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Mad about the First Amendment, Our Beacon for Liberty, Equality and Democracy

Nicholas Allard
Brooklyn Law School, nick.allard@brooklaw.edu

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Mad About the First Amendment, Our Beacon for Liberty, Equality and Democracy[1]

Nicholas W. Allard[†]

I. THE FIRST AMENDMENT MATTERS IN THE GREAT DEBATES SHAPING THE FUTURE

You cannot fight hard for something you do not love. The people of the United States must really love the First Amendment because so many are fighting so hard over its meaning, scope, and application to the myriad hotly contested issues of our day. We all are just plain mad about the essential but inconvenient bundle of rights in the great Amendment. We are madly in love with it when it protects us and our freedom. We also find it maddening when it curtails our ability to require other people to do what we want or make them stop doing what we dislike. We are concerned, perplexed, and often mad as hell about taking it anymore: that is, putting up with any more free speech and other First Amendment rights that are invoked to deny or obscure what we believe are facts and truth, to promote ideology and beliefs we dislike, or to embolden and empower adversaries, who spread hate, bigotry, division and even incite violence and insurrection.[2]

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1. This title was suggested to me by *Mad About You* the American television romcom with a "can't live with, can't live without each other" theme that ran from 1992 to 1999 starring Paul Reiser and Helen Hunt. *Mad About You* (NBC television broadcast 1992). The views in this article are those of the author alone. They are not authorized by and do not attempt to convey the views of any other organization or person.

† Former President and Joseph Crea Dean, Professor of Law Emeritus, Brooklyn Law School ("BLS"). Senior Counsel, Dentons, the world's largest law firm. Educational and civic volunteer leadership roles include serving as President of the Merton College Charitable Corporation (Oxford University) and a Bodley Fellow of Merton College, Lucy Cavendish College (Cambridge University) North America Advisory Committee, Secretary, Association of American Rhodes Scholars, Trustee, Shakespeare Theatre Company, (Washington D.C.), Director, Making Every Vote Count (Washington D.C.), and leadership roles on committees of the American Bar Association including Chair of the Standing Committee of the Law Library of Congress.

2. Actor Peter Finch won the Best Actor Academy Award for portraying the seriously disturbed television news anchorman Howard Beale in *Network*. NETWORK (Metro-Goldwyn-Mayer, Inc. 1976). In this dark and prescient depiction of media exploitation of lunacy, fantasy, and anger for ratings and profit, the character Beale frequently screams: "I'm as mad as hell and I'm not going to take this anymore." *Id.*

Today the First Amendment is front and center in vigorous public discourse regarding important legal, policy, and political questions at a historic inflection point. Our free, democratic, and civilized way of life based on law and justice faces severe threats on many fronts. Across America, and throughout the world, people are fighting over nothing less than the future of democracy, the future of humanity. We are involved, for example, in historic battles over justice, freedom, equality, globalism, and whether people and the natural world can continue to co-exist. The outcomes of these struggles will determine whether the fundamental values, norms, and imperfect institutions which have been vital for empowering people, promoting cooperation, inspiring people to care generously for each other, and improving the human condition, will continue to evolve and endure, or instead, whether we will fall into a dark dystopian world dominated by power, violence, privilege, immorality, and serendipitous happenstance, not to mention cataclysmic events of biblical proportions. At stake is whether, when responding to emergencies and existential crises, we can maintain our best ideals or resort to our worst qualities: deception, brutality, arrogance, ignorance, delusion, excess, selfishness, and indifferent incompetence.[3] If you believe this is hyperbole, then you have not been paying attention. Complacency is out of order. However, complacency in the face of crises is a form of societal inertia that historically has been difficult to overcome.[4]

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3. This author chooses to be optimistic and points others to inspiring reminders of America's eventual success overcoming the Great Depression and World War II, powerfully depicted in the Ken Burns documentary series, *The Roosevelts: An Intimate History* (2014) and in Spike Lee's timely, moving, and cautionary new series about New York surviving and overcoming the 9/11 attacks and a generation of corrosive challenges, *NYC Epicenters 9/11–2021* (2021). In one of hundreds of interviews by Lee, longtime WNBC New York news anchorman Chuck Scarborough trenchantly observes that in the aftermath of 9/11, people came together selflessly, heroically, and creatively (such as the little-known story of the massive impromptu maritime rescue of half a million people trapped in lower Manhattan, far exceeding the miracle of Dunkirk). *NYC Epicenters 9/11–2021* (HBO 2021). In contrast, notes Scarborough, in many ways the COVID-19 pandemic drove us apart and many people retreated to isolation, selfishness, cynicism, and materialism. *Id.* For a comprehensive review of less optimism in books of the last generation about the abandonment of values in the face of crisis *see* Carlos Lozada, *9/11 Was a Test. The Books of the Last Two Decades Show How America Failed*, WASH. POST (Sept. 3, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/interactive/2021/911-books-american-values/ [https://perma.cc/B4SN-7BSA].

4. A poignant, timeless, and timely example of the difficulty of overcoming societal complacency even in the direst circumstances is Polish diplomat Jan Karski's heroic efforts in World War II to inform Western governments, including the United States, about the atrocities suffered by Jews during the Holocaust. This story is told powerfully and unforgettably in *Remember This: The Lesson of Jan Karski*, written by Clark Young and Derek Goldman, directed by Derek Goldman. The one-actor, one-act play was recently performed in Washington D.C. at the Shakespeare Theatre by David Strathairn. Thomas Floyd, *David Strathairn, Now Playing a Holocaust Witness at the Shakespeare Theatre, Reflects on the Lessons of the Past*, WASH. POST (Oct. 5, 2020, 12:00 PM), https://www.washingtonpost.com/goingoutguide/theater-dance/david-strathairn-qanda-shakespeare-theatre/2021/10/05/ec97e4dc-21f5-11ec-b3d6-8cdebe60d3e2_story.html [https://perma.cc/5H74-CM33]. The simple trenchant words of the play's Prologue, words that were written eight years ago about events that occurred over eighty years earlier, could have been ripped from today's headlines:

Complicating matters, it also is a time when people everywhere are grappling with problems amidst governmental dysfunction at every level. The dominant and often siloed economic, political, sociological, philosophical, and legal approaches of the late twentieth century and our post-World War II institutional mechanisms have failed to adequately address growing disparities in wealth, health, food security, personal safety, social, gender and racial injustice, threats to sustaining both democracy and the very world in which we live, and how to adhere to ethical values in a free and civil pluralistic society.

Although it is the conceit of every generation to believe its collective experience is unprecedented, in the twenty-first century there are "new things under the sun." Society faces issues and problems that are different in degree and scope than in the past. For example, because of the speed, power, and capacity for data storage of networked digital devices, for the first time in the history of humanity it is easy to remember, and almost impossible to forget.[5] Another example is that throughout the history of civilization political theory and governance always depended on society's evolving understanding of the nature of human beings.[6] That is, the essence of humanity was a given for artists, philosophers, and political theorists to attempt to understand and depict, and for laws to guide and govern. Now, due to scientific breakthroughs relating to the "code of life" we have the capacity to determine, predict, change, and shape the nature of humankind.[7] This does not merely shake the underpinnings of political theory and philosophy. It turns them inside out in a revolutionary way. Science plausibly, rapidly, and not too subtly is shifting the age-old question of what to do about the proclivities of people, to the uncomfortable question of what would you want the proclivities of people to be?[8] And consider that advan-

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"We see what goes on in the world, don't we?" star David Strathairn asks while channeling Karski, the real-life resistance fighter who traveled from Poland to Franklin D. Roosevelt's Oval Office in 1943 to bring word of the Holocaust's horrors. "Our world is in peril. Every day, it becomes more and more fractured, toxic, out of our control. We are being torn apart by immense gulfs of selfishness, distrust, fear, greed, indifference, denial."

Id. Karski's reports to President Franklin Roosevelt, Justice Felix Frankfurter, and other leaders went unheeded and failed to prompt government intervention in the genocide of Jews by the Nazi regime which continued unabated until the end of the war. *See id.*

5. This is the profound insight of preeminent privacy expert Viktor Mayer-Schonberger, Professor of Internet Governance and Regulation, the Oxford Internet Institute, Oxford University. *See* VICTOR MAYER-SCHÖNBERGER, DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE (2009).

6. I discussed this observation previously in: Nicholas Allard, *Sweet Are the Uses of Adversity*, 52 U. TOL. L. REV. 197, 224–25 n. 68–70 (2021) [hereinafter Allard, *Sweet Are the Uses*].

7. *See generally* WALTER ISAACSON, THE CODE BREAKER (2021).

8. In China, a scientist used Crispr to "edit the genes of human embryos, which yielded the world's first genetically modified infants." *See* Katherine J. Wu, Carl Zimmer & Elian Peltier, *Nobel Prize in Chemistry Awarded to 2 Scientists for Work on Genome Editing*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/2020/10/07/science/nobel-prize-chemistry-crispr.html [https://perma.cc/J8VZ-GW35]. The promise and risks of the new gene editing technology is discussed

ces in artificial intelligence synergistically coupled with biotechnology raise novel questions about machines supplanting humans even in the learned professions, whether robots deserve civil rights, including First Amendment protection, and questions concerning the fundamental distinction between machines and humans.[9] Turning to the fraught relationships of humans and the natural world, will we heed the experts who warn that we must completely change how we eat, move, work, and live in the next fifty years, or it will be too late to save the planet from environmental destruction?[10]

It is no overstatement to note that by the mid-twenty-first century the U.S.—and in fact the world—will be challenged to make top to bottom changes that dwarf anything society has ever contemplated or done. Completely new systemic policy and behavioral approaches are needed in at least three other areas in addition to mitigating climate change: (1) reinvigorating the infrastructure, legitimacy, and security of democracy, (2) charting societal rules for applications of breathtaking advances in biomedical codes of life and digital technology, and (3) as is painfully obvious, reversing growing disparities in economic opportunity, public health, including food security and safety, social mobility, and eradicating the enduring consequences of racial, ethnic, cultural, religious, gender, and all forms of discrimination based on personal identity and sexual preference.

Yet extreme ideas, partisan strife, and disputes over basic facts, truth, and lies (not to mention the meaning of complex data), thwart evaluating,

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in Nobel Laureate Dr. Jennifer A. Doudna's book, A CRACK IN CREATION (2017); and ISAACSON, *supra* note 7.

9. In some sense that time already is upon us. With increasing numbers of us to various degrees having artificial mechanical components and increasing biological engineered parts in our bodies, along with other developments such of the advances of AI and the prospect of machines gaining self-awareness, the line between human and robot becomes harder to draw. Note, there is considerable and growing literature discussing whether and when robots will have enforceable civil rights. *See, e.g.*, *The ACLU of the Future May Protect Robot Rights*, TIME (Sept. 11, 2015, 1:34 PM), https://time.com/4023497/susan-n-herman-will-robots-need-rights/ [https://perma.cc/9AM4-VABD] (the complete text of Professor Herman's statement is on file with the author); DAVID J. GUNKEL, ROBOT RIGHTS (2018); David Gunkel, *2020: The Year of Robot Rights*, MIT PRESS READER (Jan. 27, 2020), https://thereader.mitpress.mit.edu/2020-the-year-of-robot-rights/ [https://perma.cc/P2ZX-HUDS]; Anthony Cuthbertson, *Robots Will Have Civil Rights by 2045, Claims Creator of 'I Will Destroy Humans' Android*, INDEPENDENT (May 25, 2018, 11:12 AM), https://www.independent.co.uk/life-style/gadgets-and-tech/news/robots-civil-rights-android-artificial-intelligence-2045-destroy-humans-sophia-singularity-a8367331.html [https://perma.cc/YFV2-C74L]; Lauren Sigfusson, *Do Robots Deserve Human Rights?*, DISCOVER (Dec. 5, 2017, 10:45 AM), https://www.discovermagazine.com/technology/do-robots-deserve-human-rights [https://perma.cc/G49V-8JSZ].

10. *See, e.g.*, Catherine Clifford, *Bill Gates: These 5 Concepts Will Help You Understand the Urgency of the Climate Crisis*, CNBC (Feb. 14, 2021, 10:00 AM), https://www.cnbc.com/2021/02/14/bill-gates-concepts-to-understand-the-climate-crisis.html [https://perma.cc/3RWM-MN5S]; Caitlin Yilek, *Bill Gates Thinks American's Lives Have to Change to Save the World. Here's Where to Start*, CBS NEWS (Feb. 16, 2021, 4:50 PM), https://www.cbsnews.com/news/bill-gates-climate-change-norah-odonnell-watch-live-stream-today-02-16-2021/ [https://perma.cc/P7GY-4HDQ]; *Bill Gates: The 2021 60 Minutes Interview*, CBS NEWS (Feb. 14, 2021), https://www.cbs.com/shows/60_minutes/video/WZfB1m0BH_2ate_LJMNXVxQQ6fbYG9Mb/bill-gates-the-2021-60-minutes-interview/ [https://perma.cc/56M8-99SN].

communicating, implementing, and cooperating to uphold solutions in the public interest. Archaic and flawed election mechanisms, and new, brazen techniques to suppress and discount votes when credible evidence justifying new rules that make it more difficult to vote is lacking, undermine the fundamental requirement for democracy: that of open and free elections that make the government accountable to the people it serves.[11] In recent years, we witnessed the emergence of mass social movements and enormous public protests on a variety of issues, a painfully contentious and contested 2020 election among a sharply divided electorate, and vociferous and fierce disagreement and resistance to government-imposed requirements and advisories for protecting the public health during the pandemic. Throughout it all, the enormous impact of new social media on shaping social, political, and economic debates, and the vast influence of powerful media platforms, presents both unprecedented challenges and opportunities.

In the United States, throughout all the controversy and change—at every turn—there are questions about the exercise and infringement of constitutional rights, described in language written in the eighteenth century. It is language which, so far in our history, has illuminated and helped us navigate the difficult path over time for sustaining liberty and progressing toward equality and other rights. They are words for keeping democracy in our brilliantly engineered, self-correcting constitutional form of limited self-government subject to the informed consent of the governed:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[12]

It often seems as if everyone in the United States has strong feelings about this language and questions about its contemporary relevance. There is no requirement embodied in the text that one need be knowledgeable to express one's feelings self-assuredly and vigorously. Even a recently arrived resident, Prince Harry, the Duke of Sussex, was not bashful bashing free speech and the freedom of the press. Harry, who seems comfortable dealing with the media on his own terms, exercised his right to speak his mind about the First Amendment, though his thoughts were not exactly clear, and he admittedly did not understand what he was talking about.[13]

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11. Mark Bohnhorst, Reed Hundt, Kate E. Morrow & Aviam Soifer, *Presidential Election Reform: A National Imperative*, AALS (2021), https://www.aals.org/wp-content/uploads/2021/06/Presidential-Election-Reform-.pdf [https://perma.cc/6W6E-G49U].

