

Written Statement

Jonathan Turley,

Shapiro Professor of Public Interest Law

The George Washington University Law School

“Fanning The Flames: Disinformation and Extremism In The Media”

United States House of Representatives

Committee on Energy and Commerce

Subcommittee on Communications and Technology

February 24, 2021

I. Introduction

Chairman Doyle, ranking member Latta, members of the Subcommittee on Communications and Technology, my name is Jonathan Turley, and I am a law professor at George Washington University where I hold the J.B. and Maurice C. Shapiro Chair of Public Interest Law.¹ It is an honor to appear before you today to discuss “disinformation and extremism in the media.” This is an issue that is heavily laden with political passions and agendas. In our age of rage, every issue tends to be associated with the interests of one party or one personality. In such an environment, all values or rights often become purely functional questions as to whether they advance or inhibit political objectives. In coming to this hearing, I have only one interest and only one concern: free speech in the United States. As will come as no surprise to those familiar with my prior writings, I maintain what was once a mainstream view of free speech. I believe that free speech is the greatest protection against bad speech. That view is admittedly under fire and indeed may be a minority view today, but history has shown that public or private censorship does not produce better speech. It is a self-replicating and self-perpetuating path that only produces more censorship and more controlled speech. I encourage you (indeed I implore you) not to proceed down that slippery slope toward censorship.

¹ I appear today on my own behalf and my views do not reflect those of my law school, my colleagues at Fox News or the newspapers for which I write as a columnist. My testimony was written exclusively by myself, though I received inspired editing assistance from Jason Long and Seth Tate.

I come to this subject as someone who has written,² litigated,³ and testified⁴ in the area of free speech and the free press for decades. I have also worked for television and print media over three decades.⁵ These are dangerous times where disagreements on the law or politics are often expressed in personal assaults, cancelling campaigns, and vicious attacks. Extremist and violent speech is not an abstract or academic matter for me and many others who work in the public domain. Through the years, I have received hundreds of threats against myself, my family, and even my dog. My home has been targeted and

² Parts of this testimony are taken from a manuscript on the expanding anti-free speech movement in the United States. I have previously written on free speech issues, including the value of anonymity in the exercise of the right. *See, e.g.*, Jonathan Turley, *Registering Publicus: The Supreme Court and Right to Anonymity*, 2002 Supreme Court Review 57-83. I have long maintained a view of privacy and free speech rights shaped by a Millian view that maximizes individual rights. *See, e.g.*, Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions*, 64 Emory L. J. 1905 (2015). My blog, Res Ipsa Loquitur (www.jonathanturley.org), has a free speech focus as do dozens of my columns in national newspapers going back decades. *See, e.g.*, Jonathan Turley, [History Shows Free Speech Is The Loser In Mob Action](#), The Hill, June 24, 2020; Jonathan Turley, [Declaring Antifa A Terrorist Organization Could Achieve Its Anti-Free Speech Agenda](#), LA Times, June 1, 2020; Jonathan Turley, [Big Brother or Little Brother: The Public Applauds As Free Speech Dies On The Internet](#), USA Today, May 29, 2020; Jonathan Turley, *The Death of Free Speech*, Washington Post, October 14, 2012; Jonathan Turley, *Free Speech Under Fire*, Los Angeles Times, March 9, 2012; Jonathan Turley, *Undo the Stolen Valor Act to Protect Free Speech*, Los Angeles Times, October 20, 2011; Jonathan Turley, *The Free World Bars Free Speech*, The Washington Post (Sunday), April 12, 2009, at B3; Jonathan Turley, *When is Violent Speech Still Free Speech?*, USA Today, May 3, 2005, at 13A.

³ *See, e.g.*, *Brown v. Buhman*, 822, F.3d 1151 (10th Cir. 2016); *See also* Jonathan Turley, *Thanks To The Sister Wives Lawsuit, We Have One Fewer Morality Laws*, Washington Post, December 20, 2013.

⁴ *See, e.g.*, United States Senate, Committee on the Judiciary, Subcommittee on the Constitution, “*The Right of The People Peacefully To Assemble: Protecting Speech By Stopping Anarchist Violence*,” August 4, 2020 (Testimony of Professor Jonathan Turley); United States House of Representatives, Permanent Select Committee on Intelligence, *The Media and The Publication of Classified Information*, May 26, 2006 (Testimony of Professor Jonathan Turley).

⁵ This includes multiple contracts with NBC, MSNBC, CBS, and BBC. I recently left CBS and BBC to work with Fox News as a legal analyst.

multiple campaigns have sought my termination as a professor, particularly after I testified as a constitutional expert in the impeachment hearings of former presidents William Clinton and Donald Trump. Thus, while I am generally viewed as something of a “free speech purist,” I have no illusions about the harm of disinformation and extremist speech in our society. Yet, I believe that speech controls pose far greater threats for our country than misguided or malevolent speech. For that reason, I welcome this hearing as an opportunity for a civil and informed discussion of the underlying issues related to speech regulation. I expect that there is much agreement among us on this panel on the costs of false or extremist speech. However, the costs of such speech should not blind us to the greater costs of speech regulation.

I would like to touch on three basic points in my testimony today. First, I will briefly address the problem of disinformation and extremist speech in our society. Second, I will discuss the growing anti-free speech movement building within our society. Third, and finally, I will address how free speech remains the best response to bad speech. Increasingly, free speech is being referenced as a danger in itself that needs to be controlled as opposed to being the very value that defines us as a people. History has shown that limiting free speech will not reduce hateful or false speech, but rather will only fuel such speech in different forums while enforcing approved or orthodox viewpoints. Before you abandon the bright lines of protections for free speech and the free press, I urge you to consider and weigh those costs in the interest of our country.

II. The Scourge of False Speech and The Spector Of Regulated Speech

It is important for hearings of this kind to begin with what is not in dispute. We all agree that there is a torrent of false, hateful, and extremist speech on social media and other public forums. This speech is not without cost. It fuels the rageful, victimizes the gullible, and alienates the marginal in our society. It is a scourge in our society, but it is not a new scourge.

As I often note in testimony before Congress, the Constitution was not only written for times like these, it was written during times like these. While politicians often describe their opponents as being unprecedented in their obstructionist or hostile attitudes, politics in the United States has always been something of a blood sport, literally. At the start of our Republic, the Republicans and Federalists were not trying to “cancel” one another in the contemporary sense. They were trying to kill each other in the actual sense through measures like the Alien and Sedition Acts. Thomas Jefferson once described the Federalists as “the reign of the witches.” That period was also notorious for scurrilous and false information on both sides. There were also rampant conspiracy theories of alliances with Great Britain, France, Spain, and other powers. Newspapers and pamphleteers were highly biased and partisan.

