



THE FATE OF AMERICAN DEMOCRACY DEPENDS ON FREE SPEECH

*Suzanne Nossel**

The freedom of speech—an essential cornerstone of American democracy—is under direct attack, leaving American institutions, civic culture, and society deeply vulnerable. Restrictions on books and educational curricula, limits on assembly rights, the rampant spread of disinformation, the chill of “cancel culture” and online abuse—all impinge upon the open exchange of ideas that the First Amendment was intended to underwrite. Encroachments on freedom of expression emanate from all sides of the political spectrum and through both formal and informal channels. It is imperative that efforts to contain and surmount the crisis of American democracy include a sharpened focus on the defense of free speech, an essential counterpart to voting rights, civil rights, and a healthy democratic culture.

INTRODUCTION

In response to our democratic crisis—polarization, contested elections, political violence—philanthropists, activists, and civic leaders have set about trying to find ways to restore democracy and a vibrant civic culture. Foundations have launched ambitious new programs. Individual philanthropists have convened col-

* Suzanne Nossel is Chief Executive Officer of PEN America, a leading human rights and free expression organization, and serves on the Meta Oversight Board. Her prior career spanned government service and leadership roles in the corporate and nonprofit sectors, including as Chief Operating Officer of Human Rights Watch and Executive Director of Amnesty International USA. During the first term of the Obama administration, she served as Deputy Assistant Secretary of State for International Organizations. She is the author of *Dare to Speak: Defending Free Speech for All* (2020) and is a featured columnist for *Foreign Policy* magazine. This article was originally published in August 2024 in Volume 153, Issue 3 of *Daedalus*, the Journal of the American Academy of Arts and Sciences. The citation format has been largely preserved from that publication.

laboratives—the Democracy Alliance, the Democracy Funders Network, New Pluralists—aimed to pool resources and insights to shore up the polity. A cottage industry of new organizations has grown over the last seven years to work on voting rights, voter access, election laws and systems, civic participation, and more. These valiant efforts have collectively helped tamp down political unrest, fend off demands to reject the 2020 election result, and defend vulnerable democratic systems at the state level across the country. Many of these efforts are geared not just toward fortifying American democracy in its current form, but also to reinventing it to better meet the needs of a country buffeted by technological, demographic, and social change.

One bulwark of a healthy democracy that these efforts have not sufficiently prioritized, however, is free speech. This is doubly surprising. First, because alongside voting rights and systems, good governance, and civic participation, free speech and open discourse have always formed part of the backbone of a healthy democracy. And second, because free speech and open expression are so clearly under threat today. Controversies over free speech—what can and cannot be said, taught, studied, and read—are fueling grievances that are deepening polarization and distrust in our political system. Yet the battle to uphold free speech has not been incorporated into the broader movement for democracy. It must be.

In this essay, I first describe the loss of faith in free speech on the left and the right and the reasons for it. I then detail the relationship between free speech and democracy, and how it has come under pressure from growing pluralism, polarization, and digitization. I follow by outlining how a flagging commitment to free speech in education, in terms of protest and assembly rights and in relation to the role of the free press, are collectively weakening American democracy. I conclude with a series of recommendations that can help shore up the place of free speech as a democratic cornerstone now and for generations to come.

I.

Free speech is in danger of losing its status as a prime American value. The courts still uphold the right to free speech; indeed, free speech protections were steadily widened by judicial decisions throughout the twentieth century. But free speech ideals are now faring poorly in the hands of legislators, politicians, institutions, and citizens. Meanwhile, a growing slice of twenty-first-century challenges to free speech—the harms of social media, so-called cancel culture or informal re-

prisals for errant speech, hot button subjects that are effectively off-limits for discussion on college campuses and in the media—do not implicate state action and, for the most part, cannot be redressed through constitutional channels.

Embedding the place of free speech in American society and culture thus requires recognizing that the freedom of speech is not just an individual right, but also a collective cultural value. The violation of free speech rights by the government in relation to specific citizens is not the only threat to free speech in the United States today. Rather, the perception that one cannot speak freely—coupled with the fear of reprisal or exasperation that our discourse makes it impossible to be heard—is feeding corrosive levels of social and political frustration. In Florida, outrage over so-called wokeness has fueled the most comprehensive legislative assault on free speech rights in memory, with limitations on what can be taught and studied in schools and colleges.¹ The defense of free speech and open discourse cannot be left up to attorneys, legal scholars, and courts. The obligation rests with individual citizens and with a wide range of institutions and leaders, in and out of government. At a time of deep political schisms, free speech must be elevated as a cause above politics, with leaders across the spectrum recognizing that the free exchange of ideas is a prerequisite to achieving their own political priorities and social visions.