12. U.S. CONST. amend. I.

13. Prince Harry after leaving the decidedly less free speech, free press friendly constitutional monarchy that he was born into and giving up the more comfortable confines of his royally fortified legal position in England, appears quite happy about making others eat the publicity he dishes out, but

More troubling and less forgivable—coming from those who should know better—is the suggestion that public figures have the right to be dishonest and lie, especially during a political campaign or a contested election. For example, Rudolph W. Giuliani, a former prosecutor, New York City Mayor, and more recently on and off attorney, but constant provocateur and self-anointed spokesperson for former President Donald J. Trump, reportedly told FBI investigators he had the right to "throw a fake" in a campaign, to embellish and even lie about facts, and to generate fake news, which is sad and pathetic considering the source.[14]

Head-scratching ignorance, obliviousness, and old-fashioned hypocrisy about the purpose and scope of the First Amendment are not limited to the rich and famous. Often lost on countless people invoking the First Amendment is that it protects against governmental action, and not speech or activity by private people and organizations.[15] This circumstance is more "our bad" than those who are mistaken. It is a reminder of the serious need for better civic education about the Constitution and the rule of law, and how our government and system of justice is supposed to work.[16] However,

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is less able to stomach when others robustly comment and report about him and his American spouse, Meghan Markle. In one podcast interview he called the First Amendment "bonkers." He said:

> I don't want to start sort of going down the First Amendment route because that's a huge subject and one in which I don't understand because I've only been here a short period of time. But you can find a loophole in anything. And you can capitalize or exploit what's not said rather than uphold what is said. I've got so much I want to say about the First Amendment as I sort of understand it, but it is bonkers.

Kathy Hoekstra, *Royal Pain: Prince Harry—And His Media Fans—Need Educating on Why the First Amendment Matters*, PACIFIC LEGAL FOUND. (May 25, 2021), https://pacificlegal.org/royal-pain-prince-harry-and-his-media-fans-need-educating-on-why-the-first-amendment-matters/ [https://perma.cc/8RP4-84WD]; Aspen Pflughoeft, *Prince Harry called the First Amendment 'Bonkers.' Here's the Reaction*, DESERET NEWS (May 18, 2021, 11:00 AM), https://www.deseret.com/entertainment/2021/5/18/22440505/prince-harry-calls-first-amendment-bonkers-in-new-interview [https://perma.cc/TC35-2LMM] (noting that "Prince Harry compared his royal experience to being on 'The Truman Show' and 'living in a zoo'"). His comments drew an immediate large response and criticism from a variety of outlets including Newsweek, The Mercury News, Entertainment News, and Vanity Fair, among many others. *See id.*; Hoekstra, *supra* note 13.

14. Devlin Barrett, *Giuliani Said it was Okay to 'Throw a Fake' in a Campaign*, WASH. POST (Aug. 12, 2021, 4:36 PM), https://www.washingtonpost.com/national-security/giuliani-fbi-surprise-fake/2021/08/11/754e9b4c-fabc-11eb-9c0e-97e29906a970_story.html [https://perma.cc/527A-66A3].

15. The First Amendment protects people from government interference (and not interference from private entities or persons) at the federal level, and through the Fourteenth Amendment, at state and local levels. Herbert v. Lando, 441 U.S. 153 (1979); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 533 (6th ed. 2019). In certain limited circumstances, the Court has ruled that private entities can be subject to the constraints of the First Amendment, such as when a private actor is "entangled" with the government through inducement, and whether or not facilitation by the government advances government objectives, and when a private actor is performing a traditionally government "public function." *Id.* at 563; *see* Jackson v. Metro Edison Co., 419 U.S. 345 (a private party providing electric utility service did not constitute a public service traditionally exclusively provided by government).

16. Professor Joel L. Goldstein's forthcoming article, *Teaching Constitutional Law After Trump*, in Issue 3 of the Sixty-Sixth volume of the *St. Louis University Law Journal*, discusses the need for law schools to engage in civic education. The responsibility of all lawyers to engage in civic education was a passion of the late Robert Katzmann who made an outsized impact in this regard, among other

as Nadine Strossen elucidates so ably in this issue, the scope of what constitutes state action that is subject to the First Amendment can be a question of significance and, in some instances more serious than others, complexity that rises above merely disingenuous muddying of constitutional waters.[17] The need to update the state action doctrine in general, and in particular to extend First Amendment protections to new media because they have evolved into contemporary public forums for the free marketplace of ideas, have been subjects of interest for leading First Amendment scholars.[18]

There is no shortage of ways that the First Amendment is entwined with what affects and matters to us. These include evolving privacy issues in a digital world never imagined by the founders (or even by more recent generations of digital immigrants, including so-called baby boomers like this writer). The First Amendment speaks to where and how a student can blow off steam about not making the varsity cheerleading squad in high school.[19] It has long been relied on to protect a free and independent press

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accomplishments, as Chief Judge of the U.S. Court of Appeals for the Second Circuit, and as a political scientist. *See generally*, ROBERT KATZMANN, JUDGING STATUTES (2014). The American Council of Trustees and Alumni ("ACTA") is one source of data about the decline in teaching founding history nationwide. For example, the twelfth edition of its annual Core Curriculum Report (November 2020) found that eighty-two percent of U.S. universities "do not require students to take a foundational course in U.S. government or history." Press Release, ACTA, ACTA Launches 12th Edition of Core Curriculum Report (Sept. 28, 2020), https://www.goacta.org/2020/09/acta-launches-12th-edition-of-core-curriculum-report/ [https://perma.cc/6KEM-NT8W]. A survey conducted in 2018 by the Woodrow Wilson Fellowship Foundation found that only thirty-six percent of Americans would pass the standard citizen test given to immigrants. Press Release, The Woodrow Wilson National Fellowship Fund, National Survey Finds Just 1 in 3 Americans Would Pass Citizenship Test (Oct. 3, 2018), https://woodrow.org/news/national-survey-finds-just-1-in-3-americans-would-pass-citizenship-test/ [https://perma.cc/LH7Q-TPUB]. This test only requires applicants to get sixty percent of the questions right. *Id.* Fewer than one quarter knew why the colonists fought the British, and more than half do not know how many justices serve on the Supreme Court. *Id.* Sixty percent do not know which countries the United States fought in World War Two. *Id.* Younger people performed the worst. *Id.* Only nineteen percent of those younger than forty-five passed the test. *Id.* In fact, there are many recent studies showing that ignorance of basic information about American history, government, and law is a growing problem. *See, e.g.*, *America's Increasing Ignorance of American History & Government Can No Longer Be Ignored*, AMERICAN HERITAGE FOUND., http://americanheritage.org/wp-content/uploads/docs/America's%20Increasing%20Ignorance%20-%20Civic%20Studies%20Summaries.pdf [https://perma.cc/KZ4Y-YGZY] (last visited Oct. 27, 2021). The situation has not improved since Justice Sandra Day O'Conner described the situation as a national crisis on the basis that this knowledge is fundamental to maintaining a democratic society based on the informed consent of the people to the rule of law. *See* Howard Blume, *Sandra Day O'Connor Promotes Civic Education*, L.A. TIMES (Dec. 27, 2011, 12:00 AM), https://www.latimes.com/local/la-xpm-2011-dec-27-la-me-civics-20111227-story.html [https://perma.cc/XEV8-GB2J].

17. Nadine Strossen, *The Paradox of Free Speech in the Digital World: First Amendment Friendly Proposals for Promoting User Agency*, 61 WASHBURN L. J. 1, 11, 18 (2021).

18. Erwin Chemerinsky, well before the public emergence of the Internet, wrote Erwin Chemerinsky, *Rethinking State Action*, 80 N.W. U. L. REV. 503, 533–34 (1985). *See* David L. Hudson, Jr., *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR ASSOC., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/in-the-age-of-socia-media-first-amendment/ [https://perma.cc/G6RW-2RLW] (last visited Oct. 27, 2021).

19. Mahanoy Area Sch. Dist. v. B.L. Levy, 141 S. Ct. 2031 (2021).

because it is a prerequisite for democracy.[20] In the United States this has included enabling criticism of public officials by requiring that actual malice be proven in defamation actions brought by government officials and public figures.[21] However, this long-standing precedent is likely to be reconsidered and cannot now be taken for granted.[22] The First Amendment speaks to whether recent state laws will stand that reverse reproductive rights long established under constitutional privacy and due process guarantees.[23] The First Amendment is also implicated in other headline news, because the Amendment governs academic freedom, scholarly research and discourse, and is invoked to protest recent regulations, government investigations, and disclosure regimes that increasingly are imposed on higher education in the name of well-intended public purposes.[24]

And particularly disturbing for this writer are proliferating new constraints on voting rights that frustrate one of, if not the central, purpose of the First Amendment. This purpose is to provide people with the freedom, information, and moral compass they need to hold government accountable. After all, the protections of each of the five freedoms the Amendment protects—speech, religion, press, assembly, and the right to petition—are designed to and have the effect of limiting government subject to the will of the people. Having the information and views of others that is needed to

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20. The importance of freedom of the press for sustaining democracy was emphasized in the award announcement and acceptance statements of the 2021 Nobel Peace Prize recipients, Maria Ressa and Dmitry Muratov, journalists who covered abuse of power in the Philippines and Russia. Nerijus Adomaitis, Andrew Osborn & Karen Lema, *Journalists Who Took on Putin and Duterte Win 2021 Nobel Peace Prize*, REUTERS (Oct. 8, 2021), https://www.reuters.com/world/philippines-journalist-ressa-russian-journalist-muratov-win-2021-nobel-peace-2021-10-08/ [https://perma.cc/2VVV-SVJF].

21. *See generally* New York Times v. Sullivan, 376 U.S. 254 (1964).

22. Recently Justices Gorsuch, in *Berisha v. Lawson*, 141 S. Ct. 2424 (2021), and Thomas, in *Berisha* and *McKee v. Cosby*, 139 S. Ct. 675 (2019), called for reconsidering the landmark decision in *New York Times v. Sullivan*.

23. In Texas, S.B. 8 was signed into law by Governor Greg Abbot on September 1, 2021, after months of legal challenges culminated in the Supreme Court refusing to issue a stay by a 5-4 decision. *See* Robert Barnes, *Supreme Court Won't Block Texas Abortion Law But Grants Expedited Review for Nov. 1*, Wash. Post (Oct. 22, 7:39 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-texas-abortion-law/2021/10/22/e62d4954-334b-11ec-9241-aad8e48f01ff_story.html [https://perma.cc/Y7GF-HJZQ]. It is expected that the future of *Roe v. Wade*, 410 U.S. 113 (1973) will be before the Court in its 2021–2022 term. *See, e.g.*, *id.*; Petition for Writ of Certiorari, Dobbs v. Jackson, 2020 U.S. S. Ct. Briefs LEXIS 5495 (2020). As this Article went to print, the Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization*, involving a Mississippi law that prohibits abortions after fifteen weeks of pregnancy. *See* Dobbs v. Jackson Women's Health, 141 S. Ct. 2619 (2021) (granting certiorari). A broad range of observers expect that the right to abortion afforded by *Roe v. Wade* will be restricted if not overturned. *See, e.g.*, Linda Greenhouse, *The Supreme Court Gaslights Its Way to the End of Roe*, N.Y. TIMES (Dec. 3, 2021), https://www.nytimes.com/2021/12/03/opinion/abortion-supreme-court.html [https://perma.cc/CX8D-2TYR].

24. *See, e.g.*, Gina Kolata, *Vast Dragnet Targets Theft of Biomedical Secrets for China*, N.Y. TIMES (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/health/china-nih-scientists.html [https://perma.cc/5BXQ-CA6T] (describing government investigations into Chinese academic and industrial researchers, and the new academic disclosure legislation pending in Congress as part of the Higher Education Act).

guide and decide voting choices and being able to express preferences by casting votes to elect or replace officials and to support or reject ballot initiatives, are fundamental requirements for fulfillment of First Amendment rights. If the ability to vote is abridged, if people's votes do not count, then the deprivation of their individual First Amendment rights is without remedy and recourse essential for democracy. If people cannot cast ballots, or their votes do not count equally, then the First Amendment is for naught.[25] Moreover, the act of expressing one's choice in an election is quintessential political speech that deserves protection and strict scrutiny of government efforts to curtail the exercise of this fundamental and essential right of democracy.[26]

How the United States and the world beyond will navigate the enormously challenging issues of our time, and the forceful headwinds impeding the resolution of controversies and existential threats, remains to be determined. At least in America, the First Amendment principles historically have helped guide and sustain our complex, heterogenous, rambunctious country. Undoubtably, First Amendment doctrine will continue to have significant influence as it is applied, evolves, or is honored in the breach.[27] There are few (if any) simple answers to the daily tread of First Amendment issues which shape how we live, work, engage with other people, worship, gather, and play. A compelling example appears in this Issue. Nadine Strossen presents a *tour de force* comprehensive review of the paradoxes

25. This is so with respect to its intended central function of holding the government accountable to the people. The First Amendment serves other beneficial purposes such as individual liberty interests and in self-fulfillment, self-determination, free thought, solitude, introspection, reflection, spirituality, and individual choice.

26. U.S. CONST. art. I, § 4 provides that each state legislature shall set "the times, places and manner" of holding elections for senators and representatives. But Congress may at any time by law make or alter such regulations. *Id.* There are other constraints on states abridging voting rights including the Section Two of the Fourteenth Amendment's prohibition against denial or abridgment in any manner of voting rights, enforceable by the severe penalty of the loss of representation in Congress for violations. It is debatable, if not highly unlikely, that numerous recent state voting laws could withstand strict scrutiny if subjected to that traditional test under the First Amendment or are consistent with its objectives of checking government power. However, the Court in recent years has not been receptive to the notion that voting rights should be analyzed and upheld according to First Amendment principles. In two state gerrymandering cases, one involving a North Carolina challenge to redistricting by Democrats and one involving a Maryland challenge by Democrats, the Court refused to apply the First Amendment. The opinion written by Chief Justice Roberts found "no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue." Rucho v. Common Cause, 139 S. Ct. 2484, 2504 (2019); Benisek v. Lamone, 138 S. Ct. 1942 (2019). However, a First Amendment approach might be viable in cases involving direct restrictions on registration and voting, and that do not involve state redistricting with which the Court never has interfered. The Court traditionally indicates it is ill-equipped and is reluctant to decide the political questions posed in redistricting gerrymandering cases. *See Rucho*, 139 S. Ct. at 2502. Conceivably, it might revisit First Amendment challenges at least in instances where it would be appropriate to require proponents of new voting restrictions to establish and defend whether, as a matter of fact on the record, they can withstand strict scrutiny.