There is also a common suggestion that false information or “disinformation” is dramatically on the rise or more prevalent today than in prior periods. The fact is that there are no dark mysterious forces at work. The Internet and other communicative technologies have given a greater voice to millions – for better or worse. For the first time, media figures and politicians do not largely control the public debate. The Internet is empowering for individual expression. Indeed, it represents the single greatest contribution to free speech

since the printing press. With such enhancement comes an increase in all types of speech: good, bad, and everything in between.

The reliance on the Internet and social media has also been enhanced by the decline of trust in the mainstream media. For years, media companies have catered to viewpoint constituencies in what is often called “echo journalism.” Many people now confine their viewing and reading to news outlets that offer confirmatory coverage in line with their own viewpoints. It is the journalist version of comfort food. Few venture out of this siloed comfort zone. This is true on both the left and the right of the political spectrum. The open bias of much of our news has left many citizens without a source for reliable information. To make matters worse, some academics (and some reporters) are discarding traditional views of neutrality in reporting. For example, [Stanford Communications Professor Emeritus Ted Glasser](#) has publicly called for an end of objectivity in journalism as too constraining for reporters in seeking “social justice.” Given such views, it is hardly surprising that [trust in the media is at an all-time low](#). As a result, many citizens attempt to construct what is true from a variety of sources on the Internet. They do not trust the mainstream media and they certainly do not trust politicians.

This erosion of faith in the media has been accelerated by false or exaggerated stories on both the left and the right. There is currently a bizarre QAnon theory that Trump will become president on March 4th because an 1871 law converted the government into a corporation and that the country will return to a sovereign state next month. That facially absurd theory attracted [roughly 1.5 million views](#).⁶ Another example were the claims of systemic voting fraud by former President Donald Trump, including in his speech on January 6, 2021. I was critical on Twitter of that speech while it was being given and I opposed the challenge of electoral votes in Congress. I also condemned Trump for his false statements about the authority of Vice President Michael Pence to “send back” electoral votes. In other words, I was able to use the exercise of free speech to combat what I viewed as false speech. It is also true that the existence of such countervailing information will not always change minds, particularly when there is a mistrust of official or media sources of information. This can create a dangerous blind spot.

The same is true on the left. For years, false stories were rampant on the Russian investigation. For example, stories about Carter Page being a Russian agent were carried on a wide array of news sites despite the fact that there was little evidence to support the allegation. He was, in fact, an American intelligence asset. Other widespread accounts continued to be reported even after being refuted. For example, I [testified on the protests around Lafayette Park](#) and was surprised how members in the hearing repeated a debunked theory that former Attorney General Bill Barr cleared the area to make way for a photo op for Trump before a church.⁷ In reality, the plan to clear the area was approved long before any photo op was discussed and Barr was not aware of the photo op when he gave his

⁶ <https://www.rollingstone.com/culture/culture-news/qanon-conspiracy-theories-trump-tiktok-1118668/>

⁷ See United States House of Representatives, Committee on Natural Resources, Full Oversight Hearing: “*The U.S. Park Police Attack on Peaceful Protesters at Lafayette Square Park*,” June 29, 2020 (Testimony of Professor Jonathan Turley).

approval. As with the recent fencing around the Capitol, federal agencies decided a wider parameter was needed after protests threatened to breach the White House security area. The threat of a breach was deemed sufficient to require that the First Family be moved briefly to the White House bunker. Indeed, media like National Public Radio (NPR) still have articles proclaiming this false theory as a fact. Another example is the handling of the Hunter Biden story by the New York Post. The story was blocked by Twitter as based on suspected “hacking” despite the fact that the story made clear that the source of this information came from an abandoned laptop, not hacking. To this day, even after admitting its mistake in blocking the story before the election, Twitter maintains the hacking rationale.⁸

The question is who will be the arbiter of truth in any public or private regime of speech regulation. There are rampant false stories across the political spectrum. However, the First Amendment limits the ability of the government to regulate or censor speech. Accordingly, the United States has been spared a history with a state media like China or Iran. The focus on preventing state media controls is increasingly inconsequential in light of the growing levels of control exercised by Big Tech with the urging of many politicians. The last few years have shown there is no need for a central ministry controlling the media if there is a common narrative or bias among private companies controlling much of our communications. What is particularly concerning is the common evasion used by academics and reporters that such regulation is not really a free speech issue because these are private companies and the First Amendment only addresses government restrictions on free speech. As a private entity, companies like Twitter or publishing houses are clearly not the subject of that amendment. However, private companies can still destroy free speech through private censorship. It is called the “Little Brother” problem. That does not alter the fundamental threat to free speech. This is the denial of free speech, a principle that goes beyond the First Amendment. Indeed, some of us view free speech as a human right.

Consider racial or gender discrimination. It would be fundamentally wrong even if federal law only banned such discrimination by the government. The same is true for free speech. The First Amendment is limited to government censorship, but free speech is not limited in the same way. Those of us who believe in free speech as a human right also believe that it is wrong to deny it as either a private or governmental entity. That does not mean that there are no differences between governmental and private actions. For example, companies may control free speech in the workplaces and companies have been recognized as having their own free speech rights. However, the social media companies were created as forums for speech. Indeed, these companies sought immunity on the false claim that

⁸ One can point to such errors on both the left and the right. Even when confronted on such stories, many in the media refuse to correct them, but that does not mean that they should be blocked or banned. I was once [criticized by a Washington Post columnist](#) for a column that I did not write that argued a viewpoint that I did not support. The same columnist, Jennifer Rubin, misrepresented [a judicial decision without correction](#). See <https://jonathanturley.org/2020/05/15/washington-posts-rubin-misrepresents-emoluments-ruling-in-latest-trump-fueled-gaffe/> Yet, [free speech allows such errors to be addressed by others to create a countervailing record](#).

they were not making editorial decisions or engaging in viewpoint regulation. No one is saying that these companies are breaking the law in denying free speech. Rather, we are saying that they are denying free speech as companies offering speech platforms.

The reason that most of us have opposed state media controls is not simply because we disfavor state regulation of speech, but because we favor free speech. These companies can effectively deny free speech more efficiently and effectively than any state apparatus. It was not surprising that recently Russian President Vladimir Putin denounced Big Tech as a threat to “Democratic institutions.”⁹ As one of the world’s most authoritarian and murderous figures, Putin is hardly concerned with democratic institutions. He can, however, recognize (and even begrudgingly respect) a system of continual speech regulation and control that surpasses his own capabilities on a global scale. Political parties can engage in raw censorship through allies in Big Tech to a degree that would be impossible, even unimaginable, through a single government. We would have achieved little in our constitutional system if we took such an approach. It would be akin to putting multiple bolts and barriers on the front door of a house while leaving every window and the backdoor wide open. It creates the pretense of security the same way our current situation creates the pretense of free speech. Of course, for many, the risks to this emerging system of speech control seem slight because they agree with the bias in these companies. External controls on speech seem trivial or inconsequential when the speech is not your own – and even less if it is speech that you abhor or despise. The impact, however, on free speech is immense.

