akhil Amar:** ... met. And this is an amazing audience. But Salman Rushdie said one thing at the end that should concern us all. Look, look around. There are not enough young people in the room. We were young back then. We we have to teach our children. To, you know, to, to borrow from Crosby, Stills-

[00:38:24] **Jeffrey Rosen:** [laughs]

[00:38:24] **Akhil Amar:** ... Nash and Young. So here's the thing, because Jeff, you're right. This is an amazing place. Ladies and gentlemen, please look to your right. Okay. So that is the room where it happened. And two things happened, and they were different. You know, people can talk. But then, are you willing to walk

the walk? Okay. The Declaration of Independence drafted there, and here's the thing. It wasn't really put to a vote.

[00:38:51] **Akhil Amar:** And then, the Constitution is drafted there, and it is put to a vote. And the Athenians didn't put the Cleisthenic Constitution to a vote, and the Romans didn't. And this is astonishing, and that's amazing, and more people got to vote on when America became great. It's not perfect - slavery and all the rest, but that's a moment in human history. It's astonishing because an entire freaking continent is getting to vote on how they and their posterity are going to be governed. More people got to vote than ever before in human history.

[00:39:25] **Akhil Amar:** But they also spoke. So, you actually have here an artifact, a newspaper publishing the proposed constitution. There is freedom of the press before there's a First Amendment, you see, because the press is free to publish this short little thing. It's short, not so judges can make stuff up but... So the ordinary people can actually read it, start to finish, and decide whether they're for it or against it. So that's freedom of the press before there's a First Amendment. They put it to a vote. Two things, and then I'll shut up.

[00:39:58] **Akhil Amar:** The first thing ordinary people say is like "Dudes, you forgot the rights." To secure these rights, governments are instituted among men, securing their just powers to the extent of the government. "You forgot the rights," says George Mason, and other people, and they did.

[00:40:14] **Akhil Amar:** And in this ratification process, actually, the federal said, "You're right, we goofed." So first thing we're going to do, we're going to add some amendments, and what do the amendments say? "The people, the people, the people, the people, the people" as in the right of the people to petition and assemble and the Second Amendment and the Fourth and the Ninth, Tenth. Because it's coming from this "We the People" Act of ordainment, establishment. We're putting it to a vote, and ordinary people say, "You know, we want rights, including rights to criticize, because that's what we're doing right now."

[00:40:42] **Akhil Amar:** Final point, the people who...you're allowed to oppose the Constitution, and you're not voted off the island. If you oppose the Declaration of Independence, you're almost not heard from again, truth be told, because it's a war, and you're either for us or against us. And almost no one who opposes the Declaration goes on to anything, truthfully.

[00:41:02] **Akhil Amar:** You can oppose the Constitution. And, like George Mason, we still have universities named after you, you see. And you can be President of the United States, James Monroe, Vice President of the United States, Elbridge Gerry, George Clinton, Justice on the Supreme Court, Samuel Chase. So we don't just say it. We do it. The Bill of Rights comes from critics, comes from dissenters, comes bottom up from the people.

[00:41:42] **Akhil Amar:** So two amazing things happened there. Declaration, not bad. Constitution, even better because more people got to vote, got to speak, got to criticize. And they were listened to and not voted off the island. And that's the story of the word the people in this amazing wall that you have up there.

[00:41:53] **Jeffrey Rosen:** Beautiful. And you tell the story of the connection between We the People and the Constitution so well in your books. And Akhil, I just have to tell you what an electric thrill it is to be talking about the First Amendment here with you and our friends gazing at the Independence Hall. It's just an extraordinarily sacred space to be talking about free speech.

[00:42:15] **Jeffrey Rosen:** Steve Solomon, the man who convened all of us, your magnificent book, *Revolutionary Dissent: How the Founders' Generation Created the Freedom of Speech*, tells the stories of jury trials like the Zenger Trial, which Jacob Mchangama mentioned, and other dissenters like McDougal, who were acquitted by jury nullification by liberty-loving juries that didn't want to enforce seditious libel laws. Tell us about how those revolutionary dissenters shaped the Founders' conception of free speech.

[00:42:48] **Steve Solomon:** Yeah. Well, Thank you. Thank you, Jeff, very much. So, the law. There was of England, the common law of England that was adopted here, came over the Atlantic to find freedom of speech in a very limited way. What it said was it was a freedom from prior restraints. So, the government could not shut down the newspaper. It could not license the newspaper. However, once you published-

[00:43:18] **Steve Solomon:** ... you were responsible for what you published. And in terms of what we're talking about today, the concern was criticism of the government. And that's what we call seditious libel. It's the criminalization of criticism of the government. That system was here. Now, in August of 1765, after the passage of the Stamp Act, which taxed Americans without their consent, something happened in Boston. They put up... they dedicated a liberty tree. And



half the town came out, and they heard speeches all day. There were effigies hanging of the British prime minister, and it energized the opposition.

[00:44:06] **Steve Solomon:** This was carried by newspapers all throughout the colonies. And one by one all these cities put up their own Liberty poles, Liberty trees. And debate was energized, and it was opposition to British taxes without consent and other things too like general warrants. And the Liberty trees were just one thing. People started writing pamphlets, broadsides. It's- They, they wrote poems. They wrote plays. They were all criticizing Britain for their policies.

[00:44:44] **Steve Solomon:** Now, at least technically, all of this literature, all of this action was a violation of seditious libel. Jacob made mention of the *Zenger* case. That was 1735. Now, go forward to the 1760s, the British aren't really happy about all this criticism, and they start to try to use their seditious libel laws against the colonists. But they're not successful, because in order to bring a case, you've got to convince a grand jury to indict. They couldn't do that.

[00:45:18] **Steve Solomon:** Some examples, the Boston Gazette, the most radical paper in America, published Samuel Adams. They published all kinds of revolutionary literature. The governor tried four times to get indictments. All four times, the grand jury said, "No." Then, he went to the General Assembly of Massachusetts, tried to get action there. They came back and said, "No," and said the freedom of the press was a bulwark of liberty.

[00:45:50] **Steve Solomon:** He moved south to New York City. He mentioned Alexander McDougall. Alexander McDougall was a wealthy merchant. He circulated a broadside for the Son of Liberty. He was identified as the writer. They were unable to convict him, again, because of the popular resistance to seditious libel.

[00:46:15] **Steve Solomon:** And one more example, because it shows just how desperate the colonial governors were. The rural governors, going down, again, a little bit south to Virginia. Governor Dunmore, 1775, conflict has already broken out of Lexington and Concord. He flees Williamsburg, gets on a man of war, a British man of war in Chesapeake Bay, and he's criticized. He's suffering the slings and arrows of outrageous pamphlets.

[00:46:51] **Steve Solomon:** And he's very unhappy. He's like, "Well, you know, I'm not going to... I'm not going to be able to indict these newspaper publishers.

But he has another idea. One morning, he sends a dozen of his soldiers on a boat off the man of war into Norfolk. And they go to the offices of the Norfolk Intelligencer and they take the printing press. And they take it out to the man of war. Not only did they shut down the Norfolk paper very critical of him. But then, they started publishing all kinds of propaganda in favor of the king. So that's the desperation that they had. How could they stop the criticism?

[00:47:34] **Steve Solomon:** It got to the point where the only way to stop it was to take this kind of radical action. Now, coming out of this period, I have to quote Samuel Adams who I think maybe said it best. Listen to this quote, "There's nothing so terrible to tyrants as a free press. There's nothing so terrible to tyrants as a free press." You can see that today, right? I mean, Salman talked about authoritarianism. That's what authoritarians do. They try to shut down the press. He saw that, and that's where we are.

[00:48:17] **Jeffrey Rosen:** Steve, you just talked about the history of sedition. And Jacob, I want to ask you about the history of sedition. So as Steve and Akhil mentioned, the Sedition Acts of 1798 tried to criminalize any criticism of the federalist president, John Adams, but not the Republican vice president, Thomas Jefferson. Jefferson and Madison objected to the Sedition Acts on grounds of federalism. They said that Congress couldn't exercise that power, reserving the possibility that the states might.

[00:48:55] **Jeffrey Rosen:** But in their great dissents in the 1920s, Brandeis and Holmes disagreed and came up with the idea that speech should only be banned if it's intended to and likely to cause imminent violence, and really causing offense against the authorities was not enough. So I want to ask you, what's the history of that principle, that you can only restrict speech if it's intended to and likely to cause imminent violence? Was it original with Holmes and Brandeis, or are there roots back in ancient times?

[00:49:25] **Jacob Mchangama:** Well, I want to take a step back first with the Sedition Act of 1798, because I think that really demonstrates that the sort of two conceptions of egalitarian and elitist free speech survived into American history. So you see that suddenly with the Sedition Act, suddenly, federalists are saying, "Well, yes, we've adopted the First Amendment, but basically, we have a Blackstonian conception of free speech, you know, prior constraints." But if you say something against the government, you can go to jail. Whereas at least, if you

read his report of 1800, he writes a meticulous detailed argument in favor of why the First Amendment protects against seditious libel.

[00:50:07] **Jacob Mchangama:** And he specifically distinguishes America from Britain, where Britain has a much more elitist system. America is governed by the people. And therefore, seditious libel laws violate that. So, that's important. I think those two conceptions are with us today. Even in the age of social media, we see sort of these two conceptions. But the idea that words should only be punishable when they incite to violence, or at least when they lead to act, is something that you see in Tacitus. It's something that you see in Spinoza.

[00:50:53] **Jacob Mchangama:** And, of course, they are crystallized very clearly in *Brandenburg* which is a decision which I think a lot of people outside America don't understand including in my country. My home country, Denmark, is right now reintroducing a blasphemy ban because people on the far-right have been burning Qurans in public.

[00:51:14] **Jacob Mchangama:** So now, the, the government is passing a law which says that the improper treatment of religious objects will be punishable with treason of up to two years under a chapter in our criminal law which punishes treason and threats to national security. And, you know, it was only in 2017 that the Danish government abolished its blasphemy ban.