27. William Shakespeare, HAMLET, Act I, Scene IV (1602) ("But to my mind, though I am native here. And to the manner born, it is a custom. More honor'd in the breach than observance.").

and proposed measures for upholding the objectives of the First Amendment in the digital sphere, given the largely unforeseen emergence of large and powerful communications platforms. The prescient timeliness of her essay is exquisite given the riveting, recent Congressional attention paid to companies like Facebook and monopoly investigations launched by the U.S. Department of Justice and state attorneys general.[28] These dominant private sector interactive, electronic, digital platforms traditionally are not subject to the constraints that the First Amendment imposes on government, while at the same time, they are protected by its privileges. They engage in censorship that the government is not permitted to do, while enjoying the protection of the First Amendment for their decisions to publish, not publish, or otherwise censor or label the content of others. They also enjoy broad immunity from civil suits because of a statute that Congress passed twenty-five years ago. Professor Strossen admirably articulates the head spinning complexities, nuances, and uncertainties of either accepting the status quo or instead attempting to adopt even the most promising alternative options for free speech guardrails in cyberspace. A good place to begin any analysis of the options for applying First Amendment principles to social media companies, as well as to other important contemporary issues beyond the questions about private actors in cyberspace that Professor Strossen discusses, is where she ends her essay, with a reminder of H.L. Mencken's warning: "There always is an easy solution to every problem—neat, plausible, and wrong."[29]

28. Strossen, *supra* note 17; Ryan Mac & Cecilia Kang, *Whistle-Blower Says Facebook 'Chose Profits Over Safety'*, N.Y. TIMES (Oct. 3, 2021), https://www.nytimes.com/2021/10/03/technology/whistle-blower-facebook-frances-haugen.html [https://perma.cc/3VDV-9MLZ]; Press Release, Dep't of Just., Just. Dep't Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [https://perma.cc/9PAJ-X4YA]; *see* Phil Weiser, *Hold Social Media Giants Accountable for the Harm They Cause*, DENVER POST (Oct. 7, 2021, 1:22 PM), https://www.denverpost.com/2021/10/07/social-media-facebook-instagram-kids-weiser/; Cat Zakrzewski, Gerrit De Vynck & Rachel Lerman, *36 States Sue Google over How It Manages Its Play Store, Alleging Damage to Both Consumers and App Developers*, WASH. POST (July 7, 2021, 8:27 PM), https://www.washingtonpost.com/technology/2021/07/07/google-play-store-lawsuit/ [https://perma.cc/3VK6-Y385].

29. Strossen, *supra* note 17. Mencken's outsized impact on journalism, literature, and literary and political criticism in the twentieth century, and the use he made of the First Amendment, may be found in a remarkable biography that chronicles the life and times of an often cranky and odd man. TERRY TEACHOUT, THE SKEPTIC: A LIFE OF H.L. MENCKEN (2003).

II. FREE SPEECH IN TODAY'S DIGITAL INTERCONNECTED WORLD. NOW WHAT? FROM SECTION 230 AND *RENO V. ACLU* TO THE CONSOLIDATION OF PRIVATE POWER, CEASELESS ACCELERATING INNOVATION, DYNAMIC ECONOMIC GROWTH, PARTISAN SILOS AND BLINDERS, GOVERNMENT DYSFUNCTION, CLUELESSNESS, THE ELUSIVENESS OF TRUTH, AND THE PERSISTENCE OF THE DIGITAL DIVIDE

Essentially all digital activity can be characterized as speech. In just a blink of history's eye, technological advancements have developed at warp speed during the last three decades. The emergence and explosive growth of the availability, affordability, reliability, and use of digital networked computer technology to exchange ideas, information, and other forms of content has profoundly changed our world, arguably more so than the introduction of any other new communications technology in human history.[30] Digital interconnected computer technology has been praised for generating and disseminating knowledge, stimulating innovation, competition, efficiency-driven economic growth, and consumer choice, and credited for propelling movements seeking democracy, peace, justice, and equity.[31] It also has been condemned for proliferating objectionable and dangerous content of many kinds, spawning enormous powerful monopolies, obliterating privacy, facilitating fraud and false advertising, giving criminals new tools and extending their global reach and ways to avoid law enforcement, equipping terrorists and anti-state organizations to recruit new adherents to their causes and expanding their power to disrupt and harm those whose way of life they despise.[32]

Digital network technology is also widely blamed for exacerbating the political division and partisan strife that drives and keeps us apart by crea-

30. Reno v. ACLU, 521 U.S. 844 (1997). The introductory overview of "The Internet" in Justice Steven's opinion seems almost quaint, and understandably so, as is the case for most books, textbooks, and articles describing the phenomenon at that time. *Id.* at 849–52. Civilization's recurring good and bad experiences with new communications technology are described in TOM STANDAGE, THE VICTORIAN INTERNET (1998). The wonderful arc and impact of inventions in America from its founding and through the nineteenth century may be found in Brooklyn Law School Professor and legal historian Christopher Beauchamp's book, CHRISTOPHER BEAUCHAMP, INVENTED BY LAW: ALEXANDER GRAHAM BELL AND THE PATENT THAT CHANGED AMERICA (2015). *See generally* Nicholas Allard & David Kass, *Law and Order in Cyberspace*, 19 HASTINGS COMM. & ENT L.J. 563 (1997) [hereinafter Allard, *Law and Order*].

31. Throughout history, democratic uprisings and social movements have been fueled by the advent of new communications technology, including those late twentieth century civil rights and anti-Vietnam war movements, the fall of the Berlin wall and demise of the Soviet Union, and the birth of efforts to protect the environment. My list of the most recent examples and the remarkable power of new digital media to organize and generate interest in causes would include: the Arab Spring, Occupy Wall Street, Parkland Strong, Times Up, Me Too, Black Lives Matter, and national breast cancer awareness, anti-Cancer, and anti-Aids campaigns. Do not quibble with my list, make your own.

32. It is striking how familiar many of the problems often associated with new digital technology seem, and it is useful to consider how they differ. *See, e.g.*, STANDAGE, *supra* note 30; JAMES GLEICK, THE INFORMATION: A HISTORY, A THEORY, A FLOOD (2011); TIM WU, THE MASTER SWITCH (2011).

ting a virtual cyberworld of personal insularity, expectations for instant fixes to complex issues, disinterest, lack of appetite for complexity and long-term results, and belief in or disingenuous willingness to rely on information that is incomplete, inaccurate, or untrue. For example, digital wizardry, despite almost magical positive uses, can conjure up very realistic deepfake videos that are intentionally but almost indiscernibly phony.[33] New audio technology is also raising concerns about potential abuse of voice cloning services. These voice cloning creations are artificial but sound authentic because they are derived from recordings of peoples' actual spoken words.[34] These and other rapidly evolving developments are often criticized for impeding the consensus, collaboration, rigor, patience, trust, and tolerance necessary for society to solve the tough problems of our time. Every aspect of these developments has First Amendment implications.

In truth, the dichotomy between the benefit and drawbacks of new information and communications technology has been a familiar experience throughout the history of civilization, from ancient times through the Middle and Renaissance Ages, the Agrarian and Industrial Revolutions, and continuing to the digital and biomedical breakthroughs of the twenty-first century.[35] Once again, we are in a moment when society is wrestling with how to best adapt and agree on how to use new technology, and it is not certain what the rules and acceptable practices should be. That is for very good reasons, as Professor Strossen so ably articulates in her profoundly insightful piece. We are buoyed by knowing that over time the advent and availability of new forms of communication have always ultimately empowered people and made the world better. We have good reasons to try to be patient and hold on to our long-standing faith that the solution to bad, misleading, or objectionable speech, is more speech.[36] Nevertheless, given

33. Consider the TikTok Tom Cruise deepfake video that helped fuel the ongoing debate of the use and abuse of this technology. Mark Corcoran and Matt Henry, *The Tom Cruise Deepfake that Set Off 'Terror' in the Heart of Washington D.C.*, ABC NEWS, (June 27, 2021, 7:16 PM), https://www.abc.net.au/news/2021-06-24/tom-cruise-deepfake-chris-ume-security-washington-dc/100234772 [https://perma.cc/C6N2-BE38]; Rachel Metz, *How a Deepfake Tom Cruise on TikTok Turned into a Very Real AI Company*, CNN (Aug. 6, 2021, 8:00 AM), https://www.cnn.com/2021/08/06/tech/tom-cruise-deepfake-tiktok-company/index.html [https://perma.cc/R3VW-ZC4G].

34. *AI Technology Gave Val Kilmer His Voice Back: But Critics Worry the Technology Could Be Misused.*, WASH. POST (Aug. 18, 2021, 7:11 AM) https://www.washingtonpost.com/technology/2021/08/18/val-kilmer-ai-voice-cloning/ [https://perma.cc/L22Y-YDCX].

35. *See supra* notes 30 & 32 and accompanying text.

36. This view can be traced at least to John Milton opposing censorship and other restrictions on free speech, who wrote:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

JOHN MILTON, AREOPAGITICA 58 (1644). The Supreme Court has relied on Milton's reasoning often. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Times Film Corp. v. Chicago, 365 U.S. 43, 67, 82, 84 (1961); Eisenstadt v. Baird, 405 U.S. 438, 458 (1972) (Douglas, J., concurring); and

the magnitude and urgency of our problems and, as Professor Strossen points out, because we do not really know enough about the impact and operation of the technology, how it will evolve, or even the details of proposed nongovernmental controls, there is ample cause to make it a priority to get the policies right, and to be concerned that we might fail to get it right.

Throughout it all, it will be difficult not to focus on short-term outcomes in particular legal controversies. As it always is so. Thus, the aphorism, "tough cases make bad law." It will be harder but more promising to attempt to apply First Amendment principles, guided by understanding the long-term mutuality of interests of all people and constituencies, in generally applicable, neutral concepts and rules—rules that reflect the nature of the technology and world we live in. This will serve the prospect of discerning how to adapt and find new rules, rules that will resist obsolescence as technology advances rapidly.[37]

For example, rules that apply to a specific existing technology delivery system, and that vary from one system to another, tend to generate inconsistencies and fail to keep pace with innovation.[38] Also, analytically suboptimal—to put it mildly—is attempting to repackage and apply legal concepts developed for older "legacy" communications systems (e.g., paper, print, telephone, film, broadcast media, and subscription video) to new and utterly different technology rather than rethinking and updating the law to the extent possible and sustainable in technologically neutral and flexible ways.

That approach was prevalent in the United States for most of the twentieth century regulation of electronic communications.[39] A more promising approach is to rethink and develop legal principles that realistically reflect how the technology works, do not constrain innovation, and anticipate that change is inevitable. At present, considerably more study

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Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 151 (1961) (Black, J., dissenting).

37. In general, it could be helpful thinking about the concept of technology neutrality in First Amendment analysis. *See e.g.*, Sherzod Shadikhodjaev, *Technological Neutrality and Regulation of Digital Trade: How Far Can We Go?*, EUR. J. OF INT'L L. (July 30, 2021), https://academic.oup.com/ejil/advance-article-abstract/doi/10.1093/ejil/chab054/6331206?redirectedFrom=fulltext [https://perma.cc/22FX-PZ3H]; Bert-Jaap Koops, *Should ICT Regulation Be Technology-Neutral?*, STARTING POINTS FOR ICT REGULATIONS. DECONSTRUCTING PREVALENT POLICY ONE-LINERS, IT & LAW SERIES (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918746 [https://perma.cc/3KWD-4RNJ].

38. *See supra* note 37 and accompanying text.

39. Moving from a legal paradigm that kept different communications technologies in separate regulatory industry silos as regulated monopolies to a competition model with neutral rules for when providers offered similar services was the central conceptual driver of the 1996 Telecom Act, *supra* note 37. Among many others I wrote about this in Nicholas W. Allard & Theresa Lauerhass, *Debalkanize the Telecommunications Marketplace*, 28 CAL. W. L. REV. 231 (1992); Allard, *Law and Order*, *supra* note 30.

and evaluation will be needed to determine which rules and best practices are necessary to uphold society's collective interest in the First Amendment's purposes that extend beyond its traditional limited applications. This work would seem relevant, for example, not only to Professor Strossen's inquiry about new techniques and practices to guide dominant private sector media platforms, but also how we think about the applicability of the spirit—if not the letter—of the First Amendment to voting rights and the administration of elections.

We have come a long way since Vice President Al Gore and others first began championing the Information Superhighway and the World Wide Web.[40] The emergence of this technological phenomenon coincided with the culmination of many years of legal, legislative, and regulatory debates over how best to update and reform the then conventional communications industries. These industries had been artificially compartmentalized into separate business lines by legal constraints, rather than technological limitations, and governed largely by a regulated monopoly model.[41] The Clinton-Gore Administration and a bipartisan Congress shifted the long-standing balkanized regulatory regime and marketplace to a more technologically neutral and competitive model by the signing of the landmark Telecommunications Act of 1996.[42] The Act became the first legislation signed electronically into law in the Great Hall of the Jefferson Building of the Library of Congress.[43] Notwithstanding the usual hyperbole and high hopes expressed at the time, no one attending could have been faulted for failing to appreciate fully that the baton had been passed to a new and dynamic virtual world of a borderless, agile (and often mobile) digital marketplace of ideas, information, images, sounds, and services—all built on speed and a vast and growing storage and search capability. It was the early days of a new cyberworld with almost unfathomable possibilities.

In a very real sense, the Telecommunications Act of 1996 was obsolete the day it became law. Undeniably, the Act was of unusual importance and succeeded in its stated purpose of reducing six decades of burdensome

40. The phrase "Information Superhighway" is widely and properly associated with former Vice President Al Gore. *See, e.g.*, Al Gore, Vice President of the United States, Information Superhighways, Speech Before the International Telecommunications Union (March 21, 1994).

41. *Supra* note 39 and accompanying text.

42. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

43. This history, which I was privileged to witness in person, is noted by Guy Lamolinara in, "Wired for the Future: President Clinton Signs Telecom Act at Library of Congress." Guy Lamolinara, *Wired for the Future*, LIBR. OF CONG. (Feb. 19, 1996), https://www.loc.gov/loc/lcib/9603/telecom.html [https://perma.cc/FG7J-8GWZ]. Note that references to "wired" and "online" at this pivotal moment twenty-five years ago and even today reflect the old "connected to a wall" view of the communications world rather than the current expansion and even dominance of wireless mobile connectivity. How often do we still say "online" or "let's take this offline" when we are, or will be, using wireless communications?

regulation and stimulating the more rapid deployment of new technologies.[44] However, the major provisions of the Act had little to do with the Internet. Rather they were designed to promote competition in the telephone, broadcast, and multichannel video markets.[45] Indeed, the text of the legislation only had two references to the Internet by name, an electronic organism that, although still a commercial toddler, already was well on its way toward supplanting conventional communications to an extent that few people imagined.

Any cursory review of public comments, cases, and articles about the Internet and cyberlaw in those early (but not long-ago) days makes them seem almost quaint and idealistic given intervening developments. Nor did it seem then, or ever since, that lawmakers always had a firm grasp of the mechanics or significance of what the Internet was or how it worked, even among those who were shaping the rules.[46] Understandably, decisions and rules were made in writing the 1996 Act that were based on some assumptions and expectations that have been overtaken by time. In considering new developments, it is important to begin by reevaluating those original policies to see whether they remain necessary and effective, or whether they have outlived their sell-by date with respect to their original purpose and should be updated or even replaced.

A. Section 230 Survived Reno v. ACLU *and Outdid Expectations*

One of the most important examples, with major First Amendment implications, is the current and ongoing vigorous re-examination of language contained in the Act that is popularly referred to as "Section 230."[47] It states

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44. Reno v. ACLU, 521 U.S. 844, 849–50, 857 (1997).

45. *Id. See, e.g.*, Presidential Statement on Signing the Telecommunications Act of 1996 (February 8, 1996); H.R. Rep. No. 104-458 (1996) (Conf. Rep.).