III. America’s Anti-Free Speech Movement

The calls for greater governmental and private censorship in the United States are growing at a time when free speech is under unprecedented attack. Such movements remain a type of dormant virus in our body politic. As parties see an opening to limit opposing views, they have tended to yield to that temptation with differing levels of success. In that sense, the struggle for free speech in the United States is interwoven with our history, from the colonial period to the present day. From the outset, there was a clear concept of free speech, but not a clear commitment to protecting it. Indeed, free speech was a rallying cry for patriots resisting colonial rule. Figures like Thomas Paine and John Peter Zenger raised many issues against the English Crown that are still debated today in conflicts over free speech and the free press.¹⁰ It is important to note that crackdowns on free speech have often come with the periods of our greatest government abuses as a nation.

The intolerance for dissenting speech exists across countries and societies. Orthodoxy is the enemy of free speech and such doctrinal views are often the result of religious or social values. Yet, the greatest anti-free-speech “movements” with national

⁹ MADELINE ROCHE, PUTIN WARNS BIG TECH POSES A THREAT TO 'LEGITIMATE DEMOCRATIC INSTITUTIONS,' TIME, JANUARY 27, 2021. <https://time.com/5933666/putin-davos-agenda-speech/>

¹⁰ See, e.g., Jonathan Turley, *Viewpoint: How likely is an Assange conviction in US?*, BBC (April 11, 2019), <https://www.bbc.com/news/world-us-canada-47874728>.

significance tended to be secular, government-mandated speech controls. A number of historical periods are strikingly analogous to the current controversies in our streets and in our schools.

The United States has gone through repeated periods of crackdowns and criminalization of free speech. Early in the Republic, the anti-sedition laws were used to not only to intimidate but to arrest those with opposing views. The use of the Sedition Act by President John Adams and the Federalists was recognized at the time as not just an abuse, but as the height of hypocrisy. Adams and the Federalists routinely engaged in false and malicious writings about Jefferson, including declaring that, if elected, “Murder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes.”¹¹ Thomas Jefferson and James Madison denounced the law, which made it illegal for anyone to “print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . .”¹² This included a Vermont congressman who was prosecuted for criticizing John Adams’ “unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.”¹³ The prosecution proved the point but the irony was lost on Adams. It was not, however, lost on Jefferson, who remarked that “our general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of England.”¹⁴ Yet, even those leaders seem to have had a more modest view of free speech protections, including the possibility of seditious prosecutions.¹⁵ Whether a result of the conflict with the Federalists or a deep-seated view of free speech, the sedition prosecution period led to the articulation of our modern First Amendment values.¹⁶ At least twenty-five leading Republicans were arrested, from journalists to politicians, though that number may not

¹¹ Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, MILLER CTR., <https://millercenter.org/president/jefferson/campaigns-and-elections>

¹² Sedition Act of 1798, Ch. 74, 1 Stat. 596 (1798) (expired 1801).

¹³ See CHARLES SLACK, *LIBERTY’S FIRST CRISIS: ADAMS, JEFFERSON AND THE MISFITS WHO SAVED FREE SPEECH* 114, 127–28 (2015).

¹⁴ *Id.* at 163–64 (citing *Letter from Thomas Jefferson to John Taylor*, (Nov. 26, 1798), in Bernard Schwartz et al., 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971)).

¹⁵ In a disappointing statement during the Virginia Resolutions debate, Madison assured his opponents “every libellous writing or expression might receive its punishment in the state courts.” *Address of the General Assembly to the People of the Commonwealth of Virginia*, in 6 *THE WRITINGS OF JAMES MADISON* 333–34 (Gaillard Hunt ed., 1908).

¹⁶ See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 304 (1985) (discussing how this period of political conflict “provided the foundation for the Modern theory of the First Amendment”).

fully capture the full extent of the government crackdown.¹⁷ All those convicted would later be pardoned by President Jefferson. The Sedition Act was never found unconstitutional, and, fittingly, expired on Adams' last day in office as a lasting and indelible mark on his presidency.¹⁸

Prosecutions for unlawful speech continued periodically in the United States, becoming particularly abusive during periods like the Civil War and other times of armed conflict. For example, under President Woodrow Wilson, the country experienced a crackdown on dissenting views when the United States entered World War I in April of 1917. Wilson called for new laws to punish dissenters, dismissing free speech concerns by declaring that “[disloyalty] was not a subject on which there was room for . . . debate” since such disloyal citizens “sacrificed their right to civil liberties.”¹⁹ To carry out the crackdown on free speech, Wilson needed, and found, an eager partner in Congress. Congress enacted the Espionage Act of 1917, introducing the criminalization of any acts that “cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States” or willfully to “obstruct the recruiting or enlistment service of the United States.”²⁰ At the time, Attorney General Charles Gregory made clear the menacing intent of such laws, declaring: “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”²¹

It was during this period that the Congress rediscovered the allure of sedition laws. One year after passing the Espionage Act, the Congress passed the Sedition Act of 1918.²² From 1918 to 1921, Gregory's successor Attorney General Mitchell Palmer prosecuted hundreds of individuals under these laws – gaining infamy as the architect of the “Palmer Raids.” Communists, socialists, and anarchists faced repressive measures across the country.²³ In just one raid in January, 1920, over 3,000 alleged Communists were rounded up.²⁴ The abuses during this period were not simply a failure of the Executive and

¹⁷ Wendell Byrd, *New Light On The Sedition Act of 1798: The Missing Half Of The Population*, 34 L. & HIST. REV. 514 (2016).

¹⁸ GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 71 (2004).

¹⁹ PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 53 (1979).

²⁰ Espionage Act of 1917, Ch. 30, Tit. I, § 3, 40 Stat. 217, 219 (1917).

²¹ *All Disloyal Men Warned by Gregory*, THE N.Y. TIMES (Nov. 21, 1917) at 3, available at <https://www.nytimes.com/1917/11/21/archives/all-disloyal-men-warned-by-gregory-criminal-courts-will-handle.html>. For a discussion of this period, see Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009).

²² Sedition Act of 1918, Ch. 75, 40 Stat. 553 (1918) (repealed Mar. 3, 1921).

²³ See generally, CHRISTOPHER M. FINAN, *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* 30, 32–34 (2007); STONE, *supra* note 100, at 220–26 (2004).

²⁴ Finan, *supra* note 105, at 1–4.