II.

Too many young progressives see free speech as a smoke screen for hatred. Loose talk about the harms of speech has cordoned entire subject areas—transgender rights, affirmative action, reparations for the historic mistreatment of minority populations, public safety, the Israeli-Palestinian conflict—as virtually off-limits for discussion in classrooms and other campus settings (as well as in workplaces), lest errant comments cause offense and lead to hard-to-shake accusations of bigotry or inexcusable callousness.² Invited speakers on these and other topics have been shouted down at universities by irate student protesters who cast free speech—or, more specifically, open discussions of contrary views on topics

¹ See Suzanne Trimel, “These 4 Florida Bills Censor Classroom Subjects and Ideas,” PEN America, July 13, 2022, <https://pen.org/these-4-florida-bills-censor-classroom-subjects-and-ideas>.

² For example, see Bipartisan Policy Center, *Examining Student Self-Censorship on College Campuses*, January 14, 2022, <https://bipartisanpolicy.org/blog/examining-student-self-censorship-on-college-campuses> (“evidence continues to point toward a growing reluctance, particularly among students, to express themselves openly”).

such as racial justice, gender identity, or war—as inimical to their causes.³ Administrators have fired professors for depicting paintings considered offensive, supporting union activity, and criticizing mask mandates.⁴ That the loudest voices asserting and defending free speech rights on campus are sometimes libertarian or conservative can compound the perception in some quarters that free speech rights are about protecting the powerful and privileged (or at least the white and the male), and are at odds with social justice causes.

Ironically, although some on the right have denounced enforced ideological orthodoxies in higher education and elsewhere in the name of free speech, some conservatives have emerged in recent years as some of our most aggressive censors. Republican-controlled statehouses and schools have embraced legislated book bans and restrictions on curricula in classrooms and higher educational institutions.⁵ They have disproportionately targeted books and theories by and about minority authors and gays, lesbians, and transgender people, rejecting newer, broader ideas about racial equality, gender identity, and sexual orientation. The move to marginalize these viewpoints has been accompanied by a reversion to old-fashioned, even prudish notions of sexuality, with objections being lodged against books like the *Diary of Anne Frank* or Toni Morrison’s *Bluest Eye* on the grounds that they are pornographic.⁶ As an antidote to what they regard as wokeness run amok, they

³ For example, see PEN America, “Student Disruption of a Judge’s Speech at Stanford U Deserved a Forceful Defense of Free Speech by the Administration,” March 14, 2023, <https://pen.org/press-release/student-disruption-of-a-judges-speech-at-stanford-u-deserved-a-forceful-defense-of-free-speech-by-the-administration-says-pen-america> (“‘When a speaker has been invited to campus, they deserve the ability to speak and be heard,’ said Kristen Shahverdian, senior manager in free expression and education”).

⁴ For example, see Robin Abcarian, “Firing an Art History Professor for Showing Students an Image of the Prophet Muhammad Is Out of Line,” *Los Angeles Times*, January 11, 2023, <https://www.latimes.com/opinion/story/2023-01-11/hamline-univeristy-art-history-teacher-firing-mohammad-image> (“PEN America, which supports free expression, accused Hamline of ‘academic malpractice’ and called its treatment of López Prater, who did not respond to my request for comment, ‘one of the most egregious violations of academic freedom in recent memory’”).

⁵ See PEN America, “PEN America Files Lawsuit Against Florida School District Over Unconstitutional Book Bans,” May 17, 2023, <https://pen.org/press-release/pen-america-files-lawsuit-against-florida-school-district-over-unconstitutional-book-bans>.

⁶ See Mike Schneider, “Illustrated Anne Frank Book Removed by Florida School,” AP News, April 13, 2023, <https://apnews.com/article/censorship-books-school-libraries-holocaust-anne-frank-bb65349704ab2dae1ac90a0f9856d7b9>.

choose censorship. While courts may curb some of the overreach, states and school systems have wide latitude to determine what is taught in public classrooms. Moreover, research shows that, in hearing free speech cases, judges tend to be more vigilant in guarding speech that aligns with their own political values.⁷ Staunchly conservative district and circuit courts in parts of the country where educational censorship is afoot may sympathize with legislators who see the suppression of ideas considered controversial, inappropriate, or subversive as justified.