46. The late Alaskan Senator Ted Stevens (R. Alaska), when he was the chair of the Commerce Committee with jurisdiction for communications and the Internet, offered an unforgettable but incongruous description: "It's not a big truck, it's, it's, a series of tubes." Alex Gangitano, *Flashback Friday: 'A Series of Tubes,'* ROLL CALL (Feb. 16, 2018, 5:00 AM), https://www.rollcall.com/2018/02/16/flashback-friday-a-series-of-tubes/ [https://perma.cc/9GF2-29VS]. Another example is the widely reported "light bulb on" moment observed by this writer during a memorable Brooklyn Law School appearance by the late Justice Antonin Scalia. Justice Scalia seemed surprised and impressed by a question by a student about whether computer data is one of the "effects" protected by the Fourth Amendment. Debra Cassens Weiss, *Does Fourth Amendment Protect Computer Data? Scalia Says It's a Really Good Question*, ABA J. (Mar. 24, 2014, 1:06 PM), https://www.abajournal.com/news/article/asked_about_nsa_stuff_scalia_says_conversations_arent_protected_by_fourth_a [https://perma.cc/YL3A-79AV].

47. What is now referred to as Section 230 of the Communications Act of 1934 was added as Section 509 to the Telecommunications Act of 1996, part of the Communications Decency Act of 1996, Title 5 of the 7 Titles of the Telecommunications Act of 1996. In contrast to the other six Titles, the language in this provision was added in Conference without prior hearings or legislative floor debate. *See generally* . VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., SECTION 230: AN OVERVIEW (Apr. 7, 2021), https://crsreports.congress.gov/product/pdf/R/R46751

in relevant part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[48] This statutory language has been called "[t]he 26 words that created the Internet."[49] It grants broad immunity for internet service providers for exercising a publisher's traditional editorial functions, such as deciding whether to publish, withdraw, postpone, or alter content.[50]

After the Communications Decency Act was enacted as part of the 1996 Telecommunications Act, to which the essentially unrelated Section 230 was added late in the legislative process, its constitutionality was immediately challenged in *Reno v. ACLU*.[51] The Court, per Justice Stevens, overturned the provisions of the Communications Decency Act designed to protect children from objectionable materials, but let stand Section 230, which the ACLU did not oppose.[52]

In upholding this provision, courts have found the free speech purpose of the language to be obvious.[53] However, the assumption that it was necessary to protect free speech was not the only purpose—and in some quarters may not have even been the primary grounds for supporting the provision which received broad bipartisan Congressional support in both the House of Representatives and the Senate.[54] First, at the time, it was widely believed that the nascent Internet needed to be nurtured to sustain its growth and fulfill its potential. Insulating it from legal liability, large financial claims, and costly management of risks was a way to preserve and stimulate the growth of the vibrant and competitive free market that existed for interactive computer services.[55]

[https://perma.cc/49L9-P3AG] (summarizing the legislative history of Section 230).

48. 47 U.S.C. § 230 (c)(1).

49. *See generally* JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019) [hereinafter KOSSEFF, THE TWENTY-SIX WORDS]; Brian Fung, *These 26 Words 'Created the Internet.' The US Government Is Coming for Them*, CNN (Feb. 25, 2020, 12:10 PM), https://www.cnn.com/2020/02/25/tech/section-230-doj/index.html [https://perma.cc/4E5M-A8GW] (including original co-sponsor of the statute Senator Ron Wyden's (D. OR) defense of the language).

50. Zeran v. Am. Online, Inc., 129 F.3d. 327, 330–32 (4th Cir. 1997).

51. Reno v. ACLU, 521 U.S. 844, 849 (1997).

52. *Id.* at 883–85.

53. *See id.*

54. Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008). Indeed, after more than a decade of considering the need for more competition, lawmakers were unavoidably well aware of the power of the legacy telephone, broadcast, and cable communications companies and their power to restrain competition. It is likely many considered it realistic and necessary to promote the nascent internet businesses that otherwise might have been stifled in their infancy, as was the experience with the introduction of mobile phones in the U.S. later than elsewhere in the world.

55. Section 230(a) and (b) describe the purposes of the provision. BRANNON & HOLMES, *supra* note 47. For a discussion of the purposes at the time of enactment, *see* Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved [https://perma.cc/K8C9-V6AD].

Moreover, Section 230 was designed to facilitate the proliferation of numerous competitive platforms for content distribution and encourage them to adopt and test multiple different content moderation policies.[56] Experimentation with content controls was desired, as was self-regulation. In fact, the spate of contemporary complaints about current electronic platforms' terms of use and censorship policies in a real sense reflect criticism of what Congress intended these platforms to do. It was also hoped and believed that Section 230 immunity ultimately would lead to greater consumer choice and control. Whether this aspiration has been realized could be a topic of lively debate.

In some respects, Congress overachieved its purposes in enacting Section 230 to provide interactive computer services a safe harbor from legal exposure. The dramatic growth of the Internet and the emergence of popular and successful companies such as Amazon, Facebook, Google, Apple, YouTube, Netflix, Hulu, Twitter, TikTok, Snapchat, LinkedIn, and Zoom, to mention a few, mark a new and completely different era in cybermarkets. Section 230 allowed innovative applications to emerge and flourish without substantial risk of legal ramifications.[57] It also helped create the business climate favorable to an array of exciting new internet services, such as retail cybersales, advanced search engines, social media, video streaming, and cloud computing.[58] Consequently, cyberbusiness now is no longer in its infancy. And in a measure of economic, political, and legal climate change, there are those who believe it is now time for people and competition to be protected from established internet services, rather than vice versa.[59]

In fact, in recent years and on a somewhat ad hoc basis, courts have begun to narrow the Section 230 immunity originally upheld in the earliest

56. Johnson & Castro, *supra* note 55.

57. *Id.*

58. *See generally* KOSSEFF, THE TWENTY-SIX WORDS, *supra* note 49.

59. *See* Michael D. Smith & Marshall Van Alstyne, *It's Time to Update Section 230*, HARVARD BUS. REV. (Aug. 12, 2021), https://hbr.org/2021/08/its-time-to-update-section-230 [https://perma.cc/P6MD-MLNC]. The U.S. Department of Justice ("DOJ") proposed revisions to Section 230 on September 23, 2020, cited to the DOJ website. *See* Jessica Guynn, *Trump vs. Big Tech: Everything You Need to Know About Section 230 and Why Everyone Hates It*, USA TODAY (Oct. 15, 2020, 7:18 PM), https://www.usatoday.com/story/tech/2020/10/15/trump-section-230-facebook-twitter-google-conservative-bias/3670858001/ [https://perma.cc/26GG-JTKG]; Dan Patterson, *What is "Section 230," and Why Do Many Lawmakers Want to Repeal It?*, CBS NEWS (Dec. 16, 2020, 10:59 AM), https://www.cbsnews.com/news/what-is-section-230-and-why-do-so-many-lawmakers-want-to-repeal-it/ [https://perma.cc/QDQ4-53AJ]; Matt Laslo, *The Fight Over Section 230—and the Internet as We Know It*, WIRED (Aug. 13, 2019, 3:18 PM), https://www.wired.com/story/fight-over-section-230-internet-as-we-know-it/ [https://perma.cc/F4SE-9G7W]; Shira Ovide, *What's Behind the Fight Over Section 230*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/technology/section-230-explainer.html [https://perma.cc/J3X6-Z8ZW].

challenges to the statute.[60] Moreover, the commercial entities that have benefited from Section 230 have increasingly come under sharp scrutiny. The role and responsibility of some companies protected by Section 230 have been questioned in a broad array of controversies pertaining to international sex trafficking,[61] hate speech,[62] foreign interference in the U.S. election,[63] facilitation of terrorism, political partiality,[64] abuse of monopoly power,[65] infringement of privacy, and a lack of adequate protections for personal, commercial, infrastructure, and national security data. Section 230 immunity even became an issue in the 2020 election.[66] Predictably, several bills have been introduced to amend Section 230 in light of recent

60. *See, e.g.*, Hy Cite Corp. v. Badbusinessbureau.com, LLC, 418 F. Supp. 2d 1142 (D. Ariz. 2005); Barnes v. Yahoo!, Inc., 570 F. 3d 1096 (9th Cir. 2009); Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008); Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1 (2016) (finding that half of twenty-seven cases reviewed in 2015–2016 denied the service provider immunity).

61. In 2018, Congress required providers to remove content that violated federal and state sex trafficking law in the Stop Enabling Sex Traffickers Act, Pub. L. No. 115-164 (enacted April 11, 2018).

62. Danielle Citron, *Tech Companies Get a Free Pass Moderating Content*, SLATE (Oct. 16, 2019), https://slate.com/technology/2019/10/section-230-cda-moderation-update.html [https://perma.cc/X5VD-LPVV]. In 2019, after mass shootings in several locations around the U.S. and the world, a debate arose over the responsibility of service provides for online hate speech and whether they were protected by Section 230 or the First Amendment. *See, e.g.*, Elizabeth Nolan Brown, *Free Speech on the Internet Continues to Confuse Everyone*, REASON (Aug. 7, 2019, 9:32 AM), https://reason.com/2019/08/07/free-speech-on-the-internet-continues-to-confuse-everyone/ [https://perma.cc/6VGU-Z9YX].

63. Facebook CEO Mark Zuckerberg said in 2016, "I think the idea that fake news on Facebook influenced the election in any way, I think is a pretty crazy idea." *Probe Reveals Stunning Stats about Election Headlines on Facebook*, CBS NEWS (Nov. 17, 2016, 8:47 AM), https://www.cbsnews.com/news/facebook-fake-election-news-more-popular-than-real-news-buzzfeed-investigation/ [https://perma.cc/57HK-53VW]. Subsequently, Robert Mueller's Special Counsel investigation and report found sweeping interference which included Russian organizations', phony surrogate groups', and individuals' use of social media to disseminate propaganda that favored Donald Trump and disfavored Hilary Clinton and Bernie Sanders. *See* Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election ("The Mueller Report)*, U.S. DEP'T OF JUST. (Mar. 22, 2019), https://www.hsdl.org/?abstract&did=824221 [https://perma.cc/FYM8-ZPUZ]. Danielle Keats Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453 (2018).

64. Former President Trump and Senators Ted Cruz (R. TX) and Josh Hawley (R. MO) are among those who accuse social media platforms like Twitter of ideological bias. *See* Preventing Online Censorship, Exec. Order No. 13925, 85 Fed. Reg. 34079 (May 28, 2020), https://www.govinfo.gov/content/pkg/DCPD-202000404/pdf/DCPD-202000404.pdf [https://perma.cc/GR36-39UU]. *See* Harper Neidig, *GOP Steps Up Attack Over Tech Bias Claims*, HILL (Mar. 19, 2019, 7:57 PM), https://thehill.com/business-a-lobbying/434837-gop-steps-up-attack-over-tech-bias-claims [https://perma.cc/HL7D-VYVA].

65. In recent years there have been monopoly actions filed against dominant internet platform providers. The relation between monopoly power and Section 230 was addressed in the February 2020 Justice Department workshop on Big Tech. *See* Adi Robertson, *Five Lessons from The Justice Department's Big Debate Over Section 230*, VERGE (Feb. 19, 2020), https://www.theverge.com/2020/2/19/21144223/justice-department-section-230-debate-liability-doj [https://perma.cc/ZW8K-RLS4].

66. This was so for candidates from both parties. For example, in Texas both Senator Cruz and Presidential candidate Beto O'Rourke proposed changes to Section 230. *See* Lauren Feiner, *Beto O'Rourke Goes After Key Immunity for Social Media Companies If They Allow Users to Incite Violence*, CNBC (Aug. 16, 2019, 2:41 PM), https://www.cnbc.com/2019/08/16/beto-orourke-goes-after-immunity-for-big-tech-after-el-paso-shooting.html [https://perma.cc/Q84J-HBZ3].

developments.[67] At least to this observer, it is most likely that this flourish of Congressional activity marks an early phase in what will prove to be a protracted and contested legislative process. Again, at a minimum it would be valuable as a part of the ongoing assessment of alternatives to Section 230 to keep in mind the extent to which the original assumptions that led to the Section's enactment are still relevant.

Professor Strossen's comprehensive survey of the numerous policy and legal options arising from reconsideration of Section 230 in which she reviews their advantages and disadvantages suggests that most are conceptual works in progress. I wish neither to replicate her analysis nor risk adding a mustache on the Mona Lisa she has painted. Instead, here I will simply offer a few very brief further observations.

B. State Action, Monopolization, and Public Forums

As Professor Strossen acknowledges, the potential and circumstances would seem to be limited for applying First Amendment constraints to private internet service providers under the state action doctrine.[68] Recent attempts to do so on the basis that the providers had become governmental actors by virtue of being coerced by government, cooperating with government entities, accepting government funds, or that they were otherwise doing what the government could not itself do, are unpersuasive, if not frivolous.[69] Nor does it seem likely that there is any other imminent significant

67. President Joe Biden floated the idea of eliminating Section 230 altogether. *See* Makena Kelly, *Joe Biden Wants to Revoke Section 230*, VERGE (Jan. 17, 2020, 10:29 AM), https://www.theverge.com/2020/1/17/21070403/joe-biden-president-election-section-230-communications-decency-act-revoke [https://perma.cc/B2BK-D8FM]. However, his administration has not yet advanced a Section 230 reform agenda. Several bills to change Section 230 have been introduced, but to date the only one so far to advance out of Committee is the proposed Eliminating Abusive and Rampant Neglect in Interactive Technologies ("EARN IT") Act which was amended and reported out of the Senate Judiciary Committee relating to content promoting and amounting to child abuse. It also has been introduced in the House. *See* Derek B. Johnson, *EARN IT Act Sails Through Senate Judiciary Committee*, FCW (Jul. 6, 2020), https://fcw.com/articles/2020/07/06/johnson-earn-it-act.aspx [https://perma.cc/5D42-VNG4].

68. On its face, the First Amendment and other provisions of the Constitution apply only to governmental action, and courts have construed that requirement and limitation to apply to government action at both the federal and state levels. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Manhattan Cmty Access Corp. v. Halleck, 139 S. Ct. 1921 (2019). Under limited circumstances courts have found that private parties are subject to the First Amendment because they are engaging in state action. Chemerinsky, *supra* note 18, at 507; CHEMERINSKY, *supra* note 15. Opening a media platform to the public does not transform a private company into a state actor. *Manhattan Cmty Access*, 139 S. Ct. at 1921; *see also* Prager Univ. v. Google LLC, 951 F.3d 991 (9th Cir. 2020); Freedom Watch, Inc. v. Google Inc., 816 F. App'x 497 (D.C. Cir. 2020); Benjamin Din, *Federal Judge Blocks Florida's Social Media Law*, POLITICO (June 30, 2021, 10:17 PM), https://www.politico.com/news/2021/06/30/judge-block-florida-social-media-law-497442 [https://perma.cc/RM69-NKH8].

69. For example, former President Trump filed lawsuits against Facebook, Google, and Twitter for censoring, flagging, and outright suspending his account and his allies' use of these platforms in the U.S. District Court for the Southern District of Florida. Cat Zakrzewski & Rachel Lerman, *Trump Files Class Action Lawsuits Targeting Facebook, Twitter and Google's YouTube over Censorship of Conservatives*, WASH. POST (July 7, 2021, 2:45 PM), https://www.washingtonpost.com/technology/20

expansion of either of the narrow "entanglement"[70] or "public function"[71] exceptions to the state action requirement.