[00:51:37] **Jacob Mchangama:** So I think that principle really is central to the principle that Salman also talked about - that if you are serious about defending speech for those that you don't like, you really need to have very, very clear principles. Because, otherwise, human beings are experts at convincing themselves, coming up with elaborate narratives of why free speech is really important, but the communists, the abolitionists, the women's rights activists, the gay rights activists are actually undermining free speech or undermining the values on which democracy depends. And, therefore, they have to be criminalized. So I personally am a big fan of *Brandenburg* and I wish that principle was more universally observed, but that's not the world we live in.

[00:52:29] **Jeffrey Rosen:** Yes. Look, we must teach that *Brandenburg* principle as part of our convening today. Speech can only be banned if it's intended to and likely to cause imminent violence, not if it might cause a possible bad act in the future, not if it might cause offense, not if it could possibly incite people to affiliate with others who might argue. No, it has to be intended to and likely to cause

imminent violence. And it's the most speech-protective principle in the world and so interesting to learn that it has roots in Tacitus and Spinoza.

[00:52:57] **Jeffrey Rosen:** Akhil, help us understand exactly where it came from in the thoughts of The Founders. Jacob mentioned Madison's report of 1800. Is that the crystallization of the libertarian conception that speech can only be banned if it's intended to and likely to cause imminent violence? And then, how did it evolve during the Civil War and finally make its way to Bran- to Brandeis, and Holmes, and Brandenburg?

[00:53:22] **Akhil Amar:** Yeah. Thanks for mentioning the Civil War because it's important.

[00:53:26] **Audience:** [laughing]

[00:53:26] **Jeffrey Rosen:** No-

[00:53:29] **Akhil Amar:** So here's- I actually... This was not intentional, I get all my clothes from downstairs, my ties and things like that. But it turns out, I think I'm wearing my Abraham Lincoln socks today.

[00:53:38] **Audience:** [laughing]

[00:53:38] **Akhil Amar:** That wasn't for this event. And I do have my We the People socks from downstairs. They're very nice. And, I'll... They have great ties here. Here's the point.

[00:53:50] **Audience:** [laughing]

[00:53:51] **Akhil Amar:** Salman Rushdie told you because he's one of the world's greatest writers, about storytelling and narrative. Okay. Narratives are very powerful. Here's why we have a particular challenge because we are the one nation in the world where the great grandchildren of all the other continents actually come together. And that puts real strains on us because we don't have race in common. We don't have religion in common, not even quite language.

[00:54:20] **Akhil Amar:** Some of our forebears came here hundreds of years ago in chains, others hundreds of years ago with bullwhips in their hands, and others came yesterday. So the only thing that we have in common is actually our

Constitution and our narrative. And the big narrative, *Brandenburg* is good, and Brandeis is good. Holmes. But here's the big narrative. You need to understand the American Revolution, which gives us the Declaration of the Constitution, and the American Civil War, which gives us the Fourteenth Amendment. That's the big picture. That's what we Americans have in common. We have in common George Washington and Abe Lincoln especially, more than anyone else.

[00:55:02] **Akhil Amar:** So, he told you, and he's right, the Brits, they're so stupid. They actually... It's not just that they put a tax. The Americans haven't voted for it. They put a tax on paper, in the Stamp Act. That's a tax on newspapers, and who's not going to like that? The newspapers, okay? Don't put a tax on newspapers because they're going to push back. That's not very smart, and that's the American Revolution. And there's anxiety about this new central government that's being created.

[00:55:31] **Akhil Amar:** And so the first thing they say is where are the rights and the central government can't restrict stuff. Congress shall make no law, and John Adams wasn't quite there for all of this. And he kind of missed the memo. And so he makes it a crime to criticize Donald Trump... I mean criticize John Adams, excuse me.

[00:55:53] **Audience:** [laughing]

[00:55:53] **Akhil Amar:** And he's thrown out on his ass by the American people. He's the only early president who is, because he doesn't get it. But today, threats come not just from religious extremism, as Salman Rushdie said, and maybe not just from certain media outlets that have monopolies but from states and local governments.

[00:56:17] **Akhil Amar:** Think about actually the threats today, and this one isn't going to help you very much. It says, "Congress shall make no law." Well, there's another war in America, because the Revolutionary War is locals against the central government. And we like local juries and local militias even, and that's a Bill of Rights. Congress shall make no law in the Tenth Amendment, and militias and juries in the Fifth Amendment grand jury, Sixth Amendment Trial Jury, Seventh Amendment Civil Jury. That's Steve's story. It's about revolution, he said. But the rights actually originally don't apply against states and localities.

[00:56:54] **Akhil Amar:** And that's a mistake, because states and localities start to suppress, and Jefferson doesn't fully get it. And it's a capital offense in many states to criticize slavery. I'm not making that up. A capital offense. The Republican Party is outlawed in the Deep South in the 1850s more than the Communist Party ever was in the 1950s.

[00:57:18] **Akhil Amar:** Abraham Lincoln's name is not allowed to be on the ballot in effect. South of Virginia gets zero popular, not electoral. Zero. Zero. You can look it up in Wikipedia. Zero popular votes south of Virginia because we've outlawed discourse. And a great war comes as a result of this. And, in the aftermath, we insist never again. No state can make or enforce any law which abridges these fundamental rights. Say, shall make no law abridged. That's there, but that's only the federal government.

[00:57:56] **Akhil Amar:** Now, the Fourteenth Amendment says, "No state shall make or enforce any law which shall abridge, shall make no law abridged." The same words as you see up there, but states and localities are limited. That's because of Lincoln. That's because of the Civil War. So final sentence.

[00:58:11] **Akhil Amar:** The only thing we have in common is our Constitution and our national narrative. And the kids don't learn it. They don't know their presence. They don't know the history of the Revolution and the Civil War, which give us the Bill of Rights and the Fourteenth Amendment. And if we don't know that, we die. Okay? So, that's our narrative. And we need great storytellers to tell that story. And when they come here, they begin to learn that story, Jeff. But we have to bring the children here. We really do. That's the national narrative that needs to be taught.

[00:58:42] **Jeffrey Rosen:** Absolutely, Akhil. And it's so exciting to think of bringing all those school kids to stand in this space, to see the tablet, and then to see that gallery and to see Brandeis' original opinion and George Washington's letter to the Quakers and Mary Beth Tinker's armband. And it's just a privilege to be able to inspire the next generation. Steve Solomon, as Akhil and Jacob have said, many of the Founders were not especially committed to a libertarian conception of freedom of speech.

[00:59:24] **Jeffrey Rosen:** Jefferson was more concerned about keeping the federal government out of prosecuting sedition, but he himself authorized state sedition prosecutions. Hamilton would have allowed prosecution of laws with bad

tendency after the facts. Did any of those juries that acquitted accused critics of the government in the colonial era articulate the idea that speech was a natural right that should only be banned if it's intended to and likely to cause imminent violence, or was that really just crystallized later?

[00:59:53] **Steve Solomon:** The juries themselves did not articulate that, because that's not what juries do. They come back with guilty and not guilty. Grand juries either indict or don't indict, so they don't come out with, necessarily with reasons for it. But the Founders did.

[01:00:10] **Steve Solomon:** So in their papers, in their essays, in their pamphlets, and there were so many of them, they articulated. They went back to the Enlightenment philosophers, John Locke's natural rights. And they also worked from the Bills of Rights that the states had passed, which nine of the 11 Bills of Rights included the right to a free press. And they called it... It wasn't just a right to a free press. It was... They called it the bulwark of liberty.

[01:00:48] **Steve Solomon:** Now, I think that gives us some clues because if it was just one of a lot of other rights, they would just say freedom of the press. What they saw was the press as a bulwark of liberty, meaning that you can't protect all the other rights if you don't have a free press.

[01:01:05] **Steve Solomon:** And so they were also concerned about general warrants. They were concerned about their jury... The rights to a jury trial being taken away. Without the right to protest, without the right to protest, you can't protect the other rights. You're silenced. And so you lose the other rights by not being able to stand up to them. And so there are clues. There was no committee that sat down and said, "Here's what we mean by freedom of speech and freedom of the press." There's no committee.

[01:01:38] **Steve Solomon:** But I think what you try to do is draw from the writings and their actions and what do they actually understand the concept to mean. And you take that from all the debates that went on, especially in the ratification period. Almost, I would say probably all of the ratification conventions involved a lot of talk about freedom of speech and freedom of the press. So yeah.

[01:02:11] **Jeffrey Rosen:** Speech is the bulwark of every other right. It's so important to remember. We just have time for one final round of concluding thoughts. Salman Rushdie challenged us to debate the idea that the American

principle, that free speech should only be banned if it's intended to and likely to cause imminent violence, is more persuasive, more worthy of respect, better than the view embraced by all other Western democracies in Europe and around the world that speech can be banned if it offends dignity and if it offends honor.

[01:02:47] **Jeffrey Rosen:** Jacob Mchangama, tell us about the competing European view. It has its roots in earliest European history. It was crystallized in the French Revolution. It was embraced in Weimar Germany and is rampant in Europe today. So that our audience understands how different it is from the American view.

[01:03:05] **Jacob Mchangama:** Yeah. So, the classic example would be so-called hate speech laws. So every European democracy has laws that, for instance, criminalize making hateful statements about specific groups, whether based on race or ethnicity or religion.

[01:03:22] **Jacob Mchangama:** And if you want to steel man the case for that, well, then the argument goes, "Well the Nazis came into power through democratic means. And, therefore democracies have to be intolerant of intolerance because, otherwise, totalitarian movements will abuse democracy and free speech to abolish democracy itself." And you could say "Well, you know..." To those of us who are more persuaded by the American approach, you could say, "Well, European democracies since World War II have been prosperous, stable. You have robust political debate, and so what's, what's the danger?"

[01:04:03] **Jacob Mchangama:** Yes, there might be... Sometimes, someone might be imprisoned or fined for speech that we would consider that should be protected... But all in all, you know, things have gone well. But you know, my counter-argument is what I call the Weimar fallacy. So, the idea that Weimar Germany is an argument in favor of restricting free speech, I think, rests on pretty shaky historical grounds because the short-lived Weimar democracy between 1918 and 1933 actually banned a lot of speech, including those of Nazis.