Legislative branches, the so-called “political branches,” to protect free speech. They were the result of a complete three-branch failure with the acquiescence of the Supreme Court and lower courts. A well-known example is the decision of the United States for the Ninth Circuit decision in *Shaffer v. United States*²⁵ where the court upheld the criminalization of clearly protected political speech. The defendant was charged with mailing copies of *The Finished Mystery*, a book with the following passage:

“If you say it is a war of defense against wanton and intolerable aggression, I must reply that . . . it has yet to be proved that Germany has any intention or desire of attacking us . . . The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches.”²⁶

That is clearly protected speech, but the Ninth Circuit blissfully dismissed the First Amendment claim while adopting a wildly attenuated analysis.²⁷ The Court upheld the conviction of Debs for speech that was the very essence of the First Amendment. Debs merely gave a speech opposing the war. Before the jury, Debs refused to back down in his exercise of free speech and reaffirmed his opposition to “the present government” and “social system”:

“Your honor, I ask no mercy, I plead for no immunity. I realize that finally the right must prevail. I never more fully comprehended than now the great struggle between the powers of greed on the one hand and upon the other the rising hosts of freedom. I can see the dawn of a better day of humanity. The people are awakening. In due course of time they will come into their own.”²⁸

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

Outside of wartime crackdowns, our struggle to protect free speech hit another low during the Cold War and “Red Scare.” Again, this period revealed a total failure of all three branches in supporting a crackdown on free speech. The Executive Branch arrested suspected Communists and Congress enacted new powers under the Internal Security Act to allow the mass detention of dissidents. The grand jury process was regularly used to

²⁵ 255 F. 886 (9th Cir. 1919).

²⁶ *Id.* at 887; *see also* Stone, *supra* note 103, at 943.

²⁷ Jonathan Turley, *At Michigan rally, Bernie Sanders revels in his role as political successor to Eugene Debs*, USA TODAY (March 9, 2020, 4:51 PM), <https://www.usatoday.com/story/opinion/2020/03/10/bernie-sanders-michigan-rally-political-successor-eugene-debs-column/5000675002/>.

²⁸ Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1174 (1984).

target political dissidents and coerce people to reveal their associations and beliefs. Of course, the most visible abuses occurred in the hearings on “Un-American Activities” with figures like Senator Eugene McCarthy. The work of these committees was replicated in a myriad of federal and state laws barring rights and privileges to suspected Communists.²⁹ Notably, however, some academics supported this crackdown. For example, Professor Carl Auerbach reconstructed the premise of the early anti-Sedition laws by claiming that certain speech cannot be protected because it is inimical to the constitutional system.³⁰ Thus, Auerbach insisted that the First Amendment must be understood contextually as part of a “framework for a constitutional democracy.” As such, it is antithetical to interpret the First Amendment “to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism.”³¹

The Auerbachian view captures the lingering rationale for excluding certain speech from constitutional or political protection. His construction is a simple and familiar construct. He frames free speech in functionalist terms. It is valued for its role in preserving a constitutional democracy, yet not valued to the extent that it is viewed as inimical to that system. In fairness, while Auerbach recognized the rights as a goal of the system, he also recognized that such rights cannot be used against the system. In this sense, it is a right qualified on its compatibility with the common values embodied in the Constitution. For those of us with a normative view of free speech, the constitutional system exists to guarantee the right, not the right to guarantee the constitutional system. Once a functionalist view is adopted, speech denial can become merely a matter of perspective. Those views deemed dangerous or hostile to the system are viewed as beyond the protections of the constitutional system. Hegemony becomes a mere reflection of consensus. It is a relativistic view that will be readily embraced, not just by the government, but by extremist groups alike.

²⁹ As Professor Stone observed: “The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture . . . In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States.” Stone, *supra* note 103, at 939, 949–50, 954.

³⁰ Carl Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 184 (1956); *see also id.* at 189.

³¹ *Id.* at 189.

In a curious way, we are living through a period reminiscent of the Red Scare, though socialism is now, by some polls, popular with almost half of voters³² and a majority of Democratic voters.³³ That, in my view, is a good thing in terms of diversity and tolerance in our political system. However, there is now an inverse intolerance against conservative voices. The Red Scare was a period where writers and others were put on blacklists and denied employment for holding the “wrong” views. There are now new calls for blacklists from not just [members of Congress but writers and academics](#).³⁴ There exists an ever-present fear of being accused of being reactionary or racist in questioning any aspect of the current protests or their underlying demands. Professors and writers have faced demands to be fired or removed from boards due to their views questioning systemic racism in policing, or for the criticism of recent violent protests or particular groups. Ironically, where professors and writers were once targeted for their criticism of the government, it is more likely today that one will be denounced for being supportive of the government, particularly law enforcement.

The most chilling examples of intolerance have come on campuses of higher education. The extensive “cancelling” of speeches and events on campuses often involves rejecting the classical view that free speech protects all speakers, even those who are viewed as advancing harmful ideas. For example, a protest leader who succeeded in blocking a conservative speaker at Berkeley voiced an increasingly common refrain in an editorial: “I don’t think that anyone’s free speech is being impaired. I think sometimes the free speech amendment is used as a way to frame violent conversations as a matter of free speech.”³⁵ When a University of North Carolina student assaulted pro-life advocates on campus in 2019, she gave another common explanation for violent protests: that seeing certain opposing views is “triggering” and hurtful.³⁶ The rationalization for many disruptive or violent forms of conduct on campuses seeks to focus on the cause rather than the means of such protests. By declaring opposing views harmful or threatening, the range

³² Mohamed Younis, *Four in 10 Americans Embrace Some Form of Socialism*, GALLUP (May 20, 2019), <https://news.gallup.com/poll/257639/four-americans-embrace-form-socialism.aspx>.

³³ Hunter Moyler, *76 Percent of Democrats Say They’d Vote for a Socialist for President*, NEWSWEEK (Feb. 11, 2020, 10:34 AM), <https://www.newsweek.com/76-percent-democrats-say-theyd-vote-socialist-president-new-poll-shows-1486732>.

³⁴ <https://jonathanturley.org/2021/01/22/why-burn-books-when-you-can-ban-them-writers-and-publishers-embrace-blacklisting-in-an-expanding-american-anti-free-speech-movement/>

³⁵ Juniperangelica Xiomara Cordova-Goff, *Campus must prioritize safety of marginalized over free speech*, THE DAILY CALIFORNIAN (May 1, 2017), <https://www.dailycal.org/2017/05/01/399178/>.

³⁶ Caleb Parke, *Liberal student arrested for punching pro-lifer on UNC campus, triggered by images of aborted children*, FOX NEWS (May 9, 2019), <https://www.foxnews.com/us/liberal-student-arrested-punching-pro-lifer>.

of responses is expanded to include measures of “self-defense.” This construct converts speech into a discretionary right, subject to how it is received or interpreted by other individuals or groups. It also justifies the targeting of a wide range of individuals who can be silenced under the same rationale.