These are not promising routes for upholding First Amendment principles against private entities that engage in censorship, because such entities enjoy their own First Amendment protections even when they arguably engage in infringement of rights that the government itself could not do. For many reasons, courts can and should be skeptical about arguments that the mere threat of legislation, regulation, or prosecution converts private parties into state actors. For starters, there is usually a long process from when a bill is formally introduced to its enactment. After all, given the predominant legislative gridlock at the federal level, the legislative process is a difficult, uncertain, time-consuming journey that often leads to a dead end.[72] Furthermore, even after enactment there can be a ceaseless

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21/07/07/trump-lawsuit-social-media/ [https://perma.cc/2XZ3-5LQL]. In these suits, Trump claimed that the private companies should be considered a "state actor" subject to First Amendment constraints. *Id.* Trump argued in these suits, and his supporters informally contended in other forums, that there are various grounds for treating the companies as state actors, including: that they were threatened and coerced by his adversaries in government, that they cooperated with government actors, that they held themselves out to be public forums subject to the First Amendment, and that by compliance with government regulations or receiving benefits from government they in effect became state actors. *Id.* These arguments which were contrary to settled law and seem foreclosed by the most recent Supreme Court case on the topic, were widely and variously criticized by legal authorities, knowledgeable observers, businesses and organizations from all points of the political spectrum who said the cases were "dead on arrival," that "Trump has the First Amendment exactly wrong," based on "crackpot theory," were a "complete misinterpretation of how one becomes a state actor," "a rewrite of history," amounted to a "publicity stunt" and "frivolous" litigation. *Id. See also* Tyler Sonnemaker, *Twitter and Facebook Both Banned Trump from Their Platforms. Here's Why That Doesn't Violate the First Amendment—Or Any Other Laws*, BUS. INSIDER (Jan. 9, 2021, 12:41), https://www.businessinsider.com/why-trump-bans-from-twitter-facebook-dont-violate-first-amendment-2021-1 [https://perma.cc/MUU4-389G]; Emily Shapiro, *Trump Responds After Facebook Ban Extended Pending Additional Review*, ABC NEWS (May 5, 2021, 10:39 AM), https://abcnews.go.com/Politics/trump-remain-banned-facebook-now-oversight-board-rules/story?id=77503217 [https://perma.cc/VHP2-C5YN]; Julia Jacabo, *This Is What Trump Told Supporters Before Many Stormed Capitol Hill*, ABC NEWS (Jan. 7. 2021), https://abcnews.go.com/Politics/trump-told-supporters-stormed-capitol-hill/story?id=75110558 [https://perma.cc/ZVH8-BVTS] (this text of Trump's unscripted, rambling, and hourlong remarks contains in various places his grievances against social medial and the major electronic internet platforms); Zoe Tillman, *Trump's Social Media Lawsuits Feature A Mashup of Arguments Courts Have Already Rejected*, BUZZFEEDNEWS (July 7, 2021, 8:28 PM), https://www.buzzfeednews.com/article/zoetillman/trump-twitter-facebook-youtube-lawsuits-rejected-arguments [https://perma.cc/F3GW-BT5C]; Taylor Hatmaker, *Trump's New Lawsuits Against Social Media Companies Are Going Nowhere Fast*, TECHCRUNCH (July 7, 2021, 2:19 PM), https://techcrunch.com/2021/07/07/trump-twitter-facebook-youtube-lawsuits-section-230-first-amendment/ [https://perma.cc/2T3S-NHNB].

70. The entanglement exception to the state action requirement involves situations where the government relies on private parties to perform desired functions. It usually involves instances where the government authorizes, encourages, or facilitates private conduct that would violate the Constitution if performed by the government itself. *See* CHEMERINSKY, *supra* note 15.

71. The public function exception applies where a private party is performing a function ordinarily performed by government, and usually exclusively so. *See* Chemerinsky, *supra* note 18, at 509.

72. *See generally* FRANCES LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016). For an excellent new textbook for teaching government advocacy for lawyers describing the complex, difficult, unpredictable, fluid, and inherently reversible nature of the legislative process, which all should be considered when deciding whether proposed or threatened legislative action

effort to undo or amend what has been done.[73] Parenthetically, it is difficult to resist questioning the sincerity and merit of arguments about government pressure turning private parties into unwilling surrogates of the government, when they come from those who are not known for upholding the rules of law, cooperating with the government, or observing civic or business norms.[74]

One area that might be worth further thoughtful analysis is the state action exception in conjunction with monopoly theory.[75] In some sense, because of the monopoly power of internet service companies and the degree that internet service is essential—if it is from any one provider—an internet service company might be considered comparable to a common carrier. Traditionally, a common or public carrier is a person or entity that transports goods or services to the general public.[76] In the U.S., telecommunications carriers are regulated by the Federal Communications Commission ("FCC") under Title II of the Communications Act of 1934, which was overhauled by the Telecommunications Act of 1996.[77] Gen-

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transforms a private entity into a state actor, see SEAN J. KEALY, AMERICAN LEGISLATIVE PRACTICE (2021).

73. LEE, *supra* note 72. For example, this certainly has been the experience after enactment of the Telecommunications Act of 1996 and is vividly illustrated by the post-enactment challenges to the Affordable Care Act, formally known as the Patient Protection and Affordable Care Act and informally known as Obamacare. *See* Chris Riotta, *GOP Aims to Kill Obamacare Yet Again After Failing 70 Times*, NEWSWEEK (July 29, 2017, 6:53), https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832 [https://perma.cc/W3NG-BGWA].

74. Former President Trump has advised former aides to defy subpoenas issued by the House panel investigating the January 6 attack on the Capitol. Betsy Woodruff Swan, *Trump Tells 4 Former Aides to Defy Jan. 6 Committee's Subpoena*, POLITICO (Oct. 7, 2021, 1:11 PM), https://www.politico.com/news/2021/10/07/trump-jan-6-committees-subpoena-515593 [https://perma.cc/Y9VZ-7XLP]; Mychael Schnell, *Trump Advising 4 Former Aides to Ignore Subpoenas From Jan. 6 Panel: Report*, HILL (Oct. 7, 2021, 4:14 PM), https://thehill.com/policy/national-security/575819-trump-advising-4-former-aides-to-ignore-subpoenas-from-jan-6-panel [https://perma.cc/8B7U-YYHC].

75. Hearings chaired by U.S. Senator Richard Blumenthal (D. CT) and ranking member Senator Marsha Blackburn that featured testimony from former Facebook employee Frances Haugen stood out for many reasons. These included that there was unusually broad bipartisan interest and support for the inquiry, the inquiry was conducted at a level of sophistication about the technology reflecting a noteworthy effort by committee members and staff to learn the relevant intricacies of the technology, and the persistent concerns expressed about the unregulated monopoly power of companies like Facebook. *Protecting Kids Online: Testimony from a Facebook Whistleblower*, U.S. SENATE COMM. ON COM., SCI., & TRANS. (Oct. 5, 2021), https://www.commerce.senate.gov/2021/10/protecting%20kids%20online:%20testimony%20from%20a%20facebook%20whistleblower [https://perma.cc/78L6-8BVP]; *see* Press Release, Justice Department Sues Monopolist Google for Violating Antitrust Laws, *supra* note 28. The House Energy and Commerce Committee held further hearings on Big Tech accountability on December 1 and 9, 2021, and reviewed four proposals to amend Section 230, including punishing platforms for utilizing algorithms that amplify objectionable information. Press Release, House Comm. on Energy & Com., E&C Announces Two Legislative Hearings in December Focused on Big Tech Accountability (Nov. 17, 2021), https://energycommerce.house.gov/newsroom/press-releases/ec-announces-two-legislative-hearings-in-december-focused-on-big-tech [https://perma.cc/4W2E-3ZRW].

76. *See generally Common Carrier*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/common_carrier#:~:text=A%20common%20carrier%20is%20a,open%20to%20the%20general%20public [https://perma.cc/4CF4-UUYZ] (last visited Oct. 28, 2021).

77. *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 377–80 (1999).

erally speaking, common carriers must not discriminate among customers and must offer their services to all customers.[78] So conceptually, common carrier status could provide a legal rationale for curtailing censorship by internet service companies. Arguably, a private internet service provider might be justifiably precluded from limiting the speech of those who seek to convey their content on its facilities. However, this approach is problematic given how it has become entangled in the longstanding controversy over so-called Net Neutrality. Net or Network Neutrality refers to requiring internet service providers to treat all internet communications equally and to not discriminate or charge differently based on the user, content, website source, or other distinguishing factors.[79] Near the end of the Obama administration, the FCC classified internet service providers as common carriers in order to require them to observe Net Neutrality.[80] Then in 2017 during the Trump administration, the FCC reversed and revoked applying its new Net Neutrality rules to internet service providers on the basis of their common carrier status.[81] The matter continues to be a controversial subject. In 2018, the U.S. Senate passed a nonbinding resolution by a close bipartisan vote to restore Net Neutrality, but at this writing there has been no further legislative action.[82]

Suggesting that we might think about using the common carrier analogy also raises my caution about repackaging old rules for utterly new circumstances. Moreover, the classic essential facilities doctrine, which involves a particular kind of monopolization, is not readily applicable because it applies to would-be competitors of a monopoly, competitors who, unless they were able to use the monopoly's exclusive and essential facilities, could not conduct business, much less compete.[83] In this new context, how-

78. *See* John Bergmayer, *What Makes a Common Carrier, and What Doesn't*, PUB. KNOWLEDGE (Jan. 14, 2021), https://www.publicknowledge.org/blog/what-makes-a-common-carrier-and-what-doesnt/ [https://perma.cc/85BU-A2KP].

79. Robert F. Easley, Hong Guo & Jan Kramer, *From Net Neutrality to Data Neutrality: A Techno-Economic Framework and Research Agenda*, 29 INFO. SYS. RSCH. (June 2015), https://www.researchgate.net/publication/314426956_From_Network_Neutrality_to_Data_Neutrality_A_Techno-Economic_Framework_and_Research_Agenda [https://perma.cc/38KJ-HLM2]; *See* ANGELE A. GILROY, CONG. RSCH. SERV., ACCESS TO BROADBAND NETWORKS: THE NET NEUTRALITY DEBATE (Mar. 11, 2021), https://www.everycrsreport.com/files/20110311_R40616_81d4f1aa5388126152dec6b5a2959691d13f1145.pdf [https://perma.cc/F8DU-2EYB]; Tim Wu, *Network Neutrality, Broadband Discrimination*, J. ON TELECOM AND HIGH TECH L. (2014).

80. Open Internet Order, 30 FCC Rcd. 5601 (7) (Mar. 12, 2015), https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf [https://perma.cc/4CNN-ZGA2].

81. In re Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

82. *See* Brian Fung, *Senate Approves Bipartisan Resolution to Restore FCC Net Neutrality Rules*, WASH. POST (May 16, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/05/16/net-neutrality-is-getting-a-big-vote-in-the-senate-today-heres-what-to-expect/ [https://perma.cc/L2QY-SLUS].

83. *See* Abbott B. Lipsky, Jr. & J. Gregory Sidak, Symposium, *Essential Facilities*, 51 STAN. L. REV. 1187, 1190–91 (1999); Verizon v. Trinko, 540 US. 398 (2004).

ever, the situation is different. It is not the competitors of the service, but the customers of the service who would have to establish that they cannot compete in the marketplace of ideas without uncensored access to the monopoly's "facilities."

This argument faces the steep climb of establishing that one content provider is essential because there are insufficient alternative electronic platforms. Conceivably there could be collusive conduct or boycotts by multiple platforms that collectively have sufficient market power to stifle speech by choking off any meaningful outlet for speech. However, such parallel market behavior could be justified on the basis that each of the services responding were competing to meet the same consumer preferences and what the competitive market demands. Fundamentally, analyzing the obligations of internet service providers through the lens of monopoly theory involves the considerable challenge of demonstrating that without use of a particular platform there are not an adequate number of alternative outlets available for public discourse.[84]

Despite understandable concerns about the increasing power of what Professor Strossen calls dominant internet platforms and the dynamic, fluid nature of rapidly, continuously changing circumstances, no readily discernable basis currently exists for applying the state action doctrine to the content moderation practices of private internet service providers, so that the First Amendment protections can prevent online censorship. Accordingly, the work Professor Strossen identifies that is yet to be done to evaluate alternative approaches to uphold First Amendment principles in cyberspace is both needed and complex.

C. Truth and Fake News

Everyone complains about the truth and accuracy of internet content, but nobody does anything about it.[85] There are many reasons for this inertia, including that the phenomenon is relatively new in terms of scope, speed, and technology, that the power and uses of the technology (not to mention how it works) are not widely understood, and that the policy options raise difficult First Amendment issues. It would be of enormous value if the academy would devote focused attention on the overwhelming and increasingly serious issues relating to the difficulty of determining the

84. Strossen, *supra* note 17, at Section V (discussing the public function exception to the state action doctrine).

85. The famous quip "everyone complains about the weather . . ." is often attributed to Mark Twain but was likely first written by the editor of the Harford Courant, Charles Dudley Warner. Emily Clark, *Charles Dudley Warner: 19th Century Writer & Social Commentator*, ConnecticutHistory.Org, https://connecticuthistory.org/charles-dudley-warner-19th-century-writer-and-social-commentator/ [https://perma.cc/C5WU-VEKD] (last visited Oct. 28, 2021).

veracity of information and content on the Internet; the challenges of discovering, accessing, and hearing the truth over the volume of noisy internet traffic; the proliferation and reinforcement of self-justification;[86] and the viral mutation of misinformation[87] and disinformation.[88] Even more perplexing is finding solutions to the elusiveness of truth that, at least in First Amendment terms, are not as bad as the problem.

In a time when blatant lies about any number of subjects in the public forum get much traction, including those which threaten the public health and the very foundation of our government, it is not surprising that one of the better known assertions of my extraordinarily quotable former boss has been repeated so often: "Everyone is entitled to his own opinion, but not to his own set of facts."[89] That is undeniably so, but the tough practical question today is what can be done when so many disagree on—or, more carelessly, disregard—what is true and factual?[90]

In the past, it was sufficient and comforting to believe that the power of more free speech would ultimately prevail over bad speech.[91] And that

86. I refer to this as the "I heard it on the grapevine" defense. Consider also the peculiar instance of the would-be founder of a polarizing media outlet who found that it was harder than expected to do. *See* Jack Nicas, *Selling Freedom in a Phone*, N.Y. TIMES (Sept. 15, 2021), https://www.nytimes.com/2021/09/06/technology/freedom-phone-smartphone-conservatives.html [https://perma.cc/BX6R-AHE8] (reporting on Erik Finman's efforts to launch a smartphone for political conservatives).

87. A type of "false or out of context information presented as fact regardless of intent to deceive." Meira Gebel, *Misinformation vs. Disinformation: What to Know About Each Form of False Information, and How to Spot Them Online*, BUS. INSIDER (Jan. 15, 2021, 3:02 PM), https://www.businessinsider.com/misinformation-vs-disinformation [https://perma.cc/FG8X-YZE2].