These pressures from the left and right are undermining free speech as a bedrock constitutional, cultural, and democratic value in the United States. If young people view free speech as an alien concept at odds with their beliefs, it will only be a matter of time before such attitudes—now widespread on college campuses and among organizations where progressives predominate—pervade all forms of workplaces, editorial pages, statehouses, and courthouses. If restrictive content-based laws dictating what can and cannot be taught in schools and universities become the norm, these educational systems will cede their influence as breeding grounds for democratic citizenship and as settings in which students learn to grapple with the widest breadth of ideas. Meanwhile, fast-evolving digital technologies are reshaping how we find and absorb information, making it harder to distinguish between fact and falsehood (including on pressing civic matters such as elections), raising the costs of certain kinds of speech, and creating new methods to intimidate and silence others. These trends pose a proximate risk to American democracy and reversing them is essential to the future of the democratic project.

III.

The nexus between free speech and democracy is both abstract and concrete, universal and particular. As set out in the First Amendment, free speech is a series of interlocking rights that collectively ensure that citizens have the ability to perpetuate and perfect their system of governance. The First Amendment's protections—of freedom of belief, speech, the press, and assembly, and the right to petition the government for the redress of grievances—operate on a spectrum from the personal and private to the public and political. They protect the right to think and believe as you choose, express those beliefs to others, syndicate those views through

⁷ See Adam Liptak, "For Justices, Free Speech Often Means 'Speech I Agree With,'" *The New York Times*, May 5, 2014, <https://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html>.

media, rally fellow citizens behind a cause, and press the government for action. Those freedoms are the essence of democratic citizenship. Being a citizen in a democracy allows and, indeed, demands that an individual do more than just cast a vote on election day. To cast a ballot conscientiously requires receiving information, forming personal beliefs, understanding public concerns, and being ready to hold officials accountable. Absent such forethought and engagement, casting a vote is an empty act. A vote cast willfully and conscientiously depends upon the exercise of the freedoms enshrined in the First Amendment and on the existence of public discourse that allows people to be informed. In places where local news outlets have dried up and there are few sources of reliable information about candidates or policy issues, it is hard to cast a meaningful vote.⁸

Free speech not only underpins democracy at the level of the individual citizen, but also provides scaffolding for democratic systems that govern communities, states, and nations. Free speech makes possible open deliberations in search of improved policies and new solutions. Debate, media scrutiny, and public questioning help to vet current and prospective leaders, enabling the polity to find those who are most visionary, honest, and capable. Without robust protections for press freedom, journalists might have to risk their lives or freedoms for exposing the scandals of the #MeToo era, political corruption, or the ethical lapses of justices of the Supreme Court. Around the world, hundreds of journalists are killed each year, many in retaliation for their reporting about the misdeeds of the powerful, including public officials. Democracies do not let that happen. Open debate makes possible the rigorous exchange of ideas and perspectives necessary to adjudicate conflicting interests and to move society forward. Free speech also acts as a safety valve, allowing tensions to be aired and addressed rather than to fester and erupt into violence. Free speech is a catalyst for uncovering the truth in that it protects those who question received wisdom and express heretical ideas. Free speech also safeguards and helps advance minority rights by preventing majorities from silencing those who challenge their prerogatives. Protections for free speech create an enabling environment for creativity, pathbreaking scholarship, scientific progress, and innovation, making possible a dynamic society that can invent ways to improve upon democracy.

⁸ For example, see Margaret Sullivan, “Every Week, Two More Newspapers Close—and ‘News Deserts’ Grow Larger,” *The Washington Post*, June 29, 2022, <https://www.washingtonpost.com/media/2022/06/29/news-deserts-newspapers-democracy>.

Free speech is also a crucial tool to safeguard democratic freedoms when they come under threat. It allows the press and individual citizens to expose corruption and wrongdoing in government and among the powerful while lessening the risk of retaliation. In a society with robust speech protections, advocates of all political persuasions are free to expose and protest curtailments of voting rights and the integrity of electoral systems. Free speech makes it possible to sound the alarm if a society is eroding other democratic values or lurching toward authoritarianism. Without free speech, there is no right to take to the streets in resistance.

This is not to say that democracy and free speech are never in tension. Democratic societies have always debated where free speech should give way to other values, such as national security, public order and welfare, peace, and different conceptions of morality. From the passage of the Sedition Act in 1798 to the jailing of antidraft agitators during World War I to the loyalty oaths required during the Red Scare, free speech has never been absolute in the United States (or in any society). Every generation must revisit thorny questions of how to preserve free speech in an evolving political and social climate in which open discourse brings not just great advantages but genuine risks.

IV.

It is not controversial to assert that, in the last decade or two, the relationship between free speech and democracy has come under distinct pressure. There are many reasons for this development, but we can identify three factors in particular: technology, the increasing diversity of our society, and political polarization. These forces have combined to undermine the sanctity of free speech as a principle that transcends partisan politics.