The effort to silence opposing views is not just confined to speakers. Faculty members across the country have faced investigations, threats, and even termination over espousing unpopular views. Harvard Professor Steven Pinker was the subject of a campaign to fire and remove him from a leading academic society because he questioned, on Twitter, whether police shootings were due to systemic racism, or rather, were part of a long pattern of excessive use of force by police departments.³⁷ University of Chicago Professor Harald Uhlig was targeted for criticizing the Black Lives Matter movement and the Defund the Police campaign.³⁸ University of Pennsylvania Professor Carlin Romano was targeted because he questioned language on a proposed statement on systemic racism.³⁹ Cornell Professor William Jacobson, who is also a conservative commentator, faced calls for his termination after criticizing the Black Lives Matter movement.⁴⁰ One professor was stripped of his directorship over a program after questioning affirmative action in medical admissions⁴¹ while another was put under investigation (and required police protection) after tweeting criticism of “white shaming” and claims of systemic

³⁷ Michael Powell, *How a Famous Harvard Professor Became a Target Over His Tweets*, THE N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/15/us/steven-pinker-harvard.html>.

³⁸ Jonathan Turley, *Writers and Academics Call For Removal Of Chicago Professor For Criticizing BLM and Defunding Police*, RES IPSA (June 11, 2020), <https://jonathanturley.org/2020/06/11/writers-and-academics-call-for-removal-of-chicago-professor-for-criticizing-blm-and-defunding-police/>.

³⁹ Petra Mayer, *National Book Critics Circle Board Members Resign Over Racism Allegations*, NPR (June 15, 2020, 4:25 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/15/877385352/national-book-critics-circle-board-members-resign-over-racism-allegations>; *see also* Jonathan Turley, *Penn Professor Faces Call For His Removal After Questioning An Anti-Racism Statement*, RES IPSA (July 23, 2020), <https://jonathanturley.org/2020/07/23/penn-professor-faces-calls-for-his-removal-after-questioning-an-anti-racism-statement/>.

⁴⁰ Nick Givas, *Cornell professor who criticized Black Lives Matter faces student boycott*, FOX NEWS (June 17, 2020), <https://www.foxnews.com/us/cornell-professor-criticized-black-lives-matter-faces-student-boycott>.

⁴¹ Crystal Phend, *Anti-Affirmative Action Paper Blows Up on Twitter*, MEDPAGE TODAY (Aug. 4, 2020), <https://www.medpagetoday.com/publichealthpolicy/medicaleducation/87903>).

racism.⁴² These are only a few of the growing number of examples of intolerance on campuses, which include cases where professors have been physically assaulted or threatened by protesters.⁴³ What is striking about many of these instances is that other professors have supported the campaigns calling for terminations or punishment of colleagues with opposing views. While most professors do not condone such conduct, the most extreme faculty voices have advocated violence or making life a “living hell” for those with opposing views.⁴⁴ There is a range of such “direct actions” from professors who have led protests, from “shouting down”⁴⁵ speeches to physically⁴⁶ or verbally assaulting⁴⁷

⁴² Martin E. Comas, *UCF protesters demand professor be fired for racist tweets*, ORLANDO SENTINEL (June 14, 2020, 6:32 PM), <https://www.orlandosentinel.com/news/seminole-county/os-ne-ucf-professor-negy-racist-tweets-20200614-pqznqgsafnhqbd36eb2pign4si-story.html>.

⁴³ See, e.g., Katharine Q. Seelye, *Protesters Disrupt Speech by ‘Bell Curve’ Author at Vermont College*, THE N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html>.

⁴⁴ Jonathan Turley, *“Living Hell”: Clemson Professor Prompts Others To Find The Home Address Of Public Letter Author*, RES IPSA (Aug. 8, 2020) <https://jonathanturley.org/2020/08/08/living-hell-clemson-professor-under-fire-after-prompting-others-to-find-the-home-address-of-critic/>.

⁴⁵ See, e.g., *University of New Hampshire Professor Identified In Effort To Disrupt Free Speech Event*, RES IPSA (May 30, 2018), <https://jonathanturley.org/2018/05/30/university-of-new-hampshire-professor-identified-in-effort-to-disrupt-free-speech-event/> (Professor shown shouting “We don’t want you in the LGBT community. Get the f**k out.” at speaker); Ryan Blessing, *Police: QVCC administrator stole conservative commentator’s notes*, THE BULLETIN (Dec. 13, 2017, 10:42 AM), <https://www.norwichbulletin.com/news/20171213/police-qvcc-administrator-stole-conservative-commentators-notes> (professor and administrator shown stealing notes of conservative speaker to stop event).

⁴⁶ See, e.g., *California professor pleads no contest to assault on pro-life students*, FOX NEWS (Nov. 23, 2015), <https://www.foxnews.com/us/california-professor-pleads-no-contest-to-assault-on-pro-life-students> (University of California Professor charged with assaulting pro-life display and table on campus after leading her students from a class).

⁴⁷ See, e.g., Mackenzie Mays, *Fresno State prof says he did nothing wrong, won’t ‘pay a dime’ for erasing anti-abortion messages*, FRESNO BEE (Nov. 10, 2017, 2:59 PM), <https://www.fresnobee.com/news/local/education-lab/article183987576.html> (Professor berated pro-life students, denied they had a right to free speech on campus, and erased their chalk messages).

people with opposing views on campus.⁴⁸ This includes faculty members associated with violent antifascist groups⁴⁹ and professors condoning killing conservative protesters. Most of these voices have not been barred from social media or campuses.⁵⁰

Students have faced similar backlash over expressing opposing or unpopular views. For many years, there have been questions raised over ill-defined speech standards. Recently, however, any pretense of ideological neutrality has been lost in cases where schools or even fellow students have attacked students for simply expressing opposing views on issues of racism or police abuse.⁵¹ There is no empirical study on the range of

⁴⁸ One of the early and most notable examples of this trend of intolerance was the videotaping of Missouri Professor Melissa Click telling protesters to get rid of a student journalist. *Ex-Mizzou Professor Melisa Click Fired Over Protest Clash, Gets New Job*, NBC NEWS (Sept. 4, 2016, 6:14 PM), <https://www.nbcnews.com/news/us-news/ex-mizzou-professor-melissa-click-fired-over-protest-clash-gets-n642711>.

⁴⁹ One such faculty member is college professor Eric Clanton who pleaded guilty after assaulting various people at a free speech rally by hitting them in the head with a heavy bike lock. Emilie Raguso, *Eric Clanton takes 3-year probation deal in Berkeley rally bike lock assaults*, BERKELEYSIDE (Aug. 8, 2019, 2:14 PM), <https://www.berkeleyside.com/2018/08/08/eric-clanton-takes-3-year-probation-deal-in-berkeley-rally-bike-lock-assault-case>.

⁵⁰ I often oppose discipline for such statements even when professors espouse hatred or support violence against those with opposing views. One professor called for more Trump supporters to be killed. Rhode Island Professor Erik Loomis, who writes for the site *Lawyers, Guns, and Money*, said he saw “nothing wrong” with the killing of a conservative protester — a view defended by other academics. While sites like *Lawyers, Guns, and Money* feature writers like law professor Paul Campus who call for the firing of those with opposing views (including myself), it is not their commitment to free speech but our own that must guide our actions.