88. "Disinformation is a type of misinformation that is intentionally false and intended to deceive or mislead." *Id.*

89. This was a quote by former U.S. Senator Daniel Patrick Moynihan. *See An American Original*, VANITY FAIR, (Oct. 2010), https://www.vanityfair.com/news/2010/11/moynihan-letters-201011 [https://perma.cc/R2TY-K2PP]; DANIEL PATRICK MOYNIHAN, A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY (Steven R. Weisman, 2010).

90. Consider, for example, the defense of false statements by then Counselor to the President, Kellyanne Conway, as "alternative facts." *Meet the Press with Chuck Todd,* NBC NEWS (Jan. 22, 2017, 11:14 AM), https://www.nbcnews.com/meet-the-press/meet-press-01-22-17-n710491 [https://perma.cc/57CZ-3RV2]. Contrast this with the statements accompanying the Nobel Prize Committee award of the Nobel Peace Prize to two journalists, and those of the recipients upon hearing of the honor, about the importance of the pursuit of facts and truth by a free press, and that they are required for public trust in government and to sustain democracy. *Nobel Prize Awarded to 2 Journalists, Highlighting Fight for Press Freedom*, N.Y. TIMES (Oct. 21, 2021), https://www.nytimes.com/live/2021/10/08/world/nobel-prize [https://perma.cc/MRW2-KLJD]; *Nobel Peace Prize: Journalists Maria Ressa and Dmitry Muratov Share Award*, BBC NEWS (Oct. 8, 2021), https://www.bbc.com/news/world-58841973 [https://perma.cc/PK73-69MN].

91. Justice Louis Brandeis expressed the "counter speech doctrine." "If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring). "The counterspeech doctrine posits that the proper response to negative speech is to counter it with positive expression. It derives from the theory that audiences, or recipients of the expression, can weigh for themselves the values of competing ideas . . . ." David L. Hudson Jr., *Counterspeech Doctrine*. THE FIRST AMEND. ENCYCLOPEDIA (Dec. 2017), https://www.mtsu.edu/first-amendment/article/940/counterspeech-doctrine [https://perma.cc/CG4N-QQ7M].

remedy still could be a long-term answer in some cases. More speech about the safety and efficacy of vaccines may eventually, for example, help curb the pandemic. It could do so by gradually reducing the number of people in the United States with what is called "[v]accine reluctance"[92] in the face of continuous advocacy for vaccination; by reinforcing the vaccine's safety, effectiveness, and full FDA approval status; and by pointing to the vaccine's necessity, which is driven by the resurgence of cases and the spread of ever more contagious and dangerous COVID-19 variants.[93]

Long term but slow solutions are little consolation to those who are harmed or suffer the loss of loved ones before the truth becomes widely known and accepted. And, in another context, they are certainly not adequate if an existential threat such as the January 6, 2021, insurrection succeeds in overturning legitimate election results.[94] So, what can be done? At the very least we should not rest easy with the Panglossian view that "all

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However, as the qualifications in Brandeis's statement indicate, the counter speech doctrine is not always an effective remedy. *See* Whitney, 247 U.S. at 377. Present circumstances of how information is widely shared, acquired, perceived, and relied upon at great speed in our digital interconnected world puts the counter speech doctrine to a stress test. The counter speech doctrine also relies on equal access to information. For a discussion of the origin and development of First Amendment access jurisprudence since Justice William Brennan's opinion in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 587-588 (1980) (Brennan, J. concurring), see Brian C. Murchison, *The Visibility Value of the First Amendment*, 26 WM. & MARY BILL RTS. J. 995 (2018).

92. *See* Claudia Wallis, *7 Ways to Reduce Reluctance to Take COVID Vaccines*, SCIENTIFIC AMERICAN (Mar. 1, 2021), https://www.scientificamerican.com/article/7-ways-to-reduce-reluctance-to-take-covid-vaccines/ [https://perma.cc/4Y9W-2Y2F]; Tanya Albert Henry, *COVID-19 Vaccine Hesitancy: 10 Tips for Talking with Patients*, AMA (Feb. 1, 2021), https://www.ama-assn.org/delivering-care/public-health/covid-19-vaccine-hesitancy-10-tips-talking-patients [https://perma.cc/CXY6-HR76]. This is not a new issue. *See Strategies for Addressing Vaccine Hesitancy—A Systematic Review*, U.N. WORLD HEALTH ORG. (Oct. 2014), https://www.who.int/immunization/sage/meetings/2014/october/3_SAGE_WG_Strategies_addressing_vaccine_hesitancy_2014.pdf [https://perma.cc/65X4-RE34].

93. However, the persistent resistance to voluntary vaccination has increasingly moved from reliance on persuasion to mandated vaccinations. *See, e.g.*, Zeke Miller, *Sweeping New Vaccine Mandates for 100 Million Americans*, AP NEWS (Sept. 9, 2021), https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-executive-branch-18fb12993f05be13bf760946a6fb89be [https://perma.cc/K3TX-ZQR7]; *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Oct. 8, 2021), https://www.nashp.org/state-lawmakers-submit-bills-to-ban-employer-vaccine-mandates/ [https://perma.cc/TG37-4Z6Q].

94. *See* Bohnhorst, *supra* note 11. It is difficult to imagine how in any meaningful period of time more speech could have remedied a successful insurrection that amounted to a coup and a repudiation of the outcome of the 2020 presidential election. This observation is based on the lack of any credible evidence whatsoever that Trump won the election, and that victory was fraudulently claimed for Biden. Of all the credible sources that might be referenced in support of that assertion, for me, two of the most compelling are that of my colleague and the most prominent and respected Republican election lawyer in the United States, Benjamin Ginsberg. He states: "The massive fraud that former president Donald Trump claims tarnished the 2020 election has been and will remain illusory—because it didn't exist." Benjamin L. Ginsberg, *Don't Be Afraid of the Election Audits, They May Be Our Only Ticket Out of This Mess*, WASH. POST (Oct. 1, 2021, 4:52 PM), https://www.washingtonpost.com/opinions/2021/10/01/ben-ginsberg-election-audits-upside-big-lie/ [https://perma.cc/J3YR-QNYH]. Second, the so-called audit of the Arizona results by an organization loyal to Trump was "unable to come up with anything more than [finding] 360 additional votes for Joe Biden." *Id.* Wisconsin, Pennsylvania, and even states which Trump won have found no evidence of fraud or error. *Id.*

is for the best" and that more free speech is "the best of all possible worlds."[95] We should reexamine the wisdom of this classic Miltonian assumption with a weather eye in our time of social, political, and technological climate change.[96]

This exercise in critical thinking about how to best uphold truth will necessarily involve understanding very clearly how the digital world changes, improves, and impedes our learning, understanding, and communicating; in short, how it affects our pursuit and dissemination of knowledge. To understand this, it would be helpful to have a more developed and widely shared understanding of how information from computer networks is disseminated, discovered, acquired, and assimilated.

For example, perhaps because the Internet operates in such a way as to expose us to the content most like what we are looking for, and most consistent with our own views and preferences, this diminishes the impact of serendipity, discovery, revelation, metaphor, and argument in our learning. Another pertinent question may be: Does our digital connectivity expand or contract our interaction with different views and broader sources of information? Or is there technology which intentionally makes it less possible to know the truth, and if so, what are its disadvantages and dangers? Hopefully, without sounding like a curmudgeonly digital immigrant, who is cranky about and jealous of the greater technical dexterity of digital natives like my own children, students, and recent graduates, we all need to learn more about how the digital world impacts our acquisition of information and the pursuit of truth. We need a mutual understanding of facts to find remedies for what undermines the public interest without doing more harm than good.

III. "AND NOW FOR SOMETHING COMPLETELY DIFFERENT"[97]

A. Cobwebs and Complexities: Thinking About Free Speech in School and Academic Freedom

Speaking of old-fashioned, judicial decisions involving new technology often demonstrate the timeless difficulties courts face when dealing with the legal implications of rapidly moving technological advances.[98] An

95. VOLTAIRE, CANDIDE, OU L'OPTIMISME, (1759) (rejecting the folly of Leibnizian optimism).

96. Milton, *supra* note 36.

97. To borrow the catchphrase for transitions from one nonsensical skit to another in Monty Python's Flying Circus, the BBC sketch comedy television series that began in 1969 and ran for forty-five episodes.

98. *See, e.g.*, City of Ontario v. Quon, 560 U.S. 746 (2010). *Quon* concerned the right to privacy for electronic communications in a government workplace and revealed the Justices's struggles with the use of new technology. *Id.* at 759.

example is the recent First Amendment case, *Mahanoy Area School District v. B.L.*[99] *Mahanoy* involved the constitutional free speech rights of a cheerleader attending a public high school and has received outsized attention.[100] Perhaps that is because of the quotidian relatability of the circumstances of the dispute, or perhaps it was the fact that it was the first time in half a century that the Supreme Court upheld the First Amendment rights of a student in a public school.

The case was brought on behalf of a junior varsity cheerleader who had unsuccessfully tried out for the varsity squad.[101] After school, and off-campus, the student expressed her frustration and disappointment by using her own cellphone to post on Snapchat to a small group of friends.[102] In her post, she directed profanity toward the school and cheerleading team, including a few F-bombs along with a photo of a friend and her flipping the bird.[103] Reminiscent of but less wholesome than the opening scene in *Bye Bye Birdie*,[104] the rude post was forwarded to other students, parents, school administrators, teachers, and coaches, and thus angst and commotion ensued.[105]

When school authorities reacted by suspending her from the junior varsity squad for a year, the student and her parents made a federal case of it, alleging her First Amendment free speech rights were infringed.[106] Every court that reviewed the case agreed.[107] Notwithstanding a dissent authored by Justice Clarence Thomas, who in the past has taken the position that students do not have free speech rights, there was considerable public support for the 8-1 majority decision written by Justice Stephen Breyer. It seems that the popular view was that the outcome was fair, appropriate, and just common sense. Although the student's behavior was vulgar and perhaps bratty, it still deserved "robust First Amendment protections."[108] Even

99. Mahanoy Area Sch. Dist. v. B.L. Levy, 141 S. Ct. 2031 (2021).
100. *Id.* at 2042–43.
101. *Id.* at 2043–44.
102. *Id.*
103. *Id.*
104. BYE BYE BIRDIE (The Kohlmar-Sidney Company 1963), a musical comedy film adapted from the 1960 stage musical play of the same name. After performing the title song in the film that introduced actress Ann-Margret to movie fans and made her a superstar, the actress kicked off the opening musical number "Telephone Hour," sharing the news with a few friends that she (Kim MacAfee) and her boyfriend Hugo were pinned. The scene is an unforgettable depiction of high school gossip going viral, after and outside school, over the baby boomers' Internet, i.e., through wires and switches to telephones connected to walls. The film vividly conveys the timeless conundrums of adolescence and struggles with parents and adult authority figures, as for example in the song "Kids" performed by Dick Van Dyke making his film debut and the incomparable Paul Lynde, reprising their stage roles. The song asks the eternal question: "What's the matter with kids?" Answer: Not much.
105. *Mahanoy*, 141 S. Ct. at 2043.
106. *Id.* at 2043.
107. *See id.* at 2048.
108. *Id.* at 2048.

though the reaction by all involved who took the matter all the way to the highest Court in the land may seem to outsiders as a bit overwrought, the messages were only meant for a few friends who in turn disseminated it further, and the punishment by the school was both unnecessary and excessive given whatever consternation might have been caused by the insult. Justice was done.[109]

Whether *Mahanoy* manages to set simple and clear guardrails that might be applied in other school situations is another matter, and in fact, is unlikely.[110] This is because the Court's analysis dwells on concepts relevant to the tangible physical world, such as its focus on the corporeal distinction between on-campus and off-campus presence in a physical sense. Predictably, that distinction based on spatial location will be difficult to apply in other cases involving expression that occurs in the virtual, nonphysical, and distance insensitive reality of the Internet. Similarly, the Court's discussion of the very traditional concept of *in loco parentis* being limited to the physical boundaries of a school campus is also debatable and certainly not convincing or particularly helpful.[111]

At a time when schools are forced with a metaphorical gun to their heads to engage in distance learning, supervised remote education, and other virtual activities of all kinds, including virtual proms and extracurriculars, the distinction between student presence in school and out-of-school has become minimized, and may cause *Mahanoy* to have a problematic—if not short—shelf life as a precedent.[112] The metaphysical questions of where, when, and how students and schools interact, and drawing a

109. *See generally id.* It is not the intention here to minimize the significance or consequences of bad behavior online or anywhere, in virtual or physically real communities. *Mahanoy* can be taken as a wakeup call about the need to educate people of all ages about digital civility, etiquette, and best practices. It is a subject that goes beyond what passes as good manners because of the benefits of observing norms and the harms that can be caused to oneself and others by breaching them.

110. The *Mahanoy* precedent has some potentially interesting implications for student's speech in higher education. Take the 2021 fiasco from Yale Law School that began when Trent Colbert, a second-year law student, sent out an email to members of the Native American Law Students Associations inviting them to a party. Trent Colbert, *Why I Didn't Apologize For that Yale Law School Email*, PERSUASION (Oct. 25, 2021). Colbert's invitation began, "This Friday at 7:30, we will be christening our very own (soon to be) world-renowned NALSA Trap House ... by throwing a Constitution Day Bash in collaboration with FedSoc." *Id.* Almost instantly, a student screenshotted Colbert's email and posted it in a class-wide forum. *Id.* Fellow law students criticized Colbert's email for its racist undertones and demanded he issue an apology. *Id.* In particular, members of the Black Students Law Association took issue with Colbert's use of the phrase "Trap House," which is colloquially used among Blacks to reference a place where illegal drugs are sold. *Id.* Within a couple of hours after sending the email, Colbert was contacted by the Associate Dean and Director of Diversity of the law school urging him to apologize. *Id.* When Colbert refused to apologize, the administrators drafted an apology email for Colbert to use. *Id.* Again, Colbert declined to issue the compelled apology. *Id.*

111. *Id.* at 2046.

112. Justice Alito's concurrence suggests a more metaphysical and possibly more enduring approach. *Id.* at 2049 (Alito J., concurring).

line where a student's and school's relative responsibilities and rights begin and end, will be challenging. However, *Mahanoy* could have a useful, lasting impact if it helps stimulate interest and education concerning teaching and learning about digital civility and etiquette. It would make a good case study for a course on the topic.

B. The Importance of Being Earnest About New Pressures on Academic Freedom in Post-Secondary Institutions

Justice cannot be done in this small space to the important and complex subject of academic freedom and its relationship to the First Amendment rights of both institutions and the individual members of an academic community.[113] While Academic Freedom principles are a foundation of modern universities and colleges and have been codified in the twentieth century in various iterations by leading academic organizations, in practice its use is often nebulous.[114] The relationship of Academic Freedom with the First Amendment is apparent but neither coextensive nor precisely defined. Matters of free speech in academic settings, and the rights of universities, colleges, faculties, staff, and students to engage in intellectual pursuits and operations autonomously and independent of government, and the challenges and benefits of unfettered self-determined internal academic governance, are familiar. These centuries-old issues are not going away, and they are not getting any easier.