[01:04:32] **Jacob Mchangama:** And, ultimately, the most dangerous thing about it was that the Nazis were able to rely on the emergency laws that were supposed to protect democracy, to abolish democracy. So the emergency provision in the Weimar Constitution allowed the president to suspend all civil liberties. And what happened after the fire in the Reichstag was that Hitler leaned on President Hindenburg to suspend all liberties, and that paved the way to give legal backing to



basically the establishment of a totalitarian one-party state that was entrenched within six months.

[01:05:11] **Jacob Mchangama:** So, I think, historically, that's not a great argument. Of course, I can understand, if I was the chancellor of Germany, could I go out tomorrow and sign a law saying, "Yes, now Holocaust denial is protected speech, and Nazis can walk in the streets"? That's not feasible from a German point of view, just like morally, historically. You couldn't do it.

[01:05:36] **Jacob Mchangama:** So I could understand why the Germans would not do it, but I just don't think the historical arguments are strong for that approach, which is why I prefer the American one. But I also want to say that free speech is a continuous experiment, right? There's no guarantee that free speech will always ensure tolerance and, peace, and prosperity. I think that, historically, the case for free speech is pretty good, but there's no guarantee that it- will always be the case going forward. But if I was to sort of bet, I would bet on free speech over censorship [laughs] going forward.

[01:06:17] **Jeffrey Rosen:** Akhil, in just a few sentences, because we're, almost out of time, you have described yourself as an American exceptionalist when it comes to free speech. Tell our friends why you believe that the American approach to free speech is better than all other approaches.

[01:06:37] **Akhil Amar:** Well, at our best, we've produced a Lincoln. And I don't think any other country has. My parents came from India here, and those of us who are here don't want to go to India. So now, what I do want to say is there are threats posed by the government, by Congress, we talked about that, by states and localities, we talked about that. But some of the deepest threats are within ourselves because I think there's not just a freedom of speech. There's a duty to listen.

[01:07:18] **Akhil Amar:** And as... you can't easily enforce that, but we have obligations to try to listen to our fellow citizens. And we're failing in that. And Nadine, my friend Nadine, is nodding her head, and I was going to give her a shout out anyway. But she is nodding her head because she embodies this. It's so hard every day for me to actually read all the major networks, but I do. It's my kind of obligation as a citizen to try to hear folks across the board. No law can enforce this.

[01:07:49] **Akhil Amar:** This has to come from within. But if we stop talking to each other. And again, this is the spirit of these amendments, and these rules apply only against the government. Okay. But the culture of freedom of speech, it's an amazing newspaper culture in America, and people are actually reading opposing newspapers, and we're not doing that so much anymore.

[01:08:14] **Akhil Amar:** But at our best we have, and yes, there was a civil war afterward and that should be sobering to us. But I would say, if you are an American exceptionalist, we put the thing to a vote, not 1776, but 1787. We didn't throw the critics off the island. We listened to them.

[01:08:34] **Akhil Amar:** And, we allowed repression again but we elected a Lincoln who very much, actually who wins because of debates, open debates. They're called the Lincoln-Douglas Debates, covered in newspapers, and people are hearing both sides, and then voting. That's how, actually, we did it at our best. That was more than a few sentences. My apologies.

[01:08:58] **Jeffrey Rosen:** Beautiful. Beautiful.

[01:08:59] **Audience:** [clapping]

[01:09:03] **Jeffrey Rosen:** Wonderful. Steve Solomon, the last word in this great discussion is to you. You convened us for this National First Amendment Summit. What is the one thing about the First Amendment that you want our audience to think about as we conclude this panel?

[01:09:19] **Steve Solomon:** Yes. So, I would ask you very conveniently. That's the First Amendment is up there. Let's look at it, and see how it's laid out, because I think this is a narrative of democracy, and representative government. These are 45 words that are critical. So, it starts with two religion clauses, which ask people, protect people, in their inner self, the freedom of thought, the freedom of conscience. And they think about sort of the place in the universe and perhaps the relationship to a higher power. That's the inner self.

[01:09:53] **Steve Solomon:** Look at the next right. We emerge far from our inner self, and we are protected in the freedom of speech, whereby we are talking about ideas and political idea. And some of them may be very controversial. That's all well and good, but it doesn't do much politically unless you can get it out to a lot of

people. And so, the next right the Founders protected is freedom of the press, the institutional means of spreading ideas that people have among themselves.

[01:10:27] **Steve Solomon:** Now, once you do that, you spread these ideas across the country, the next step that's protected is you assemble with like-minded people for political purposes. And that's, you know, in the streets, back then, it was back in Liberty trees and so forth.

[01:10:46] **Steve Solomon:** And so you bring together a political movement. For what purpose? To petition the government for a redress of grievances, and that's the final right. So it's not just a bunch of rights that are kind of put together, but there is a narrative of democracy from the beginning to actual political change. And the speech and press sit there right in the middle, are absolutely critical to that process.

[01:11:18] **Jeffrey Rosen:** Beautiful. For having educated us about the five freedoms of the First Amendment, please thank our panelists, and please welcome our next panelist. As they come up, we are so honored to have Bruce Brown from the Reporters Committee for Freedom of the Press, and he will be moderating our conversation with Jameel Jaffer, Lyrissa Lidsky, and the great Floyd Abrams. Enjoy the conversation.

[01:11:58] **Bruce Brown:** Thank you, everyone. I confess that I feel that I was showed up by Akhil Amar with his Lincoln socks.

[01:12:06] **Audience:** [laughing]

[01:12:07] **Bruce Brown:** The Reporters Committee has socks too. [laughing] But I'm still a little bit stiff in public, and I just can't bring myself to wear them yet. But they're on the website if you want to go check them out. It's a way to walk the First Amendment walk. Well, I'm delighted to be here with Jameel, Floyd and Lyrissa. And we're going to get right to it because we have a lot to cover.

[01:12:33] **Bruce Brown:** The last few months have been just a dizzying time for First Amendment watchers. So many different headlines and cases spinning out there, a newspaper raid in Kansas, a lawsuit in Florida brought by Disney against Governor DeSantis, a defamation case against Fox News that fizzles out into a, a very large financial settlement for the company.

[01:13:06] **Bruce Brown:** Texas pulls TikTok off of state devices and networks. And then Montana decides, "Well, let's just ban TikTok entirely." Two very closely watched cases involving social media moderation, one in Texas, one in Florida. And, finally, now the Biden administration has weighed in.

[01:13:29] **Bruce Brown:** And then just last Friday, two more developments. A federal appeals court in the Fifth Circuit weighs in, in a very interesting, jaw-boning case about government contacts with social media platforms around content they carry and whether they cross the line. And then, a case we'll hear Floyd talk about where his law firm is representing Twitter. We can still call it Twitter, right, in Philadelphia? We still call them the Philadelphia A's, right? So-

[01:14:01] **Audience:** [laughing]

[01:14:02] **Bruce Brown:** ... I think we can still say Twitter. Twitter sues the state of California over its moderation law. Looking at this vast array of cases I'd like to go to each one of you to see where you view areas of defense. Where we, as press advocates, have to be playing defense? And then, where are the opportunities?

[01:14:33] **Bruce Brown:** Where we as press lawyers often gripe that the Supreme Court hasn't heard a liable case in 30 years, and it's been 20-plus years since there's been any media case. But there is a lot going on out there, nonetheless. Where are the opportunities? Jameel, I'll start with you.

[01:14:49] **Jameel Jaffer:** Well, okay. So first, let me say thanks for the invitation to be here. Thanks to Jeff and the National Constitution Center and everybody who's involved in putting this together. Great to have such a big crowd, too. I guess when I think about what the dangers are and what the opportunities are, I mean I'm definitely worried about the erosion of particular doctrines, like, for example, the right to speak anonymously. I think it's a hugely significant, important First Amendment right that is under a lot of pressure right now. I, worry about that.

[01:15:31] **Jameel Jaffer:** But to be honest, I actually think that I spend more time worried about not the erosion of First Amendment doctrine, but rather the calcification of First Amendment doctrine. It goes without saying that we live in this era of incredible technological change, and the information ecosystem that we live in now is totally different from the one that existed even 10 or 20 years ago. And I think it's really important that we hold fast to First Amendment values, to the

values that the First Amendment was meant to protect, like accountability and tolerance and autonomy truth-seeking and self-government.

[01:16:19] **Jameel Jaffer:** Like these are really important values, at least as important now as they were when the First Amendment was drafted. But I think that First Amendment doctrine needs to be responsive to technological change.

[01:16:34] **Jameel Jaffer:** And now, what we used to call the public square is almost entirely owned by private corporations. Social media has democratized speech in a lot of ways, but it's also introduced a whole set of new pathologies. It's also true that surveillance technology, I think, has turned on its head the traditional relationship or the ideal relationship between the citizen and the government. And now, I think it's increasingly fair to say that citizens are totally transparent to the government, not just to the government, but to powerful private actors as well, whereas those governments and powerful private actors are almost entirely opaque to us. And that's a complete reversal of the appropriate democratic relationship.

[01:17:28] **Jameel Jaffer:** I think the First Amendment has to be responsive to all of that. And I worry when I see other First Amendment advocates and First Amendment litigators defending First Amendment doctrine as if the doctrine were an end in itself. That doctrine exists to protect a set of values. And I don't think we should lose sight of that set of values. That's what I... If I'm up at night worrying about the First Amendment, I suppose that's probably the thing I'm worrying about.

[01:18:07] **Bruce Brown:** And, Floyd, turning to you. Looking at this vast array of headlines out there in our area, where do you see the opportunities to make new law, and where do you worry about erosion?

[01:18:22] **Floyd Adams:** Yeah. I'm not looking for a lot of new law about the First Amendment. I think the direction we should be most focused on, or at least I think the courts should be most focused on, is preserving old law. Not necessarily very old law but applying principles which have made us the most free in terms of free speech, free press in the history of the world, and not moving away from there.