⁵¹ In one recent case, Georgetown University junior Billy Torgerson was the subject of a formal resolution of condemnation by the Student Senate as well as a bias complaint from the university. The reason is a column posted on his own website in which he espoused widely held conservative views of the law and patriotic views of the country. See William Mitchell Torgerson, *A Nation of Virtuous Individuals*, AMERICAN BUCKLER (July 6, 2020), https://americanbuckler.com/articles/?fbclid=IwAR3Dg59FPZYaJ-dFd8dRsiSYwj2eqMbe0KdHBJlb077_2NNNSJX-sbiGkSU. The university did nothing to reaffirm the right of Torgerson or others to speak without fear of such collective action. One professor recently asked other colleagues for a list of students who engaged in what they viewed as hateful speech so that she could unilaterally exclude them from classes. Ethan Greer, *GUSA Senate condemns blog post written by a Georgetown student*, THE

such controversies, but few would disagree that they are on the rise around the country.⁵² Polls show a sharp decline of support for free speech and a rise in students who say that they do not feel comfortable sharing their views.⁵³ For example, a Yale poll found that seventy percent of students said that they experienced political bias and the same poll said that the students only believe one percent of their faculty were conservative.⁵⁴ A poll at Pomona found nine out of ten students said that “the campus climate prevents them from saying something others might find offensive.” Nearly two-thirds of faculty members felt the same.⁵⁵ Seventy-five percent of conservative and moderate students strongly agree that the school climate hinders their free expression.⁵⁶ The poll showed a sharp difference in the freedom expected from students based on their ideology. The number of students

GEORGETOWN VOICE (July 8, 2020), <https://georgetownvoice.com/2020/07/08/gusa-senate-condemns-blog-post-written-by-a-georgetown-student/>

⁵² One poll of 800 full-time students at Yale found one in three believed violence was justified to oppose “hate speech.” Jonathon Turley, *Poll: One In Three College Students Believe Violence is Justified to Stop “Hate Speech”*, RES IPSA (Nov. 5, 2018), <https://jonathanturley.org/2018/11/05/poll-one-in-three-college-students-believe-violence-is-justified-to-stop-hate-speech/>.

⁵³ See, e.g., *Harvard Youth Poll Finds Majority of Young Americans Support Impeachment and Removal of President Trump*, HARVARD KENNEDY SCHOOL (Nov. 18, 2019), <https://iop.harvard.edu/about/newsletter-press-release/harvard-youth-poll-impeachment-nov18-2019>) (finding that only 35 percent of young Republicans felt comfortable sharing their political opinions on campus); Jennifer Larson, et al., *Free Expression and Constructive Dialogue at UNC at Chapel Hill*, UNC FACULTY REPORTS (Mar. 2, 2020), <https://fecdsurveyreport.web.unc.edu/files/2020/02/UNC-Free-Expression-Report.pdf>; *Perceptions of Speech And Campus Climate*, POMONA COLLEGE (Feb. 8, 2018), <https://www.pomona.edu/public-dialogue/survey>. According to a Knight Foundation survey 41 percent of students believe that hate speech should not be protected. *Free Speech On College Campuses*, KNIGHT FOUNDATION (May 13, 2019), <https://knightfoundation.org/reports/free-expression-college-campuses/>.

⁵⁴ Jennifer Harper, *Inside the Beltway: Yale students report that just 1% of their professors are conservative*, THE WASH. TIMES (May 4, 2017), <https://www.washingtontimes.com/news/2017/may/4/inside-the-beltway-yale-students-say-1-of-professo/> [<https://perma.cc/9RDW-WF9E>]; see also *Survey: 70% of Yale Students Often Experience Political Bias in the Classroom*, WILLIAM F. BUCKLEY, JR. PROGRAM AT YALE (May 3, 2017), <https://www.buckleyprogram.com/post/survey-70-of-yale-students-often-experience-political-bias-in-the-classroom> [<https://perma.cc/UDJ6-SK8S>].

⁵⁵ See POMONA, *supra*.

⁵⁶ *Id.*

fearful about expressing their views was “nearly 2.5 times higher than very liberal students.”⁵⁷ Another poll of 800 full-time Yale students found that a majority “felt intimidated” in sharing their views due to the expressed views of their professors and other teachers.⁵⁸ Running below the surface of these controversies is a fundamental disagreement over not just the protection but the nature of speech. As with the growing intolerance among professional journalists, student journalists and editors are being attacked for expressing opposing views.⁵⁹ Similarly, university administrators have called for limits on free speech and have supported often vague limitations on speech.⁶⁰

We are living in one of the most extreme anti-free speech periods in our nation’s history. We have never seen the current coalition of political, media, and academic figures aligned to limit speech rights. For the first time in my life, I am no longer confident that our free speech values will prevail. This body should act as a firewall for free speech, not the accelerant for this rapidly spreading conflagration.

IV. Combatting False Speech With Free Speech

There is a growing view, as reflected in many of these cases, that free speech itself is a danger and that certain views constitute harm for the purposes of proscriptive or

⁵⁷ *Id.*

⁵⁸ James Freeman, *Most U.S. College Students Afraid to Disagree with Professors*, WALL STREET JOURNAL (Oct. 26, 2018, 5:52 PM), <https://www.wsj.com/articles/most-u-s-college-students-afraid-to-disagree-with-professors-1540588198>.

⁵⁹ *Free Speech Is Not Violated At Wellesley*, THE WELLESLEY NEWS (Apr. 12, 2017), <https://thewellesleynews.com/2017/04/12/free-speech-is-not-violated-at-wellesley/> (“Shutting down rhetoric that undermines the existence and rights of others is not a violation of free speech; it is hate speech . . . hostility may be warranted.”); Jessica Chasmar, *Syracuse University independent paper axes columnist who argued 'institutional racism is a myth'*, THE WASH. TIMES (June 11, 2020) (editors fired columnist who questioned claims of institutional racism in another publication).

⁶⁰ University presidents have opened up their schools for speech regulation by denouncing absolutist views of free speech. See, e.g., Douglas Belkin, *Why Northwestern President Morton Schapiro Favors Safe Spaces*, WALL STREET JOURNAL (May 16, 2017, 10:12 PM), <https://www.wsj.com/articles/why-northwestern-president-morton-schapiro-favors-safe-spaces-1494987120> (“You want to protect the First Amendment, obviously, but it isn’t absolute.”). Other presidents have expressly denounced “the disingenuous misrepresentation of free speech” and declared that they will not protect speech that can “spread hate or create animosity and hostility.” Ric N. Baser, *Hate speech does not equal free speech*, SAN ANTONIO EXPRESS-NEWS (Dec. 13, 2017), <https://www.expressnews.com/opinion/commentary/article/Hate-speech-does-not-equal-free-speech-12428780.php> (discussing letter declaring that colleges will not protect inappropriate or hostile speech).

defensive action. It is a construct that is familiar to many libertarians under the “harm principle” of John Stuart Mill—with a lethal twist. While many of us have long used the harm principle in a myriad of areas to define the limits on government controls and action,⁶¹ a type of warped Millian harm principle is now being used to justify both government controls and private action to silence those with opposing views. Indeed, the anti-free-speech movement on our campuses is often defended as a type of militant Millian movement, a construct that is neither faithful to Mill’s writing nor logical in its application. Yet, it is a view that has repeatedly been expressed in some of the most violent confrontations around the country.