Although the free exchange of ideas, scholarly debates, exploration and probing of critical thinking, and the pursuit of knowledge are supported

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113. A useful summary definition of the meaning of the term Academic Freedom, what it covers, what it does and does not stand for, may be found in Cary Nelson, *Defining Academic Freedom*, INSIDE HIGHER EDUC. (Dec. 21, 2010), https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom [https://perma.cc/R2N7-H454]; Cary Nelson, NO UNIVERSITY IS AN ISLAND: SAVING ACADEMIC FREEDOM (2010). Rarely a week goes by when the debate about free speech and academic freedom is not in the news. A growing number of academic institutions have signed onto the "Chicago Principles," or other similar guidelines for free expression and academic freedom in educational settings. *See Report on the Committee on Freedom of Expression*, UNIV. OF CHI. COMM. ON FREEDOM OF EXPRESSION, https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/Z622-2LYW] (last visited Nov. 17, 2021) ("Although the University greatly values civility, and although the members of the University community share in the responsibility of maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.").

114. *See* Shannon Dea, *A Brief History of Academic Freedom*, UNIV. AFFS. (Oct.9, 2018), https://www.universityaffairs.ca/opinion/dispatches-academic-freedom/a-brief-history-of-academic-freedom/ [https://perma.cc/J3SB-MSAP]; Deborah Fisher, *The Origins of Academic Freedom in the U.S.*, FIRST AMEND. ENCYCLOPEDIA (AUG. 30, 2017), https://mtsu.edu/first-amendment/post/2/the-origins-of-academic-freedom-in-the-u-s [https://perma.cc/65VY-EVFA]; Philip A. Dynia, *Rights of Students*, FIRST AMEND. ENCYCLOPEDIA (Sept. 2017), https://www.mtsu.edu/first-amendment/article/931/rights-of-students [https://perma.cc/7UU8-9HB8].

by the First Amendment,[115] academic freedom is not mentioned explicitly among the five pillars of rights in the Amendment and is a concept that is informed by—but does not overlap precisely with—those fundamental constitutional rights.[116]

Nevertheless, the First Amendment can be invoked effectively in defense of academic freedom in higher education. This is important because in America there are increasing (and to a degree, unprecedented) pressures on higher education, including: (1) litigation challenging how universities recruit, select, financially support, and educate students, as well as how they set and justify tuition, raise and use funds, and are taxed and regulated; (2) challenges by major stakeholders of universities, including faculty and alumni, that go to basic questions about a university's future identity, core values, obligation to serve worthy societal purposes, and commitment to diversity; and (3) broad cultural and political challenges cast as attacks on elitism, which often wrongly and irresponsibly devalue America's historic investment in higher education as the gateway to opportunity and progress. Despite the legitimacy of inquiries about the nature and priorities of academic work and the need for change, the skepticism, cynicism, and animosity to learning and scholarship seem to have risen to new levels. These developments threaten both the independence and vitality of institutions of higher education.

Many observers have noted the similarities between the divisive societal climate of the 1960s and early 1970s and the contentious world we live in today.[117] Once before, decades ago, many academic institutions responded to claims of fairness and changing cultural values by co-educating women and men. They also sought much more diversity of background, ethnicity, language groups, geographical origin, and skill sets while making many others changes in keeping with a renewed vision of the place of universities in the social landscape. We are at a similarly critical historical moment now.

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115. E.g., Sweezy v. New Hampshire, 354 U.S. 234 (1957); Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom [is] . . . a special concern of the First Amendment."); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

116. Fisher, *supra* note 114.

117. *See, e.g.*, *How 2020 Is Similar to 1960s—And How It Isn't*, AZBIGMEDIA (June 21, 2020), https://azbigmedia.com/lifestyle/how-2020-is-similar-to-1960s-and-how-it-isnt/ [https://perma.cc/P4L8-GPK8]; Dylan Matthews, *How Today's Protests Compare to 1968, Explained by a Historian*, VOX (June 2, 2020, 1:30 PM), https://www.vox.com/identities/2020/6/2/21277253/george-floyd-protest-1960s-civil-rights [https://perma.cc/FX5K-L88M]; Christopher Ingraham, *How the Unrest of the 1960s Compares to Today, According to Those Who Lived Through It*, WASH. POST (July 12, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/12/reddit-remembers-the-1960s-we-probably-dont-have-to-kill-all-of-them-just-the-agitators/ [https://perma.cc/LX5D-37MF]. The author has written about the comparisons between the 1960s, 1970s, and today in Allard, *Sweet Are the Uses*, *supra* note 6.

Meanwhile, the increasing forays of government into education, including proliferating legal and regulatory obligations, oversight, and investigations, will no doubt raise important First Amendment questions. One of the most recent examples is the U.S. Education Department's investigation of five states for potential civil rights violations for prohibiting school mask mandates.[118] Other ongoing examples decidedly focus on higher education. These include the FBI investigations and arrests of Chinese researchers working in U.S. institutions related to alleged industrial and scientific espionage and piracy of intellectual property.[119] Closely related are sweeping proposed new reporting and disclosure requirements in a pending amendment to the Higher Education Act of 1965 that is intended to discourage undue foreign influence and improve the research security of U.S. universities and colleges.[120]

These initiatives—whose good intentions are understandable—are burdensome, overbroad, and unlikely to be effective for various reasons. These government measures have in common a failure to recognize the reality of the collaborative, global, and transborder nature of scholarship, teaching, and learning, which generates considerable benefits along with risks. Consequently, without much chance of solving the problems to be remedied, this type of government intrusion could create an atmosphere where U.S. higher education institutions are seen as less favorable places for talented academics and researchers to work to develop critical new knowledge and scientific innovation. Perversely, rather than safeguarding and advancing America's preeminence in research, these regulatory moves

118. Liz Stark, *Education Department Investigating 5 States for Potential Civil Rights Violations for Prohibiting School Mask Mandates*, CNN POLITICS (Aug. 30, 2021, 3:19 PM), https://amp.cnn.com/cnn/2021/08/30/politics/education-department-civil-rights-investigation-school-mask-mandates/index.html [https://perma.cc/TMY5-WQL4].

119. Jeffrey Mervis, *Fifty-Four Scientists Have Lost Their Jobs as a Result of NIH Probe into Foreign Ties*, SCIENCE (June 12, 2020), https://www.science.org/content/article/fifty-four-scientists-have-lost-their-jobs-result-nih-probe-foreign-ties [https://perma.cc/H6T7-THTN]; Kate O'Keefe & Aruna Viswanatha, *FBI Sweep of China Researchers Leaders to Cat-and-Mouse Tactics*, WALL ST. J. (Sept. 7, 2020, 5:30 AM), https://www.wsj.com/articles/fbi-sweep-of-china-researchers-leads-to-cat-and-mouse-tactics-11599471001 [https://perma.cc/32US-9EA3]; Yojana Sharma, *US Targets Chinese Talent in Drive to 'Decouple' Science*, UNIV. WORLD NEWS (Dec. 12, 2020), https://www.universityworldnews.com/post.php?story=20201211141413735 [https://perma.cc/B9CS-246A]; Matthew Imelli, *Over 500 U.S. Scientists Under Investigation for Being Compromised by China*, NEWSWEEK (April 23, 2021, 2:46 PM), https://www.newsweek.com/over-500-us-scientists-under-investigation-being-compromised-china-1586074 [https://perma.cc/TR8U-RUNK]; Aruna Viswanatha, *U.S. Drops Visa Fraud cases Against Five Chinese Researchers*, WALL ST. J. (July 23, 2021, 9:21 PM), https://www.wsj.com/articles/u-s-drops-visa-fraud-cases-against-5-chinese-researchers-11627074870 [https://perma.cc/9ZEU-P6XU].

120. Section 6124(b) of the U.S. Innovation and Competition Act of 2021 was adopted by the U.S. Senate on June 8, 2021. *The U.S. Innovation and Competition Act: Senate Passes Sweeping $250 Billion to Bolster Scientific Innovation and Compete with China*, SIDLEY (June 16, 2021), https://www.sidley.com/en/insights/newsupdates/2021/06/an-overview-of-the-united-states-innovation-and-competition-act [https://perma.cc/Y3DM-4VWB].

could diminish the Nation's leadership in the pursuit of knowledge and innovation.

C. Privacy and the First Amendment in a Digital World

Like academic freedom, the right to privacy is not explicitly mentioned in the First Amendment, but the Supreme Court has discerned that it is grounded there and implicit in the Bill of Rights.[121] As with the expanding debates over academic freedom, digital technology has generated an explosion of legal privacy issues. In this regard, the United States, in contrast to European and other nations, has focused more on deregulation and stimulating technological innovation. Other western countries and multinational organizations, however, have instead prioritized protecting personal privacy from digital threats and addressing issues stemming from monopoly power. Although it is a fair question to ask whether the proverbial horse is out of the barn, that is, to ask whether personal privacy has been literally virtually lost with little hopes of recovery (as you often hear said), questions of privacy rights and cybersecurity will be growth areas for academics and practitioners alike.[122]

At a distance, it is sometimes difficult to appreciate the prioritization of the relatively few cases that find their way to the Supreme Court and that it accepts for review, as perhaps with the *Mahanoy* case, compared with other prominent, even urgent cases it declines to review. In this regard, amidst the large volume of serious privacy controversies, it is worth highlighting the very recent Supreme Court decision in *Americans for Prosperity Foundation v. Bonta*.[123] This is another case where the Court turned its limited bandwidth to attend to the questions about alleged burdens associated with disclosing financial contributions.[124] Although not squarely a privacy case, *Bonta* implicates similar aspects of the rights to association and anonymity often considered in privacy cases. Further, upon reflection, the decision may have unforeseen implications for the proposed higher education disclosure scheme that Congress is considering, ostensibly to protect U.S. academic institutions from undue foreign influence and conflicts of interest.[125]

Bonta is likely to impact state nonprofit donor disclosure and transparency frameworks across the country, and perhaps those pertaining to

121. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

122. *See* KENNETH CULKER & VIKTOR MAYER-SCHONBERGER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LOVE, WORK, AND THINK (2013).

123. *See generally* Americans for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

124. *See id.*; *see also* Citizens United v. FEC, 558 U.S. 310 (2010).

125. *See supra* notes 118 & 119.

academic institutions.[126] In *Bonta*, the Court addressed the constitutionality of California's donor disclosure obligations for charitable organizations soliciting funds within the state, ultimately finding the requirement to be a facially invalid restriction of First Amendment rights because it burdens the freedom of association of donors without being tailored to an important government interest.[127] After *Bonta*, states with disclosure laws like California's may be pressed to enforce their existing nonprofit donor reporting requirements, and could be forced to consider whether charitable solicitation legal frameworks are an appropriate means by which to promote contributor transparency going forward.

In a 6-3 decision, the Court ruled California's donor disclosure obligation unconstitutional. Writing for the majority, Chief Justice John Roberts concluded that California's donor disclosure requirement was facially invalid because the obligation failed the "exacting scrutiny" standard that should be applied to laws that burden the First Amendment associational rights of individual donors.[128] Under the Court's interpretation of the standard, exacting scrutiny requires that a donor disclosure law be narrowly tailored to the government's asserted interest, even if the disclosure law is not the least restrictive means of achieving such ends.[129] The Court found the relationship between California's disclosure requirement and its interest in preventing charitable fraud to be a "dramatic mismatch," because there was no evidence that California—despite mandating donors' disclosure from over 60,000 nonprofits—relied on the required reports for initiating investigations into registered charities.[130]

The dissent, authored by Justice Sonia Sotomayor, argued that California's nonprofit donor disclosure requirement should be upheld as constitutional, given that the reporting obligation placed no demonstrated burden on free speech and generated no reason to undertake exacting scrutiny review.[131]

The Supreme Court's ruling in *Bonta* renders California's existing disclosure obligation unconstitutional and inapplicable to charities in the state and could lead to increased scrutiny of other state-level donor disclosure requirements for both section 501(c)(3) charitable organizations and covered section 501(c)(4) social welfare organizations registered for nonprofit solicitation purposes. There are ongoing lawsuits around the country challenging similar donor disclosure requirements in other states, and new

126. *See generally Bonta*, 141 S. Ct. 2373 (2021).
127. *Id.*
128. *Id.* at 2385.
129. *Id.* at 2383.
130. *Id.* at 2386.
131. *Id.* at 2396.

lawsuits seeking to force jurisdictions to abandon or modify their current policies that were filed after *Bonta* was announced.[132] This litigation could inform future debates about government disclosure regimes and other regulations imposed on academic institutions in terms of their impact on the privacy concerns implicit in the First Amendment rights of members of academic communities and the contours of academic freedom.

D. The Persistent Inequity of the Digital Divide

The First Amendment gives people the right but not the means for their voices to be heard. Cheerleaders used to—and some still do—use old-fashioned megaphones to be heard over noisy crowds at athletic events. The impetus behind the twentieth century idea of universal communications services, and the later evolving government efforts to close the digital divide, was to assure that as many people as possible had a reasonable chance to use the latest technological version of the megaphone. In other words, efforts were made to provide universal access to the public for certain minimal or basic levels of affordable communications technology, along with the knowledge of how to use the technology.[133] As technology has evolved and advanced, it has always been a moving target of what was sufficient to keep up with the Joneses—from originally affording access to a telephone party operator monitored line, then to a rotary dial automatic telephone, and eventually to a touchstone dial device, and so on.

The Clinton-Gore administration took the universal service concept to a new level by focusing on bridging what it called the "Digital Divide" in the Internet Era.[134] Since then, there has been less focus on this cause, and,

132. New suits were filed in New Jersey and New York. *See* N.J. Civil Just. Inst. v. Grewal, No. 19-17518, 2020 U.S. Dist. LEXIS 12806 (N.N.J. July 21, 2020); Liberty Justice Center v. James, United States District Court Southern District of New York, No. 1:21-cv-06024 (S.D.N.Y. July 14, 2021).

133. *See Universal Service*, FCC, https://www.fcc.gov/general/universal-service [https://perma.cc/3CGG-JURT] (last visited Oct. 28, 2021). Universal service refers to the policy of striving to provide a baseline of communications services that guided the provision in the United States postal service and the telephone service. *See id.* It was formally adopted as national policy in the Communications Act of 1934 and embodied in the preamble of that Act. 47 U.S.C. § 151. The "Digital Divide" is a term that came into use in the 1990s to describe the gap between those who had and those who lacked access and knowledge to use affordable digital services and to measure the results of public and private efforts to close that gap. *See, e.g.*, Songphan Choemprayong, *Closing Digital Divides: The United States' Policies*, 56 LIBRI 201 (2006), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.136.9121&rep=rep1&type=pdf [https://perma.cc/2VLX-XSR2]. The National Telecommunications and Information Administration of the United States Department of Commerce contains numerous reports and data about the Digital Divide and is available at: https://www.ntia.doc.gov/ [https://perma.cc/ZB78-2KGW].

134. *See The Clinton-Gore Administration: From Digital Divide to Digital Opportunity*, CLINTON WHITE HOUSE ARCHIVES (Feb 2, 2000), https://clintonwhitehouse4.archives.gov/textonly/WH/New/digitaldivide/digital1.html [https://perma.cc/UVY7-D9DA]. Note that it became an international concept and policy issue. The Bush Administration discontinued the annual reports and references to the digital

frankly, there has been less interest as prices have fallen and access to computer technology and mobile handheld devices has exploded. But people who are still left behind, unconnected, and without the means to operate and function in the digital realm, cannot fully exercise their First Amendment rights.[135] With the unceasing acceleration of technological innovation, the challenge of helping the less advantaged and those who, for different reasons, find it difficult to keep up with evolving technology (and who often lack the required access and knowledge to use the latest minimal level of technology to function fully in society), may seem as futile as the hounds running to catch the electronic rabbits at race tracks.