[01:19:03] **Floyd Adams:** Now, you can't escape new problems with new technology and the like. I think one of the most important issues that will surely be litigated and not in just a few years, now and well into the future, does relate to social media, necessarily relates to the degree to which social media will have, at least more or less, have the same level of First Amendment protection. Which

means absence of government control, as would otherwise be the case. I mean social media is where a lot of the action is on the ground. But in terms of First Amendment law, I think we're going to have major cases and you inverted to them in the Supreme Court sooner rather than later. About questions like "Can states require social media entities that have a what we used to call, a fairness doctrine you put on one side, you want to put the other. You must put the other side on?" That has been held unconstitutional as regards to the print press. The Supreme Court has said unambiguously, "And it's not really being challenged at all now. And you can't tell this paper what to print, period. You think it's not fair that they're loaded in this direction or that direction? Too bad. Read another newspaper. Do something else."

[01:20:51] **Floyd Abrams:** That, that really is a rather simplified comic book way to describe, but it's not wrong. And it's a very important question about how social media will be treated in the courts. I mean, in my view, they have a very strong argument that they should get the same or something like, the same amount of, protection for some of the same sorts of reasons for fear of government control or government oversight. But that is not necessarily how the law is going to move. The Supreme Court has one case they'll probably decide in the next year relating to the Florida and Texas legislatures, which have passed laws designed to assure what the legislators and both states thought was fair.

[01:21:57] **Floyd Abrams:** And so in an absolutely critical moment, in the Court of Appeals for the Fifth Circuit, a judge asked the lawyer for, what I'll call, the companies, the media, social media companies, "Are you saying that you could have up in on the ground and you can favor the Democrats over the Republicans?" And the answer was, "Yes." The judge put that in the opinion of the Fifth Circuit, which I think is going to be reversed by the Supreme Court. But nonetheless, the court put that in the opinion of the Fifth Circuit in a sort of, "Can you believe that? I mean, can you really believe that?" In response to that straightforward, flat question, the answer was, "Yes, you can do it now?"

[01:22:57] **Floyd Abrams:** Now no one anymore, I think, thinks that the law is, certainly not is or even plausibly is about to change, so that a newspaper or a magazine or a book writer could be forced to answer the question, "Aren't you biased or aren't, aren't you leaning? You're in their pockets. All you do is praise them and denounce them." That situation for now, and I believe into the future, is really clear. But we don't have a great idea what the court is going to say about social media on that. The other topic, the only other one that I would mention, is

that we are likely to have more defamation cases, which may reach the Supreme Court. And there are at least three of the most conservative members of the court who have said in so many words that they would have a two plus one, that we know that they want to set aside what may well be the greatest press victory in American history. Which is the *New York Times v. Sullivan* case of 1964.

[01:24:22] **Floyd Abrams:** As the court has become more conservative and as some members of the court have become unambiguously anti-press, it makes it all the more likely that that case may well come up before this court. And while for what it's worth, I don't think they're going to reverse and affect or set aside *New York Times v. Sullivan*, we don't know. It's in play. It's in play intellectually. It's in play. And so I think they will take one of these cases, some very sympathetic case from the point of view of someone who's really been wronged, and because we protect speech so much, doesn't have a remedy. The only other thing I can say is that I really can't talk about the Twitter account...

**Bruce Brown:** Okay.

**Floyd Abrams:** ... because it has just been filed.

[01:25:34] **Bruce Brown:** Sure. Understood, understood. Lyrissa, I'd like you to engage on the same question, but add one more layer to it. You have devoted your life as an educator, a law school professor and I think everybody would be quite interested in hearing from your perspective, as a law professor. What parts of the doctrine are you struggling to persuade your students to accept today? Where do you see the weaknesses in their understanding and appreciation of First Amendment jurisprudence? And what thoughts do you have about what we can do about that in order to restore some of that belief?

[01:26:18] **Lyrissa Lidsky:** Yeah. So when you're teaching law students, it's important to remember law students are just people like the rest of us. And so they have some of the same biases as the general public. And so one of the things I worry about generally is kind of the suspicion of the press. The suspicion that the press is not providing disinterested information in a way that undermines support for press freedom generally and increases support for things like overturning *New York Times v. Sullivan*, which gave a great deal of protection for the press to criticize government officials and to criticize what we might call today influencers, as it was extended by the Supreme Court.

[01:27:08] **Lyrissa Lidsky:** But even more so, the biggest tension I see in students today is they see a big tension between liberty and equality. And so they are much more interested in punishing speech that might be thought to threaten equality. What they see is hate speech. They're much more interested, as a whole. These are gross generalizations. There's variations in students like the rest of us, but the younger generation sees emotional harm as a threat to their very safety in a way that might justify speech regulations. And you see this slide, right? "Speech that's offensive become speech that makes me feel unsafe." And so the idea that we have to tolerate that speech as part of living in a democracy and the idea that we tolerate that speech, because we don't know who's going to be in power, the next iteration of elections. And we can't be sure that our side will be in power the next time, and what our side considers offensive may not be the same thing that's considered offensive by the other side.

[01:28:21] **Lyrissa Lidsky:** And so that tension between equality and liberty comes out differently for a lot of students in the younger generation and convincing them that their views may not win and that they need neutral principles to adopt, so that to ensure liberty for all of us is a harder sell than it used to be.

[01:28:44] **Bruce Brown:** Mm-hmm. And there are things you think we can do to help buttress the belief in First Amendment doctrine with this group?

[01:28:54] **Lyrissa Lidsky:** I think teaching civics is really important. I teach constitutional law as well as First Amendment law and media law. So seeing the broad sweep of history and understanding that, in the cycles of history, there's always an authoritarian impulse to silence that speech with which we disagree. And it always, when we look back on it, ends badly. It's never a good thing. And so history, I think, gives you humility and it's the only way that these ... Yeah, Akhil on the last panel talked about, not indoctrinating, but teaching students about the constitutional principles that bind us together and the importance of holding our elected officials to norms that support those principles. Because we don't know that we'll always be the ones in power and we need some common neutral principles that we can, that will bind us together despite our differences.

[01:29:56] **Bruce Brown:** Thank you. Keeping ... Very good, yeah. Alright. And keeping with, with our teaching theme, I think it was Secretary Raimondo who said recently, Jameel, about the TikTok bans, "if you want to lose every voter under 35 ..."



[01:30:14] **Jameel Jaffer:** Yeah. [laughs]

[01:30:14] **Bruce Brown:** "... Go ban Tiktok." Do you see an opportunity in these cases for an important opportunity to invigorate this generation with ...

[01:30:32] **Jameel Jaffer:** Yeah.

[01:30:32] **Bruce Brown:** ... the importance of ...

[01:30:33] **Jameel Jaffer:** Absolutely.

[01:30:34] **Bruce Brown:** ... First Amendment protection?

[01:30:35] **Jameel Jaffer:** Yeah, I mean, I think that ... Well, first, one thing Lyrrisa, I've heard you say this before but I think it's really important that we teach the history of the civil rights movement in connection with free speech because the truth is the civil rights movement in this country would never have got off the ground, but for the freedom of speech. It was the First Amendment that protected that space. And it's much harder to see free speech and equality in opposition once you understand a little bit about that, you know, about the history.

[01:31:08] **Jameel Jaffer:** But on the TikTok stuff, I mean, I do think that there are college students, college-age students who care a lot about access to TikTok because TikTok is a place where they, themselves, post content. They participate in a kind of conversation themselves and they are listeners as well as speakers in that space. And there's a kind of dismissiveness I think on the part of some people who don't use TikTok, mostly older people who don't use TikTok, and they think that TikTok is really just about dance videos or - and it's true, there are some very good dance videos on Tiktok.

[01:31:53] **Audience:** [laughs]

[01:31:54] **Jameel Jaffer:** But there is a lot more than that on TikTok including political speech, speech about every topic under the sun is on Tik Tok and presented in more ways than you can possibly imagine and in more communities than you can possibly imagine. And a lot of that speech is really valuable speech or socially valuable speech even if you think of dance videos as outside that, outside the description. And these college-age students now see political leaders proposing to or even actually doing it, banning the access to this platform. And it is perhaps

an introduction to what free speech means in this country, what the First Amendment means in this country.

[01:32:52] **Jameel Jaffer:** As you know, Bruce, my organization, the Knight Institute, has challenged the constitutionality of Texas' TikTok ban as applied to public university professors. Because the effect of Texas' ban, which reaches only state employees, one effect of that ban is to prevent public university professors from accessing TikTok in the classroom or studying TikTok. including studying the problems of disinformation and data collection on TikTok that are ostensibly the justification for the ban in the first place. So I think that, Floyd mentioned, I think quite appropriately, that we should be concerned about preserving old First Amendment doctrine.

[01:33:41] **Jameel Jaffer:** One of the cases we're relying on in this case is a case called *Lamont v. Postmaster General* which is a 1964, I think, case involving a statute that required people who wanted to receive Communist propaganda from abroad to register with the Post Office before they could receive it. And the Supreme Court struck down that statute saying essentially, unless the government has a very good reason to prevent Americans from accessing information from abroad, it can't prevent them from doing it or burden their right to access that information. And the fact that the government regards this propaganda is not a good reason.

[01:34:23] **Jameel Jaffer:** And one of the cases we rely on heavily in our brief challenging the constitutionality of Texas' TikTok ban is that case. And, one of the questions presented in this case is how to apply that principle that was established in *Lamont v. Postmaster General* 50 years ago to this very new and different contexts. But I do think to answer your question that it's possible that some younger people who haven't yet had occasion to become familiar with the First Amendment or to fall in love with it might become familiar with it and fall in love with it because of these threats to ban a platform that they care a lot about.

[01:35:08] **Bruce Brown:** So, the famous phrase, "There'll be dancing in the streets," [laughs] I don't ... After the time this decision, will take on ...

[01:35:15] **Jameel Jaffer:** Right.

[01:35:15] **Bruce Brown:** ... new valence, right?

[01:35:17] **Jameel Jaffer:** True, yeah.

[01:35:20] **Bruce Brown:** ... the dance videos we all do on Tiktok. Floyd, this is just a perfect setting to ask you a question about the work you're now doing at Yale Law School on the press clause. When you announced the project, recently you said, "For too long, the provision in the First Amendment, that freedom of speech and of the press would be protected from government abridgement, has led to justifiably broad protection of the former, but far too little notice of the latter. It is time to begin to address that constitutional deficiency." We're also eager to hear from you about what you are doing with this work and what you'd like to see come out of it.

[01:36:08] **Floyd Abrams:** Well, so far, we're doing what academics do. We're having conferences.