Given these views, it is not surprising that I have called myself an [Internet originalist](#).⁶² The Internet was originally seen as the most transformative tool for free speech in history. It was an open, free platform for speech that united the world. Not surprisingly, it also was a threat to authoritarian countries and figures who have struggled to control and censor the sharing of information and viewpoints. Originally, Twitter was the ultimate expression of those free speech values, as individuals interacted with others to share instant observations and experiences. Back then, the platform was neutral. Its appeal was its convenience, not its supervision. Dorsey himself said the success of Twitter is based on the principle that you “make every detail perfect and limit the number of details to perfect.”

Yet, the original free use of the internet has come into increasing conflict with politicians who demand that social media companies actively prevent people from sharing information they deem to be false or misleading. Notably, when Twitter’s CEO Jack Dorsey came before the Senate to apologize for blocking the Hunter Biden story before the election as a mistake, senators pressed him and other Big Tech executive for more censorship. Rather than addressing the dangers of such censoring of news accounts, Senator Chris Coons pressed Dorsey to expand the categories of censored material to prevent people from sharing any views that he considers “climate denialism.” Likewise, Senator Richard Blumenthal seemed to take the opposite meaning from Twitter, admitting that it was wrong to censor the Biden story. Blumenthal said that he was “concerned that both of your companies are, in fact, backsliding or retrenching, that you are failing to take action against dangerous disinformation.” Accordingly, he demanded an answer to this question:

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

⁶¹ Jonathan Turley, *The Loadstone Rock: The Role of Harm In The Criminalization of Plural Unions* 64 EMORY L. J. 1905 (2015).

⁶² Jonathan Turley, *The Case For Internet Originalism*, The Hill, Nov. 2, 2020.

“Robust content modification” has a certain appeal, like a type of software upgrade. It is not content modification. It is censorship.⁶³ If our representatives are going to crackdown on free speech, they should admit to being advocates for censorship. Indeed, leading academics had the integrity recently to declare that they believe that “China is right” about censorship.⁶⁴

The expanding list of areas for censorship is no surprise. Europe has shown that such speech regulation becomes insatiable – an invitation to every group to seek to silence or sanction those who hold opposing viewpoints. For years, some of us have warned of the exportation of European speech laws to the United States. Free speech is in free fall in Europe where countries like France, Germany and England routinely charge people for speech deemed offensive or insulting to any group.⁶⁵ There is no evidence that this speech regulation has made a measurable impact on the ranks of actual fascists and extremists. They have claimed the status of victims and relish the circumvention of these laws. Neo-Nazis are holding huge rallies by adopting new symbols and coded words, while German authorities arrested a man on a train because he had a Hitler ring tone on his phone. There is no evidence that these laws actually diminish hate speech but there is plenty of evidence that they diminish free speech. That impact was evident in a recent poll of German citizens. Only eighteen percent of Germans feel free to express their opinions in public. Fifty-nine percent of Germans did not even feel free expressing themselves in

⁶³ Recently, there was a widely reported study that purportedly showed that the censoring of material on Twitter and other platforms showed no political bias. *See* Jonathan Turley, *The NYU Study: The Claim of Anti-Conservative Bias In Social Media is Unfounded But Inconclusive?* Res Ipsa, February 3, 2020 (available at <https://jonathanturley.org/2021/02/03/the-nyu-study-the-claim-of-anti-conservative-bias-in-social-media-is-unfounded-but-inconclusive/>). However, the report states the following: “The question of whether social media companies harbor an anti-conservative bias can’t be answered conclusively because the data available to academic and civil society researchers aren’t sufficiently detailed. Existing periodic enforcement disclosures by Facebook, Twitter, and YouTube are helpful but not granular enough to allow for thorough analysis by outsiders.” Thus, the report is not actually based on a review of individuals and groups censored by these companies because the companies refuse to release the data.

⁶⁴ <https://jonathanturley.org/2020/05/04/china-was-right-academics-and-democratic-leaders-call-for-censorship-of-social-media-and-the-internet/>

⁶⁵ In France, twelve protesters were fined for supporting the boycott of Israel. In Denmark, a politician was convicted for burning Korans. A German politician was criminally charged for calling migrants “scum.” In England, a Baptist minister was jailed overnight for preaching against homosexuality and a man was investigated for telling a Nelson Mandela joke.

private among friends. And just seventeen percent felt free to express themselves on the Internet.

The same appetite for limiting the speech of others is growing in the United States. This is not just reflected in demands for greater censorship on the Internet, but in recent calls for networks like Fox News to be taken off the airways. In a recent letter to companies like AT&T, Reps. Anna Eshoo and Jerry McNerney demanded answers from carriers on why they continued to air Fox News, Newsmax, and other networks on cable television. The letter follows calls for cable companies to refuse to air the networks. The letter stresses that “not all TV news sources are the same” and confronts the carriers on airing the networks as purported “hotbeds” of disinformation and conspiracy theories. Specifically, they object that “Fox News . . . has spent years spewing misinformation about American politics.”

From the perspectives of free speech and the free press, the letter is not just chilling; it is positively glacial. The letter does not address the long-standing objections to networks like CNN, MSNBC, and others for pronounced bias and refuted stories. There is a long list of such false stories. Some were corrected and some were not. Indeed, major media figures like Chuck Todd have made [demonstrably false statements](#)⁶⁶ and aired a [clearly false or misleading clip](#)⁶⁷ without any correction. Those were false stories but there are a broader array of stories that advance arguments based on [rejected theories or legal interpretations](#).⁶⁸ Claiming that there are strong criminal cases to be made on rejected legal interpretations is “disinformation” but it is also a form of opinion – and clearly an exercise of free speech.

Yet, the letter solely seeks to bar those networks that the members and their constituents do not like or likely watch. It is a complete list of every major television channel viewed as conservative-leaning. If the companies were to yield to such pressure, there would be no major television outlet offering a substantial alternative to the coverage of companies like CNN and MSNBC. Tens of millions of viewers would be forced to watch those channels or watch nothing at all. Frankly, such curtailment or outright elimination of these networks would work to the advantage of these and other Democratic members. There is a rather obvious conflict of interest that is laid bare not only by the demand but the inclusion of only networks with large conservative audiences. The objection to “spewing misinformation about American politics” is clearly made from one side of such politics.