In many ways, digital "have nots" are at a severe disadvantage in exercising their First Amendment rights. This is one of many compelling reasons to address how best to make digital technology available to those who, for whatever reason, are underserved and unserved. Without affordable access to mobile broadband technology—and the knowledge and the ability to use it—people lack the keys to social interaction, economic opportunity, and participatory democracy. They are socially, economically, and politically disenfranchised. The fundamental values underlying the First Amendment should motivate us to ensure that the voices of everyone be heard, even if that inspiring goal is never fully attainable. As technology rapidly advances, catching everyone up with what becomes the new basic floor of acceptably necessary service will be difficult, if not impossible. Still, we must try.[136]

E. Voting Rights, Making Every Vote Count Equally, and the Electoral College[137]

It seems obvious that in the United States exercising the right to vote is engaging in the ultimate kind of political speech that deserves the full

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divide referred to in *supra* note 133. The Obama administration resumed them. *See* Joyce Winslow, *America's Digital Divide*, PEWTRUSTS (July 26, 2019), https://www.pewtrusts.org/en/trust/archive/summer-2019/americas-digital-divide [https://perma.cc/GE5D-PEPR]; Katrina vanden Heuvel, *America's Digital Divide Is an Emergency*, WASH. POST (June 23, 2020), https://www.washingtonpost.com/opinions/2020/06/23/americas-digital-divide-is-an-emergency/ [https://perma.cc/97MN-ZBVS].

135. Constitutional underpinnings for prioritizing closing the digital divide are suggested in the discussion of information access rights by Professor Brian Murchison. Murchison, *supra* note 91 and accompanying text.

136. *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Murchison, *supra* note 91.

137. *See* Bohnhorst et al., *supra* note 11. The author is indebted to Mark Bohnhorst, who long served as the Associate General Counsel of the University of Minnesota for his deep dive research and writings on voting rights and electoral college reform. Also acknowledged with gratitude are the insights and work of Reed Hundt, who among his many attributes is co-founder, President, and CEO of Making Every Vote Count, Professor Elizabeth Cavanagh of American University's Washington College of Law ("WCL"), and Kate Morrow, J.D. 2021, WCL, and currently clerking with Hon. Christopher Garrett, Supreme Court of Oregon.

protection of the First Amendment.[138] Government restrictions on voting, including registration requirements and rules for the time, place, and manner of voting, can be justified;[139] however, it would seem appropriate to subject limitations on the political expression conveyed through the act of voting to the scrutiny of traditional First Amendment analysis based on facts determined by evidence. For example, if new state restrictions and rules for voting are proposed to protect the integrity of elections and to prevent fraud, evidence should be required to establish the need for the new rules. That is, evidence of voter fraud, error, or other impropriety to support the justification for the new requirements must be produced. Similarly, if the justification is for administrative, logistical, or public safety reasons, there should be evidence justifying the need. Further, evidence should be required to establish that the restrictions could reasonably be expected to achieve the desired result, and that they are less restrictive on the act of voting than alternative approaches. In brief, the growing number of state restrictions on voting rights arising after the 2020 election should be put to the test under the First Amendment and be required to withstand strict scrutiny.[140] There may be other constitutional grounds and legal bases for challenging the sudden proliferation since the 2020 election of new state voting restrictions,[141] but it is time to fully examine the viability and relevance of the First Amendment in responding to this phenomenon.

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138. *See, e.g.*, Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 486 n.100 (2016) (listing a "virtually endless, list of voting rights Supreme Court voting cases since *Baker v. Carr*, voting is characterized as providing citizens with a 'voice' in their democracy").

139. In fact, states and Congress are authorized to make such rules in Article I, Section 4 of the Constitution.

140. *See Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021?ms=gad_voting%20laws_554559194290_8626214133_132347551407&gclid=CjwKCAiA7dKMBhBCEiwAO_crFHI0CEaxNae92u0M8uWCZT3xU8bDcNGSXCoxrsJ-bn7h5ZiSddv8jhoCNzQQAvD_BwE [https://perma.cc/UDE6-5CS5] (reporting that "[nineteen] states have enacted [thirty-three] laws that will make it harder for Americans to vote"). The outcome of the hotly contested 2021 Virginia gubernatorial race is interesting for those pushing voter suppression measures. Unlike the outcome in the 2020 Presidential election where President Trump may have contributed to his loss by discouraging his supporters from utilizing mail-in and early voting and encouraging distrust in the election process, Republican candidate Glenn Youngkin beat incumbent Democrat Terry McAulifee in significant part by generating an atypical turnout of his supporters in an off-year election. *See e.g.*, Annika Kim Constantino, *Virginia Election Sees Highest Turnout in Recent History, Fueling Glenn Youngkin's Victory*, CNBC (Nov. 3, 2021, 4:44 PM), https://www.cnbc.com/2021/11/03/virginia-election-sees-highest-turnout-in-recent-history-fueling-glenn-youngkins-victory.html [https://perma.cc/5XZB-3W9U].

141. The Court significantly limited the landmark Voting Rights Act of 1965 in *Shelby County v. Holder*, 570 U.S. 529 (2013) and *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). The pending John Lewis Voting Rights Act, H.R. 4, is designed to restore the protections limited in *Shelby County* and *Brnovich*. *See* Juana Summers, *The House Has Passed a Bill to Restore the Voting Rights Act*, NPR (Aug. 24, 2021, 7:15 PM), https://www.npr.org/2021/08/24/1030746011/house-passes-john-lewis-voting-rights-act [https://perma.cc/JU5Y-XQKB]. The Freedom to Vote Act was introduced in the U.S. Senate on September 14, 2021, and contains many of the provisions in the Freedom to Vote Act, H.R. *See Fact Sheet: The Freedom to Vote Act*, Brennan Ctr for Just. (Sept. 20, 2021), https://www.

It is notable that the Court has not yet found that the First Amendment applies to and protects voting.[142] The Court has recognized First Amendment protection for many ancillary rights relating to elections: for example, money contributions are considered protected speech and corporations can enjoy that privilege.[143] Spending money to influence voters as in *Citizens United* and *Buckley*, anonymity and political petitions for ballot initiatives,[144] and expressions of political views near polling places are also protected.[145] Yet the Court has stopped short of applying the First Amendment to the act of voting, which, after all, is the ultimate way to express political views and hold the government accountable, and is arguably the central purpose of the great Amendment. So, it is time to make the case that it should be so. Perhaps the Court will agree in contexts in which it feels more comfortable sidestepping political questions that it is not equipped to handle competently. Certainly, it can decide cases where the grounds for new voting restrictions are not based on any credible evidence whatsoever. In any event, the relevance of the First Amendment should be pressed. At a minimum, arguing the point will help throw back the covers and spotlight what is really going on with the spread of new impediments to voting, and enable the public to understand what is at stake.[146]

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brennancenter.org/our-work/research-reports/freedom-vote-act [https://perma.cc/YKT9-6FFU]. It was passed by the House of Representatives in March 2021. *Id.* Another option receiving attention involves the question of the potential enforcement of the Fourteenth Amendment Section 2 protections against denial of voting rights and abridgment of the right to vote. *See* Joshua Geltzer, *The Lost 110 Words of Our Constitutiuon*, POLITICO (Feb. 23, 2020, 7:00 AM), https://www.politico.com/news/magazine/2020/02/23/the-lost-constitutional-tool-to-protect-voting-rights-116612 [https://perma.cc/J7SC-X8MU]. The suggestions that the penalties in the Fourteenth Amendment Section 2 for states that curtail voting rights of any citizen are a dead letter and that the penalties are too difficult to calculate are not particularly persuasive. *See id.* First, for proponents of textualism, there are no limits on the penalties for abridgment in the language of Section 2 to circumstances arising from the Civil War. Contemporary advocates of expanding the Second Amendment, drafted in an era of muzzle-loaded muskets, vigorously resist arguments that it does not apply to rapid fire military syle assault weapons. The Fourth Amendment was written when searches of papers and effects involved quill pens and inked foolscap; the language exists unamended, inapplicable, and arguable in the twenty-first century. In addition, the notion that in a proven case of abridgment, it would not be possible to determine a remedy by calculating what would be a fair reduction of representation in the circumstances runs contrary to what is known about what courts can do. *See* Geltzer, *supra* note 141. It can be expected from courts and lawmakers in cases of proven abridgment to rise to the challenge and to do so. *See id.*

142. Chief Justice Roberts dismissed the idea in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), a gerrymandering case in which he wrote that there were "no restrictions of speech, association, or any other First Amendment activities in the districting plans at issue." *Id.* at 2504.

143. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 312 (2010); Buckley v. Valeo, 424 U.S. 1, 54 (1976).

144. *See generally* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

145. *See generally* Reed v. Town of Gilbert, 576 U.S. 155 (2015).

146. *See* Mary Louise Kelly, *Right to Vote: Historian on What Voting Restrictions Mean for Democracy's Future*, NPR (July 16, 2021, 4:15 PM), https://www.npr.org/2021/07/16/1017012832/right-to-vote-historians-on-what-voting-restrictions-mean-for-democracys-future [https://perma.cc/X4UX-DP2J]; David Leonhardt & Ian Prasad Philbrick, *What's at Stake in the Fight over Voting Rights*, N.Y. TIMES (Updated Aug. 19, 2021), https://www.nytimes.com/2021/07/13/briefing/texas-voting-rights-

Addressing the undemocratic consequences of the anachronistic Electoral College in the context of the First Amendment also could be useful and persuasive, if not dispositive. First, it would offer a platform for better understanding that it is a state's decision under Article II whether to use a "winner takes all system" for choosing electors.[147] It would help voters understand the root cause for the possibility that a candidate can lose the national popular vote but win the electoral vote. The "winner takes all" method of assigning electors state by state is not in the Constitution, much less a constitutional requirement.[148]

Furthermore, this state-determined system can be changed by individual states without a constitutional amendment. Doing so would remove the cause of the anomalous, undemocratic possibility that a presidential candidate once again could win a majority of the national popular vote and lose the Electoral College vote.[149] The prevalent and correctable state "winner takes all" approach also is the reason why most states and the views of most voters are largely ignored during presidential campaigns, and why voters in some key states' ballots count more than those in other states.[150] Such results are certainly inherently undemocratic and, if not contrary to the letter of the First Amendment, at odds with its spirit and purpose. Optimistically, perhaps in the perennial debate about the future of the Electoral College, First Amendment principles could help guide the way.

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bill-legislature.html [https://perma.cc/FRJ5-DFTN]; Carole Levine and Steve Dubb, *What's at Stake in the Wave of Voter Suppression Bills*, NAT'L NONPROFIT Q. (Mar. 24, 2021), https://nonprofitquarterly.org/whats-at-stake-in-the-wave-of-voter-suppression-bills/ [https://perma.cc/8T3W-YQ2D]; Adam Clark Estes, *What's at Stake in the Voting Rights Act Battle*, ATLANTIC (Feb. 26, 2013), https://www.theatlantic.com/politics/archive/2013/02/whats-stake-voting-rights-act-battle/317940/ [https://perma.cc/6M53-3QPE].

147. U.S. CONST. art II, § 1. Each state determines how the electors are allocated to candidates. As of the 2020 election forty-eight states and the District of Columbia used a "winner-takes-all" rule to determine how many of a state's electoral votes are allocated for candidates in presidential elections. *Making Every Vote Count*, MAKING EVERY VOTE COUNT FOUND., https://www.makingeveryvotecount.com/ [https://perma.cc/S5ES-Z3F5] (last visited Oct. 28, 2021). That is, in almost every state, the candidate that wins the popular vote in that state, no matter what the margin, gets all of the state's electoral votes. *See id.* Only two states, Maine and Nebraska, do not follow a "winner takes all rule," and instead rely on a system of proportional allocation for electoral votes that split the allocation of electors according to the ratio of the total votes each candidate receives. *See Maine & Nebraska*, FAIRVOTE, https://www.fairvote.org/maine_nebraska [https://perma.cc/N9NP-Q5QY]. Nothing in the Constitution prevents a state from using something other than a "winner takes all system" based on the popular vote in the state. *Making Every Vote Count*, *supra* note 147. A succinct discussion and analysis of the issues, problems, and options for addressing the inequities in the Electoral College may be found on the website of the Making Every Vote Count Foundation, accessible at: https://www.makingeveryvotecount.com/ [https://perma.cc/S5ES-Z3F5].

148. *Id.*

149. *Making Every Vote Count*, *supra* note 147.

150. "Presidential elections are decided by voters in only five to ten states with 20% of the U.S. population." *Id.* Presidential campaigns prioritize campaigning in those states and focus on the issues that matter most to the voters in those "swing states." *Id.* Campaigning and different issues that are important to voters in other states receive considerably less attention if not ignored completely. *Id.* Consequently, voter turnout in other states is fourteen percent lower than in swing states. *Id.*

That is because the case for reforming the Electoral College is bolstered by considering how its anachronistic features are contrary to the requirement that democracy be based on equal voting rights. In practice, the operation of the Electoral College disenfranchises voters in two ways. First, in every state, whether red, blue, or purple, the "winner takes all" system completely ignores the preferences of voters whose choice did not win the in-state popular vote and does not assign any electors at all to their preferred candidate. Second, as has twice happened in the twenty-first century and could well happen again, the winner of the nationwide popular vote can lose the election in the Electoral College. In First Amendment terms, the voice of the people expressed when they cast their ballots is silenced by a system that does not count every vote equally. Interestingly, polls consistently show that Americans across all demographic categories favor electing the winner of the national popular vote as President and also that every vote be counted equally.[151]

IV. THE ILLUMINATING BEACON OF THE FIRST AMENDMENT

The modest effort on these pages to illustrate with selective examples the enduring, integral role of the First Amendment in how we govern ourselves and live our lives has been a much appreciated and humbling opportunity to think about many tough questions—more so because of the chance to join the distinguished other authors who are featured in this issue, and to try to contribute to the efforts of the talented, dedicated Washburn Law students and faculty who made it possible. Thank you.

Hopefully, this Essay and the entire Issue will serve to remind readers that the First Amendment was conceived as and has proven to be more than mere words. These words are among the constitutional rules that are the one thing that make us all Americans, despite our many differences. They are words that transcend theory by influencing what we do every day. They are dynamic, adaptable, and paradoxically are often difficult to abide by. In this space, we have attempted to identify areas which merit further study and discussion and conveyed how keeping our eyes on the illuminated beacon of First Amendment principles will help guide us as we grapple with the pressing future challenges we must overcome together.

Well, my job was to write. Yours was to read. I hope we finished our work at the same time.[152]

NWA

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151. *Id.*

152. A favorite closing of incomparable teacher, scholar, law dean, mentor and friend, Jesse H. Choper, UC Berkeley School of Law, shamelessly borrowed and adapted for print with great affection, gratitude, and admiration.