**Audience:** [laughs]

[01:36:17] **Floyd Abrams:** [laughs] now we are having a series of conferences around the country with great scholars which we've done for half a year now. We're doing for another year or so. Hopefully, we're going to write something up, which might persuade someone on some court or other. We have, amongst the problems we have in the country now about free press, is that small newspapers are going out of business. Newspapers in areas which have been served sometimes only by one newspaper and which covers that town, that city, that part of that state, are not only not thriving, but are rapidly going out of business.

[01:37:22] **Floyd Abrams:** I mean, there's nothing that a lawyer or academic can do about that. I asked one editor of an Iowa newspaper with a circulation I think below 2,000. I said, "speaking to you from a lawyer to a journalist, what could we do? Suppose we asked you, 'What, what would you like?'" And he said, "Well, lower mail rates." "Well, I can't help with that, you know?" the question is, is there something we can do in the law, something that we can credibly and hopefully persuasively argue that the First Amendment provides which could at least be of help when these organizations are up against Google or other super large entities which, with which they don't have good relations and we charge them a lot of money, and things like, like that?

[01:38:44] **Floyd Abrams:** But I don't have a good answer to what's the end of this. I can say that from the beginning of our country, everyone talked about

having a free press as being absolutely essential to the preservation of a free society. James Madison who had initially been dubious about having a Bill of Rights at all, he said, "It's just going to be a parchment limitation. Yeah, no one's going to pay attention, just be a piece of paper." And he was ultimately persuaded by Jefferson with whom he was very close and who he admired and by others, that in order to get the Constitution ratified, as it was drafted in Philadelphia, they had to have a Bill of Rights. That there was more and more pressure.

[01:39:54] **Floyd Abrams:** And every draft of the Bill of Rights starting with the first one written by Madison had a press clause in it, freedom of speech and the press. The first draft, Madison's first draft of the First Amendment in the First Continental Congress, on the first day, had in it a draft of the First Amendment, which had language about how the press was inviolable. "Press freedom was inviolable. Must be inviolable. Cannot be interfered with." That didn't make all the editing processes, but from the start and certainly with the framers, I mean, they really got the essentiality of having a press free enough not to be governed by, overseen by, and limited by the newly empowered federal government.

[01:41:05] **Floyd Abrams:** I mean, remember, the reason that we have the federal constitution is that the Articles of Confederation didn't work, that each state had its own coins. There was no federal army. There were no ... Any diplomat had to be cleared by all 13 former colonies, then now states. And, so there really was a consensus here in Philadelphia, not far from here, there really was a consensus that there was need to have a written constitution and a written constitution which dealt with the issues of this brand new country.

[01:41:59] **Floyd Abrams:** But at the start, the first vote in the Continental Congress about having a Bill of Rights was 10 states no, no states yes, three hadn't arrived on their horseback in time. It was nine to three. And that couldn't be confirmed, ratified. There was sufficient opposition by members of the Continental Congress and then back in the states, that this taste would not ratify without a Bill of Rights and a Bill of Rights, whatever else was in it, would protect freedom of speech, freedom of press and freedom of religion. And that's the way it became, and yet, we find ourselves now back to what I'm active in with a free press clause, which is just not very meaningful.

[01:43:06] **Floyd Abrams:** Now part of that is because we have very expansive protection for free speech and so it is not as if we're not a free people without a freer press. But not having a meaningful press clause, not having individualized

protection for the press, as opposed to speech alone, would have been a great loss and we have it and we're not using it. And what the group that I'm heading is trying to do is to make sense of that and to try to come out with some notions about how to put into the press clause, as enforced a much greater meaning than it has thus far been given.

[01:44:02] **Bruce Brown:** Thank you. Thank you. Lyrisa. You're the Floridian on our panel. There's never a lack of interesting First Amendment headlines coming out of Florida, but the one I wanted to ask you about for this panel takes us back to the right of reply case, *Tornillo*, decided in summer of '74. At that moment, access was thought of as coming from the left. Florida now has a new social media law. It's one of those cases we think may go up to the Supreme Court and I'm curious if you could speak to whether you think the political valence on this issue has shifted from where it was during that summer of *Tornillo* and also more broadly just as a constitutional scholar, knowing that *Tornillo* and other very important First Amendment precedent was established at a time when the press was more popular than it is today.

[01:45:12] **Bruce Brown:** The social media companies may be in front of the court at a time when they are not terribly popular. And if you have thoughts about that issue as well and how the advocacy is impacted, by the fact that these cases may arrive at the court at a time when there is, as we've been discussing broadly today, deep societal rifts about First Amendment protection, loss of trust in both the traditional and the new media. How does that, you think, impact outcomes in the Supreme Court?

[01:45:48] **Lyrisa Lidsky:** Well, unfortunately, I think it does impact outcomes. So, the press... lots of our institutions are not very popular with people right now, including the Supreme Court itself. It's at an all-time low in terms of its public popularity and public credibility but the press likewise. There's a great book I would recommend to you called *Why Americans Hate the Press and Why it Matters*. And the thesis of the book is basically that the dislike of the press and the press practices does make its way into legal proceedings and curbs back in, even if you don't have key decisions overturned, the way they're applied gets curbed. You also don't get legislators passing laws that supplement constitutional protections for the press.

[01:46:38] **Lyrisa Lidsky:** And then when you have juries deciding cases, for example, defamation cases involving the press, maybe they want to punish the

press more. Judges too become skeptical of press claims about press freedom, but what's interesting to me is this is occurring at the same time when it's becoming so evident that we need reliable information. We, the people, need reliable information in order to engage in democratic self-governance. The role of the press in fostering democracy is more evident than ever and the lack of the ... Especially at the local level, the press playing this role, so we can know what our government officials are up to and call them out on it or vote the rascals out if we need to, is so very evident.

[01:47:28] **Lyrissa Lidsky:** It's not surprising in a way that people aren't concerned about the press. I mean, the press has been ... My co-author and I said the press has decimated, but decimated means like 10%, right? In fact, the press has lost expertise more in the range, like newspapers in particular, about 50%, in the last 20 or so years. The expertise has just been, been leached out of newsrooms. And so it's not surprising that maybe the product looks a little different, and especially at the local level, the product doesn't even exist. So I just think that that is something that Floyd and the Yale folks need to solve. [laughs]

**Audience:** [laughs]

[01:48:13] **Lyrissa Lidsky:** No, somebody needs to solve it but I mean, I'm an eternal optimist. I think new and different groups are coming in. There's a lot of experience with experiments with public funding, and the internet does give us some room for experimentation with people gathering information and providing it to us in different ways. And you have some whistleblowing that's occurred by nontraditional press actors that called out. I mean, I think the Twitter files is some of the revelations about what was going on there, is akin to a Pentagon Papers revelation. And yet, it hasn't had the same resonance but the uncovering of both the Trump administration and then the Biden administration really coercing social media to put their narrative across is something that I think is serious that did not come out of traditional press actors.

[01:49:07] **Bruce Brown:** Yeah, that's great. I think we have time for probably one more question that I could ask of the whole panel. And it's hard not to be in the setting and not think about the majestic words from *Sullivan* of the central meaning of the First Amendment and the artifice, the image it created in their minds of the Fourth Estate, and the press is the bulwark of democracy. But we're clearly shifting into a different era and we've teased a bit here on this panel about, with technological change. As Floyd hinted, the chance that the court will take some

really important cases in the coming years and what each of you thinks that the emerging digital First Amendment will look like?

[01:50:04] **Bruce Brown:** And I'm asking that question in a week in which the Justice Department is trying to break Google apart. And so there's this backdrop of the concentration of power of the tech companies in our speech marketplace. And if you've had the opportunity to speak to that and your answer as well, all in a handful of minutes. Sorry. Jameel, you want to go first?

[01:50:28] **Jameel Jaffer:** Sure. Yeah. I guess I would start by going back to where I began, which was what the values of the First Amendment was meant to protect. I don't actually think that it's that easy to take. Even if you are 100%, confident that the Supreme Court and got it right in these cases decided 50 years ago, like *Brandenburg* or the Pentagon Papers case or *New York Times v. Sullivan*. Even if you feel in your bones that those decisions were 100% right, there's still a hard task in applying those principles to this very different factual landscape that we're dealing with now. Like you can believe in the First Amendment and in those principles implicitly and still not know how some of these cases should come out.

[01:51:20] **Jameel Jaffer:** I think that the *NetChoice* cases, which have been, alluded to a couple of times without actually been being identified. There are these two cases out of Florida and Texas. Florida and Texas have these new social media laws that regulate social media companies. They require the companies to carry some content even when the companies don't want to carry it and they also require the companies to be more transparent about their content moderation policies than they would like to be.

[01:51:50] **Jameel Jaffer:** This question of how to apply 50-year-old precedents like *Miami Herald v. Tornillo* to social media companies is not a straightforward one at all. You know, on the one hand, if you read *Tornillo* to mean the government can't force editors understood in the broadest sense to make decisions that the editors don't want to make, can't force editors hands, then these laws are obviously constitutional, the Texas law or the Florida law. I mean that's exactly what the government is doing here, right? Those governments are telling Twitter and Facebook what content they need to publish. So if that's your reading of *Tornillo*, then it's relatively straightforward.

[01:52:36] **Jameel Jaffer:** But there are a lot of differences between social media companies and newspapers. And figuring out which of those differences should

matter, whether any of them should matter is a really difficult task and I think that how the court answers those questions is going to make a huge difference to what the digital landscape looks like over the next 20 years. And, we're all here because at some level, we are enthusiasts of the First Amendment. We all believe in the centrality of free speech to our society. I think most of us probably believe that free speech and democracy are almost synonymous but you can believe all those things and still have a hard time figuring out how these cases should be decided.

[01:53:34] **Jameel Jaffer:** So I think it's very difficult to predict what the Supreme Court will do and not always obvious even to people who care about free speech.

[01:53:45] **Bruce Brown:** And Floyd?