In the meantime, various members are also pushing to close down or bar conservative blogs and news sites on the Internet for spreading “disinformation” about everything from election fraud to global warming to police abuse. It is another example of seeking to achieve indirectly what cannot be achieved directly in curtailing free speech.

⁶⁶ <https://jonathanturley.org/2020/10/18/chuck-todd-the-michigan-supreme-court-did-not-cite-any-law-in-ruling-whitmiers-actions-unconstitutional/>

⁶⁷ <https://jonathanturley.org/2020/07/19/nbcs-chuck-todd-repeatedly-airs-clip-previously-denounced-as-misleading-and-wrong/>

⁶⁸ <https://jonathanturley.org/2020/07/12/when-awfully-close-is-just-awful-nadler-raises-invalid-bribery-theory-in-call-for-barr-investigation/>

Congress could never engage in this type of raw content discrimination between news organizations. However, it can use its influence on private companies to limit free speech. The move makes obvious sense if the desire is to shape and control opinion. It is not enough that such viewers can continue to watch alternative networks. They are seeking to curtail or to prevent others from being able to watch or hear opposing views. This is the essence of a state media model. Controlling speech on certain platforms is meaningless if citizens can still hear opposing views from other sources. You must not only control the narrative but also eliminate alternatives to it.

The most notable question in the letter is the very first one asked by Reps. Eshoo and McNerney.

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

The answer should begin with the obvious principles of free speech and the free press, which are not even referenced in a letter pushing for major news outlets to be essentially shutdown. Instead, the companies are asked if they will impose a morality judgment on news coverage and, ultimately, access. This country went through a long and troubling period of such morality codes being used to bar speakers to censor material in newspapers, books, and movies, including feminists, atheists, and other disfavored groups. To invite a return to such subjective standards is alarming, particularly in barring the preferred news sources for tens of millions of citizens. Fox News has long ranked as the most watched cable network for news, and is the primary source of news for tens of millions of citizens. Like CNN and MSNBC, it is also the target of criticism over the balance of its reporting. However, the role of these companies is not to take “adverse actions” against channels because of such objections to the focus or viewpoints exhibited on such channels. As for Fox, there are a variety of voices and perspectives offered, including analysis from some of the best-known Democratic figures.

It is easy to portray disagreements as “disinformation.” Indeed, it is difficult today to report or address these controversies without facing partisan outrage.⁶⁹ It is transparently

⁶⁹ For example, in the days following the election, various claims of irregularities were raised. Such irregularities occurred in all of the presidential elections that I have covered as a legal analyst, including legal challenges. In virtually every interview after the election, I (and others) included a statement that there was no evidence of systemic fraud. Yet, we are all subject to the same hair-triggered cancel culture. For example, in one segment, we addressed the controversy in Michigan where a district using computer voting systems initially gave thousands of votes to Biden rather than Trump, as reported by Michigan Secretary of State Jocelyn Benson. The wrong designation of Trump votes as Biden votes was quickly corrected. I stressed that this appeared “human error” and that we would have to see if there was any “vulnerability” for human error raised in the promised

one sided. When I worked for NBC/MSNBC and CBS, we covered such challenges by both Democrats and Republicans. We never faced such attacks or retaliatory actions. Indeed, while blasting coverage of claims of computer vulnerability or glitches, there is [no such outrage over continuing litigation from Democratic lawyers](#) alleging such errors in challenges in states like New York.⁷⁰ As legal analysts, we try to cover all such challenges and claimed irregularities but many would prefer to tailor or bar such coverage by labeling it as disinformation.

The election coverage is a good example of how free speech offers its own protections. Many of us countered claims of systemic electoral fraud in covering the election challenges. While some individuals remain unconvinced, many more would still harbor doubts if Big Tech or Congress had succeeded in silencing those raising such questions. Instead, viewers could hear opposing views on channels like Fox with experts who overwhelmingly noted that no compelling evidence had been presented in court. Those conclusions were more compelling because they came from analysts and reporters who were open to reviewing such evidence while stressing that it had not been produced. It is the difference between a process geared toward reaching conclusions and a process of dictating conclusions. However, this process requires trust. A free and open forum for communication was the original and perfect design for the Internet. And here, once again, the Constitution could offer the clarity of that original meaning to limit the detail to the perfect. To paraphrase the First Amendment, Twitter and carriers can hold to a simple static, “originalist” position: It should “make no policy abridging the freedom of speech or the press.”

Rather than seek to silence others (or whole networks), there is an alternative way to combat bad speech. Congress should focus on publishing data and information that supports citizens in reaching their own conclusions. I am not speaking of processed or conclusory reports, but objective material for citizens to consider. There is a palpable mistrust of Congress and the media in framing information. That can be addressed through greater transparency and access to information.

I admit that I may be a relic in my views, but I continue to believe that the greatest protection against bad speech is better speech. I sometimes tell my students that free speech often metaphorically divides those who prefer oceans to swimming pools. Those seeking limits often speak of free speech like it is a swimming pool that must be monitored and carefully controlled for purity and safety. I view it as more of a rolling ocean. It is indeed dangerous, but it is also majestic and inspiring. It’s immense size also allows for a natural balance. Free speech allows false ideas to be challenged in the open rather than driving

challenges. For that commentary a [law professor accused me to being akin to a Holocaust denier and called for my termination at George Washington University](#). It is an example of disagreements are framed as disinformation but even akin to Holocaust denial.

⁷⁰ Jonathan Turley, *The Return of Marc Elias: The Lawyer Implicated In The Clinton Dossier Scandal Is Back In The News*, Res Ispa, Feb. 5, 2020, available at <https://jonathanturley.org/2021/02/05/the-return-of-marc-elias-the-lawyer-implicated-in-the-clinton-dossier-scandal-is-back-in-the-news/>

dissenting viewpoints beneath the surface. However, free speech, like other constitutional values, requires a leap of faith. Faith, not only in free speech, but in ourselves. Citizens are capable of educating and informing themselves. They do not need politicians or corporate filters to protect them from speech deemed misleading, false or inciting. History has shown that the far greater danger is found, not in these individual speakers, but the empowered censors in a system of speech control.

V. Conclusion

Roughly 70 years ago, Justice William O. Douglas accepted a prestigious award with a speech entitled “[The One Un-American Act](#),” about the greatest threat to a free nation. He warned that the restriction of free speech “is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us.” The measures being discussed today have the potential to defeat us all. It is surprisingly easy to convince a free people to give up their freedoms, and exceedingly difficult to regain those freedoms once they are lost.

Once again, thank you for the honor of appearing before you to discuss these important issues and I would be happy to answer any questions from the Committee.

Jonathan Turley
J.B. & Maurice C. Shapiro Chair of Public Interest Law
George Washington University