[01:53:48] **Floyd Abrams:** Just a word more on social media. We haven't talked about this Section 230 of the federal law, which governs this. Which basically immunizes social media against libel claims for what people say on social media. It was intended to, and it has allowed social media to explode in terms of its ability to put in effect people, while the social media entity doesn't have to check it. The New York Times has to check it. They even have to check it when the person is a public person, in many circumstances. And whether we're going to continue to have that, I don't know. But we should. And I'm not even advocating one thing or the other. A final note for me, I know we want to save you time. If I had to tell you one thing you want to tell your children when you go home tonight, it's that Salman Rushdie spoke to you.

[01:55:00] **Bruce Brown:** Yeah. And, Lyrrisa, what would you tell your class next time you convene?

[01:55:10] **Lyrrisa Lidsky:** So last term in the Supreme Court, the Supreme Court dealt with at least two very significant internet-related cases. And Elena Kagan famously said at an oral argument, "Well, we're not the nine greatest experts on the internet."

**Bruce Brown:** Yeah. [laughs]

[01:55:27] **Lyrrisa Lidsky:** And so I'm going to leave you with a little optimism because here's the thing. They waited a lot ... We've been dealing with adapting First Amendment principles to the internet for more than 25 years now. It's a long time. And the Supreme Court's been reluctant to weigh in. There aren't that many



cases, but they're finally starting to take some, which makes us a little trepidatious. But, when they dealt in *Counterman v. Colorado*, which dealt with threats last term, they were very sensitive to the misinterpretation that you could put on threats in internet context and they set mens rea standards high so that we didn't accidentally punish speech that wasn't really a threat. And then they rejected the invitation to make Twitter responsible for all extremism on the internet generated by its algorithms.

[01:56:20] **Lyrissa Lidsky:** And so they're really trying to be careful in the adaptation of these principles and it gives me a little hope. As Jameel said, the point is the principles, and we reason by analogy, but sometimes the big tech companies are not really analogous to anything we've seen before. They're kind of like newspapers. They're kind of like common carriers. They're kind of like this, they're that kind of like that. So hopefully, the Supreme Court will be modest in their own abilities and be very careful in that adaptation process this term.

[01:56:52] **Bruce Brown:** Well, thank you. I think the three of you are a pretty great three-judge panel. I'd like to see you making the laws, so thank you so much for being here tonight.

[01:57:14] **Jeffrey Rosen:** Well, ladies and gentlemen, for the last of our panels, we have three more of America's greatest First Amendment heroes. I'm just so excited to be in conversation with them and we're going to talk about free speech on campus. And Will Creeley from FIRE and Nadine Strossen from New York Law School and Jeannie Suk Gersen from Harvard Law School have been such clarion voices in America for defending free speech on campus. And, Will Creeley, let's start with you. So in the *Mahanoy* case in 2021, Justice Breyer for eight justices held that a cheerleader can curse on Snapchat and he upheld the standard from the *Tinker* case that you can't ban speech unless it's likely to cause material disruption or substantially invade the rights of others.

[01:58:17] **Jeffrey Rosen:** There have been a bunch of lower court cases since then. FIRE was involved in some of them and lower courts are divided about whether or not campus speech meets the *Mahanoy* standard. Tell us about the debate in the lower courts and where the flashpoints are.

[01:58:30] **Will Creeley:** Well, thanks, Jeff. You know, it's hard to bat clean-up here because there's been so much excellent conversation already. It's an honor. I want to weigh into things that everybody else on the other panel said. So I will

answer your question with a little bit of an answer to Bruce's excellent moderation in the previous panel. Part of the job of folks who give a damn about the First Amendment and as the legal director for FIRE, I certainly lead a team of those folks and it's my honor to do so, is to appeal to self-interest. And when I'm talking to high school audiences, as I was just a couple of weeks ago, or when I'm talking to the student organization leaders at Youngstown State where I was two weeks ago, or senior leadership at Ole Miss where I was last Saturday, I always try to make the point that you need to appeal to people's self-interest.

[01:59:16] **Will Creeley:** *Mahanoy* is a great vehicle for reminding folks, as Frank LoMonte, former Brechner Center and former head of the Student Press Law Center did in a prescient article he published in Slate just before the court's opinion in *Mahanoy*. *Mahanoy* gives us an opportunity to talk to the high schoolers in your life about why the First Amendment means something and why they should give a damn. *Mahanoy* involved the cheerleader who went to the Cocoa Hut on a Saturday night, the Cocoa Hut being, of course, the local gas station convenience store and she was pissed off. And so she and her friend in a Snapchat, that I'm fairly sure she never thought would be seen by all nine justices on the court ...

**Audience:** [laughs]

[01:59:58] **Will Creeley:** ... Raised their middle fingers somewhere in the aisle where the snacks and the chips are and the candy bars and said, "Fuck cheer, fuck school, fuck everything." Now, there's not a single person in here who I think has not felt that sentiment at some point. And certainly, the high school audiences that I talked to, as soon as they hear me curse, they say, "Wait, this guy is the real deal," and then ... [laughs]

**Audience:** [laughs]

[02:00:17] **Will Creeley:** ... they pay attention. They understand that, "Wait a second, that First Amendment that I've just been talking about, the big one with the perfect leading and kerning behind us, that First Amendment is the thing that also protects them." It's not just a parchment, right, as Floyd alluded to James Madison thinking it might be. It's real. Because the court said that Mahanoy Area High School's suspension of her from the cheerleading squad violated her First Amendment right. The school has no right to reach out into her private life on a Saturday night. They can't stand in place to the parents. As Jameel pointed out,

you're not under constant surveillance from your public high school. The First Amendment means something, even if you're a high schooler.

[02:00:57] **Will Creeley:** So what FIRE has been trying to do is weigh in on the lower courts, wrestling with Justice Breyer's three factors, right? How close the proximity is to school, whether it targets folks at school, whether it's political speech. So long story short, if you're at your grandma's house and you expressed frustration with the principal, as a case we recently filed, you can check it on our website, [www.thefire.org](http://www.thefire.org), and you are punished for that post making fun of your principal, the First Amendment has your back and that's the message we're here to send. So please go home and tell somebody. [laughs]

[02:01:34] **Jeffrey Rosen:** Nadine Strossen, I must thank you for your heroic defenses of free speech. Over the years, you've seen the campus speech battles evolve in such striking ways. You have a new book coming out about best arguments to protect free speech and rejecting the arguments against it. And one of the big arguments that's coming up in the lower courts and on campus is that it's okay to restrict bullying, and this anti-bullying language is being used to violate the *Brandenburg* standard and allow the suppression of speech. Tell us about this trend and some of the cases you're most concerned about.

[02:02:13] **Nadine Strossen:** This was actually discussed in one of the earlier panels that, in addition to the restriction, which comes from *Brandenburg* and we think makes a great deal of sense - that speech can and should be punished when it eminently directly causes or threatens certain specific harm such as violence. Students are saying, "You know, there is real harm to my psyche and to my emotions from hearing an idea that I find offensive or expression that is insensitive and it's doesn't make any sense for the law not to give me protection." And on the positive side, these are students who have been brought up in a school and educational environment that teaches them to be respectful, civil toward each other, not to engage in bullying behavior, not to engage in harassing behavior. But to equate harassment and bullying with ideas or words that are upsetting is very dangerous because it means that we are stunting the educational process, right?

[02:02:45] **Nadine Strossen:** As the number of other panels have discussed, as Salman Rushdie discussed right at the very beginning, we are never going to be able to develop our understanding to pursue truth, to pursue any of the aims of free speech, individual self-actualization, let alone be engaged citizens in a democratic republic if we do not listen to others. This was Akhil Amar's great point, including

that others who may say things that we find offensive. Now going beyond the free speech justification in a wonderful book that was co-authored by Will Creeley's boss at FIRE, Greg Lukianoff, and Jonathan Haidt, a great social psychologist, *The Coddling of the American Mind*, they point out that even from the point of view of emotional wellbeing and mental health and psychological wellbeing, it is detrimental to students to shield them from ideas or expression that is upsetting or emotionally harmful. That you may think that you're protecting them, but in the long run, you're doing more harm than good. We have to cultivate resiliency and self-confidence and the ability not to let people undermine our own sense of dignity and self-confidence through words.

[02:05:23] **Jeffrey Rosen:** That's such a crucial point that Greg Lukianoff and Haidt made and it's an answer to the claim that speech is violence. In fact, it's suppression that can cause more psychological harm. Jeannie Suk Gersen, in your wonderful articles for *The New Yorker* and elsewhere, you've painted this picture about how on-campus efforts to suppress speech as violence are now common. You've talked about the growing pressure for trigger warnings and how professors who teach controversial materials are criticized for violence. Tell us about the form those arguments take, how are they playing out in the courts and how is it that there's such a disconnect between what the courts say has to be protected and what students are demanding be banned.

[02:06:11] **Jeannie Suk Gersen:** Well, it goes back to something that Lyrissa was saying in the last panel, which is about this conflict between equality and liberty. So one of the things to remember, just even in that case, the *Mahanoy* situation, you've got the student who engaged in the speech, you've got the school, and sometimes there's another student who is offended, hurt or feels really just like their dignity has been harmed by the speech of the one student, right? So in that case, it's really the school versus the student, because they're criticizing the school, but oftentimes it's not. It is one student and another student and then the school is kind of in the middle.

[02:06:54] **Jeannie Suk Gersen:** Now, the reason that these values come into conflict so acutely is because the school also has a bunch of legal responsibilities stemming from federal agencies such as the Education Department that says to the school, "If you don't do certain things proactively or remedially to address this incidence of discrimination and harassment, then you will be violating federal law," right? So even just the absence of action, just letting it all play out, schools

can be in trouble with the government and that would mean that their federal funding would be at risk.

[02:07:34] **Jeannie Suk Gersen:** So they have genuine legal responsibilities that they're looking to fulfill, and because we know that lots of bullying and lots of discrimination happens through the spoken word, right, or written word on social media and other kinds of digital media, it's happening because you're speaking. And so at that point, you are inevitably going to have this conflict. It's not like we can turn around and go, "No, there's no real conflict. They really are all compatible all the time." It's not. There really is a conflict between First Amendment or free speech values and this, the value of protecting people and remedying discrimination, not in every case, but in some of the really hard cases, that does happen.

[02:08:25] **Jeannie Suk Gersen:** And the school truly, especially in the university setting, is really in that tough spot where they've got the legal obligations on one side and then the free speech obligations or the free ... If it's not a safe school, if it's a private school, often the free speech obligations feel even less weighty compared to the possibility that they're going to be both criticized by their students as not taking discrimination seriously enough and that the government may be breathing down their back.

[02:08:53] **Jeffrey Rosen:** You're so right, that there is a genuine conflict. And, Will Creeley, you flagged some of the post-*Mahanoy* cases students are winning some and losing others. Broadly, are the equality arguments winning in courts and could you imagine in coming years that the traditional free speech Brandenburg principle might be undermined?

[02:09:14] **Will Creeley:** I think that the previous panel hit upon this in a way that I'd like to underscore here. The value of history and historical precedent in making clear to students who are, of course, tomorrow's judges and justices and leaders that it protects their rights. So I'm going to go back to that appeal to self-interest. When I talked to students, when I was at Youngstown State, I'm talking to all the registered student organizations and that includes trans students, gay students who look at me and think, "What the hell does the First Amendment do for me? It allows people to bully me. It allows people to say dehumanizing things to assault my dignity," because Jeannie is absolutely right. This is a real tension.

[02:09:56] **Will Creeley:** And so I tell them the story of an Eighth Circuit case from the University of Arkansas that happened in the early '80s. I'm 42. I was born in '81. This case arises from events in 1982, so in my lifetime. This involves the Gay and Lesbian Student Association of the University of Arkansas and they were denied by the student government \$200 to show a film about Stonewall. And the reason they were denied is because they were hated and they were told, when they applied for this money, "I didn't think you'd look so normal. And why would we give you this money? That'd be like handing matches to an arsonist."

[02:10:30] **Will Creeley:** The student government was in turn being leaned on by the administration, which was in turn being leaned on by the state legislature. The First Amendment had their back. They filed a federal lawsuit. They wanted the Eighth Circuit. That same Eighth Circuit precedent is now relied on by evangelical student groups who say that their rights are being cut off in the name of dignity and equality in high schools and colleges. It interlocks. We litigated a case in conjunction with great folks at Davis Wright Tremaine to whom I'm now proud to call colleagues on behalf of the National Organization for Reform of Marijuana Laws at Iowa State University. Likewise, they were cut off from benefits that other groups had on the basis of viewpoint.

[02:11:12] **Will Creeley:** The way to reconcile the tension between equality and dignity rights, which are serious and feel intensely personal, I'm not here to say that they aren't real or that words can't kick your ass sometimes because they sure can, but rather, the way to reconcile the tension is by insisting the government has no right to place a thumb on either side of the scale. That are some things, as Lyrrisa wisely alluded to, are beyond elections. That there is a common ground. And that common ground is government neutrality in the face of viewpoint preferences, right? Viewpoint neutrality is the way out. Everybody gets treated the same. To me, that's equality and that's ultimately cognizing of everybody's equal dignity, no matter whether you are an Evangelical Christian or the opposite or whatever, right? It protects everybody. That's the point and that's the message.

[02:12:06] **Jeffrey Rosen:** Beautiful. Viewpoint equality is viewpoint neutrality is equality. Nadine Strossen, many of cases involving suppression on free speech on campus don't go to court and just recently, our friend Professor Robbie George, a distinguished conservative scholar, was shouted down I think at a college. Tell us about this story and how more broadly administration's responding to efforts to shut down unpopular speakers are suppressing free speech.

[02:12:38] **Nadine Strossen:** Well, FIRE has been tracking deep platforming as it's called at campuses across the country for a number of years. The trends are very concerning. Before I talk about this incident involving such a prominent scholar very recently, let me say, Jeff, that FIRE just came out with, together with College Pulse a few days ago, the fourth annual survey of student attitudes toward free speech and this is very disturbing. This is really the nut that all of us say we have to crack, because ultimately, support for freedom of speech depends on the public, right? As Learned Hand said, "It lives in and, and/or dies in the hearts of men or women." And the younger generation, as has been alluded to, has some negative attitudes. This survey which covered 248 campuses. It's the largest ever, 55,000 students. Very granular questions.

[02:13:44] **Nadine Strossen:** I believe it was 49% did support blocking fellow students from hearing a speaker in at least some circumstances. So I think we can anticipate that these problems are going to continue. Robert George, who is a very respected, mainstream conservative - politically conservative, religiously conservative - scholar, a political scientist at Princeton University, who has ironically been such a paragon of free speech. Many of you may have had the privilege of seeing some of the colloquies he has engaged in with Cornell West. You could not be more different ideologically.

[02:14:37] **Nadine Strossen:** And the two of them epitomize everything that we've been extolling about speaking with and listening to and dialoguing with somebody whose views are different and how beneficial that can be to you and to your understanding and how illuminating to the audience. To add to the irony, Professor George was discussing how the purpose of a university, the mission of a university, is truth seeking. It was a title lecture that he had been invited to give at Washington College in Maryland. And partway through the remarks, disruptive students entered, chanting and blowing whistles and playing certain musical instruments, making it impossible for him to be heard. And I think we haven't alluded to this yet, that the First Amendment includes not only the right of a speaker to convey information and ideas, but the right of the audience members to hear information and ideas. That was thwarted.

[02:15:51] **Nadine Strossen:** And most disturbingly, the reports are that neither the campus police nor university officials, including the president, who was in the audience, did anything to prevent the disruption. So the event was canceled.

[02:16:10] **Jeffrey Rosen:** Jeannie Suk Gersen, administrators have demonstrated a range of responses to shout down efforts ranging from the principal response to the dean of Stanford Law School to disruptions there to examples like the one that Nadine just mentioned. You are a leader in the Academic Freedom Alliance, which is trying to combat this behavior. Tell us how you're trying to do that and how administrators can do better.

[02:16:42] **Jeannie Suk Gersen:** Okay, so I think that this is a complicated area mainly because we want to protect the right to protest and to dissent and to object and to speak out about things you find morally offensive, right? We want students to be able to do that. So if they're going to do that by coming to an event and making their views known and holding up signs and doing all kinds of things to make sure that their message gets across and to really tell the speaker how much they disapprove, that should be protected, both under the First Amendment and by school rules, protecting the freedom of expression. Now, when that crosses over into the line of being so disruptive that the event cannot go on, that people cannot speak, that people cannot hear, that's the line that, at a university with the educational mission that we have, we don't want that line to be crossed.

[02:17:48] **Jeannie Suk Gersen:** And if it is crossed, it must have a consequence if we're really going to hold to it. But this is also difficult because the area of discipline, of disciplining students, punishing them with things like expulsion, suspension, that is historically associated with repression of free speech and free expression and freedom of thought. That's what universities did against student protesters, right? Giving them punishments and telling them that they would be kicked out of school. That's the kind of thing that is associated with repressive regimes and also with repressive schools. And so I think that this becomes a very tricky area. That's why you see schools be reluctant when students are disrupting events to actually step in and say, "We're going to call the police," or, "You're going to go before the ad board and have to defend yourself." And if you've broken the school rule, then you're going to have to be punished just like someone who committed plagiarism or stole a computer. right?

[02:18:48] **Jeannie Suk Gersen:** So I think that that's been a very difficult line for schools and I will just say, I teach at Harvard Law School. I think at Harvard Law School, we have been very clear about where that line is. We have, in order to be fair about it, you have to give everyone notice at the beginning of the year. Students have to be very clear that they're going to be violating a school rule when



they go beyond a certain point in their protest, where the protest turns into activity that is prohibited that we no longer consider protest, we consider it disruption.

[02:19:23] **Jeannie Suk Gersen:** And you have, the school has to be willing to actually act on it and discipline people and enforce and actually suspend. And I think a lot of schools are not there yet.

[02:19:37] **Jeffrey Rosen:** So true about the importance of being clear and being willing to discipline people who break the rules and also the dangers of suppressing protests because you disagree with them. And we have in the exhibit Mary Beth Tinker's black armband. She's lent it to us. And there's a picture of her when she was a young kid sitting next to civil rights protesters who first used the civil, the black armband, and then she just a few years later adopted it to protest the Vietnam War. Let's talk now about the speech interests of professors and, Will Creeley, FIRE is representing Professor Stephen Kershnar at SUNY, a devil's advocate who was on a podcast talking about the morality of age of consent laws. His case was just written up in the New York Times. And there are other professors who have been fired for their speech including those who have criticized diversity statements phenomenon, the New York Times also recently wrote up. Tell us about those cases.

[02:20:37] **Will Creeley:** Yeah, where do we start? How much time do we have? [laughs]

**Jeffrey Rosen:** [laughs]

[02:30:43] **Will Creeley:** To be somewhat careful with my comments on Kershnar as you noted The New York Times article today, we declined to comment and that's because my colleagues right now are in a hotel room in my hometown of Buffalo, New York preparing for their evidentiary hearing tomorrow. So I will encourage folks to check out our website again, thefire.org. What we've seen in recent years are professors singled out for dissenting views or controversial views on matters of public concern and punished for those views. One shocking case that my colleague, Greg Gribble who's in the audience, litigated successfully is the case of Dr. Lora Burnett at Collin College, who criticized Vice President Pence during the 2020 vice presidential debate - the one with the fly. Folks will remember that perhaps.

[02:21:32] **Will Creeley:** And said, "Someone tell this this guy to shut his little demon mouth up." And she didn't realize it, but Twitter being what it is, for good and for ill, boon and bane, the visibility of her tweet meant that her local Republican state legislator saw it. And as we found out later, sent a text message to the president of Collin College in Texas and said, "She's on the payroll, right?"

[02:21:56] **Will Creeley:** And he received a response from the president of the university saying something like, "I'll handle it" Sure enough, they handled it, right? [laughs] They effectively terminated her. So we litigated. And I could go on, like we've only got 15 minutes, folks. I could go on for a solid three hours with stories like Lora Burnett's from both sides of the ideological aisle and for some folks, who are frankly like Professor Kershnar's. Just ideological gadflies, who are classic Socratic protagonists who wants to say, "Well, why do we think that's bad? Let's talk about it. Let's see what we can figure out about morality by asking questions about deeply held convictions that we have as a society."

[02:22:33] **Will Creeley:** Academic freedom should protect all of that and that's why we're litigating in federal court. We have our appeal. We won a preliminary injunction against Florida's Stop WOKE Act, which listed eight concepts that teachers were not allowed to "advance" in a college classroom. The college classroom should be precisely the place where we have those debates. These were Governor DeSantis' brainchild. They were designed to target "woke" viewpoints. In California right now, we're also in federal court with a new lawsuit because California community colleges now have adopted and evaluate story framework and evaluation framework for professors that measures their commitment and teaching of antiracist principles.

[02:23:19] **Will Creeley:** Now, again, no matter what you think of "woke" or "antiracist principles," those things should be hotly debated in our public college campuses. That's the whole idea. You start the knowledge-generating machine and you back away slowly if you're a legislator. You don't get to push and poke and say, "Well, now we're a Blue State, so we're going to say you can't talk about Red State things," or vice versa. So yeah, we're working hard to, [laughs] to protect academic freedom, but it's a full-time job.

[02:23:42] **Jeffrey Rosen:** It is indeed and it's so urgently important, as you just said, that you are defending academic freedom against threats from the right and forms of anti-WOKE Act and from the left in terms of those who would punish those who failed to pledge allegiance to a particular diversity statement or a

particular dogma. Nadine Strossen, tell us more about the threats on both sides. Are those refusals to pledge allegiance to diversity statements a form of compelled speech and do you think that the threats on this count are coming more from the right or the left or on the, on both sides?

[02:24:21] **Nadine Strossen:** Definitely, the threats are coming from across the ideological spectrum including a persistent phenomenon that each side, and I hate to use the word sides because I see all of us as part of a continuum. But many of us see ourselves in tribes and each tribe is happy to complain about censorship that's coming from the other side, but not willing to recognize that they too are engaging in it. And, Jeff, if I could say, to me, the greatest threat to free speech on campus is coming from students themselves because they are afraid of their fellow students. The peer pressure is so enormous. The latest FIRE and College Pulse survey showed that this is so pervasive that even the schools that had the best free speech culture, because the administration was relatively enlightened, the policies were relatively enlightened, there was almost no difference between the top schools and the bottom schools in terms of student self-censorship.

[02:25:36] **Nadine Strossen:** And that self-censorship, I was really startled to see, comes not only in the classroom but also in individual conversations with faculty members, also in conversations with other students. 25% or so across the board said that they either very often or quite often are engaging in self-censorship and the survey had a very specific definition that you fear punishment, either legal punishment or social punishment or even physical attack. So it was a very specific definition. And the most concerning to me as an educator, 25% of students across the board, at the time that they answered these surveys, they were enrolled in college. Many of them had been there for a number of years, but all for at least a semester, that they are engaging in more self-censorship now than when they began college.

[02:26:41] **Nadine Strossen:** So the exact opposite of what we would expect and hope for, that the college experience would be something that would free your mind, that would free your tongue that would open you to speaking and to listening and that's not happening unfortunately.

[02:27:01] **Jeffrey Rosen:** It is tragic to hear that truth and it's so important that you remind us that self-censorship and the fear of offending the conformity of the mob is perhaps the greatest threat to speech, confirming John Stuart Mill's warning that the threats to speech would come less from government than from the tyranny

of social opinion. Jeannie Suk, how are you seeing that self-censorship and fear of conventional disapproval manifesting itself on campus and what can be done about it?

[02:27:36] **Jeannie Suk Gersen:** So unfortunately, Harvard University, I think, may have come in dead last ...

[02:27:41] **Nadine Strossen:** Oh, yes.

[02:27:41] **Jeannie Suk Gersen:** in the FIRE...

**Audience:** [laughs]

[02:27:42] **Jeannie Suk Gersen:** ... rankings of schools. And there's, we've internally had some debates about your methodology, but ...

**Jeffrey Rosen:** [laughs]

**Nadine Strossen:** [laughs]

[02:27:50] **Jeannie Suk Gersen:** ... but be that as it may. What I am seeing, and I'll now speak in the first person as a teacher. I'm a constitutional law professor, I also teach criminal law. Those are two topics in which you run the gamut of controversial issues. Everything from abortion to affirmative action to the civil rights movement. And in criminal law, you've got the death penalty, you've got all kinds of sexual assault, all of the different topics that students generally today would tend to associate with the danger of getting emotionally harmed in a conversation if someone were to say something that were, that they would find offensive, hurtful. Like denying their own identity, something like that. So that's just my daily teaching experience. That's what I'm doing every day.

[02:28:46] **Jeannie Suk Gersen:** I would say I began teaching in 2007. And in the years that I've been teaching, everything has changed about the classroom environment. And I now no longer rely on volunteers at all in my classroom discussions because that's just no way to get a robust debate or any kind of a diversity of viewpoints. You might get diversity from here to here, whereas you would want a wider range of views represented in the classroom. You can't get that by saying, "Okay, who's going to volunteer to say something?" and mainly because of the fear. You get a lot of, you know ...

[02:29:32] **Jeannie Suk Gersen:** Well, I don't think this, but, some conservatives might think this. You get a lot of that, a lot of distancing. And then I think a lot of, ... I've had times when, in the law schools...Our legal system is an adversarial legal system at least in the courts and so there is inherently a notion of there being more than one side that you would have to listen to. But on campuses today, if you say the phrase "both sides," it is inherently coded as either conservative or making excuses for views that are either racist or discriminatory, right? That if you say that phrase, "both sides," that will lose a large portion of your student audience.

[02:30:20] **Jeannie Suk Gersen:** And yet, our job as legal educators is to teach students to argue at least two sides of an issue and so I've had the experience of saying, "Okay, here's this case, *Lawrence v. Texas*. You're going to say Justice Kennedy's view in your own words in the best way you can and you're going to say Justice Scalia's view in the best way that you can." And, usually, that exercise goes beautifully. It does. But then you will get the students afterwards who would say, "I felt really traumatized by having to listen to that." Having to ...

**Audience:** [laughs]

[02:31:57] **Jeannie Suk Gersen:** ... having to have you...I mean you laugh, but this is like really serious. I mean, this is just, "I want the professor to know," and they'll go to my teaching fellows and say, "I want the professor to know she can never do that again and she can never call on me to say a viewpoint that I might not agree with. And I won't have her ever call on me again for any issue having to do with LGBT you know, whatever it is." So you have students saying those kinds of things and I think that, with faculty in this environment, many of them can feel scared to actually stand their ground and say, "This is how I teach and I do this for a reason."

[02:31:40] **Jeannie Suk Gersen:** I feel lucky, despite FIRE's views to the contrary, I feel lucky to teach at a school, Harvard Law School, where I know that the administration will have my back on matters of academic freedom in the classroom and pedagogy, right? It would never be a situation for me. I feel confident where if I, next year, if I said, "Okay, what's Justice Scalia's view on this?" Then somehow I'm going to be hauled in and disciplined or investigated for something. I, unfortunately, think a lot of teachers across the country would not feel the same way. And it does depend sort of administration-by-administration. Harvard Law School may be different from the Faculty of Arts and Sciences, may be different from the Medical School or the School of Public Health.

[02:32:25] **Jeannie Suk Gersen:** So unfortunately, right now, we have a little bit of a training gap in terms of university administrators. They've, in the last 10 years, gotten a lot of training and lot of raising their intelligence and their expertise about matters of discrimination and making people feel like they belonged, that may not traditionally, felt like they've done a lot of that. But now it's time also to put in the academic freedom piece of it, that what diversity means is not just diversity in terms of your race or your ethnicity or your gender or gender identity, but also diversity of viewpoints. That is at the end of the day, when you talk about diversity, they're all there too because they embody different experiences and may have different views and that is what you're going to learn from. And I think that universities have lost sight of what the purpose of diversity is, even while worshipping diversity.

[02:33:33] **Jeffrey Rosen:** That's an extraordinarily important warning and a cautionary tale. I'm teaching constitutional law this term and I'm also asking students to state the majority opinion and state the dissent. You don't have to say which one you agree with, but just the skill of learning how to articulate both sides is crucial to learning common law and I have not experienced the pushback that you have. But it's very sobering. We have just two minutes left and we must end on time because it's been a remarkable series of panels. I hope it's okay. I'm going to just take the privilege of moderating this discussion to end with the words of Louis Brandeis. Because whenever I think about what I want to teach to young people and learners of all ages, they're encapsulated by his statement. And, *Whitney*, I can recite it now as a party trick. So here it is. Just send us into the night.

[02:34:29] **Jeffrey Rosen:** This is Brandeis and he's just been reading Jefferson, his bill for establishing religious freedom, and he's tracking Jefferson's arguments. He says, "Those who want our revolution," the people in Independence Hall over there, "those who want our revolution believed that the final end of the state was to make men free to develop their faculties and that, in its government, the deliberate forces should prevail against the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty." That's from Pericles' funeral oration. "They believed that freedom to think as you will and speak as you think," that's from Tacitus, "are means indispensable to the discovery and spread of political truth, that, without free speech and assembly, discussion would be futile, that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest threat to freedom is an inert people, that public discussion is a political duty and that this should be a fundamental principle of the American government."

[02:35:33] **Jeffrey Rosen:** That just sums it up in these beautiful words and I'm so grateful to our extraordinary scholars for having come across America to educate us about the First Amendment and let the shining light of reason that we have beamed forth today inspire all of us to defend free speech in the years ahead.

[02:35:54] **Jeffrey Rosen:** Thank you so much.

[02:36:12] **Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock, and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Yara Daraiseh, Cooper Smith, and Samson Mostashari. The First Amendment Summit was produced in partnership with the Freedom Forum, FIRE, The First Amendment Watch at NYU, PEN America and the Reporters Committee for Freedom of the Press. Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Sign up to the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect) and always remember that the National Constitution Center is a private nonprofit. We rely on the generosity, passionate engagement and devotion of the First Amendment of people from across the country who are inspired by a nonpartisan mission of constitutional education and debate.

[02:36:59] **Jeffrey Rosen:** Support the mission by becoming a member at [constitutioncenter.org/membership](https://constitutioncenter.org/membership) or give a donation of any amount to support our work including the podcast at [constitutioncenter.org/donate](https://constitutioncenter.org/donate). On behalf of the National Constitution Center, I'm Jeffrey Rosen.