The rise of digital technologies has challenged the once-vaunted place of free speech in democracy in several ways. In eras dominated by oral and print communication, countering mendacious, hateful, or dangerous speech was a relatively straightforward matter. Even with the advent of radio, film, and television, government officials and the citizenry could generally have confidence, in a liberal spirit, that allowing a wide berth for free speech would allow reason and truth to triumph. In 1927, Justice Louis Brandeis famously wrote that the best antidote to “falsehoods

and fallacies” is “more speech, not enforced silence.”⁹ While the American past has not lacked for episodes of demagoguery, hysteria, and other instances of mass unreason, we have generally placed trust in the Brandeisian formulation.

But new communication mediums (the internet), devices (mobile phones), and platforms (social media and forms of artificial intelligence) have allowed speech to spread with unprecedented rapidity and geographic reach, and to resist countering or correction by traditional authorities. Algorithmically driven online platforms propel speech with a velocity that far outpaces the analog world. Digital media algorithms propagate the posts that animate online users most. Such content disproportionately includes incendiary, hateful, and false speech. Defenders of the wisdom of Brandeis must confront difficult questions about how speech functions online and how its hazards can be managed.

One paradox that the prevalence of online speech has exposed is that “more” speech can—contra Brandeis—itsself serve to enforce silence. A controversial or objectionable post online can unleash a torrent of vitriol and harassment, including physical-world threats and retaliation. The outcry may lead the original speaker to delete the post, close their account, or avoid bringing up the subject of their comment publicly ever again. Others witnessing the abuse may vow never to expose themselves to that kind of menacing outrage. Over time, such effects exert a powerful chilling force on online discourse, circumscribing entire subject areas and perspectives that cannot be touched without unleashing a virtual fusillade.

Online speech is also more easily manipulated than traditional spoken, written, or even broadcast communications. Foreign governments, ideological extremists, and other political operatives have new, cheap, and potent ways to interfere with democratic deliberations, manipulating media, sowing disinformation and fanning distrust in democratic institutions. Traditional First Amendment doctrines, centered on stopping the government from suppressing speech, have little to offer when it comes to these conundrums. Courts are now grappling with whether and how to arbitrate government efforts to intervene in online discourse, including

⁹ See Tatiana Serafin, “Brandeis Concurring with Holmes in *Whitney v. California*, 1927,” First Amendment Watch, September 30, 2022, <https://firstamendmentwatch.org/history-speaks-brandeis-concurring-holmes-whitney-v-california-1927>.

through new laws adopted by Texas and Florida to dictate how social media platforms moderate online content.¹⁰ In the 2022–2023 term, the Supreme Court brushed away two cases claiming that social media companies fostered terrorist content, deciding that the plaintiffs, who were family members of ISIS victims, had failed to state a cognizable claim.¹¹ The decisions brought little clarity to key questions including whether, and to what degree, the First Amendment constrains the discretion of digital platforms to moderate online content, or what bounds may exist—or be legislatively imposed—to circumscribe the broad immunity from liability that online providers have long enjoyed.

The rise of digital technologies has also coincided with an intensified focus by social activists and institutional leaders on making society more equitable and inclusive according to newer conceptions of what constitutes fairness and equality. Reckoning with institutionalized forms of racism and discrimination has raised questions about how we think and talk about identity, and which experiences and perspectives deserve emphasis. The past exclusion of certain groups from opportunities to publish, broadcast, and create art has given rise to pitched debates over who is entitled to tell which stories and whether new forms of gatekeeping are necessary to ensure that lesser heard voices get their due. The growing visibility and acceptance of gays, lesbians, and transgender people has called into question long-established ways of talking about individuals and families, fueling a harsh and censorious backlash against queer representation in books and culture, especially for the young. With formal equality in spheres including education and employment having now been guaranteed for decades by law and endorsed by society, the lingering residue of entrenched bias implicates how people see and relate to one another, touching unavoidably on how they speak to and about other people.

Another factor contributing to the encroachment on free speech has been the effort, often born of good intentions, to make sure that American society, as it becomes more racially and ethnically diverse and more tolerant of gender differences, better protects and enables voices long excluded from spheres of discourse. Some

¹⁰ For example, see Lizzie Leary, “A Looming Legal Battle Could Change Social Media Forever,” *Slate*, September 27, 2022, <https://slate.com/technology/2022/09/florida-texas-social-media-laws-supreme-court.html>.

¹¹ For example, see Nina Totenberg, “Supreme Court Unanimously Sides with Twitter in Isis Attack Case,” NPR, May 18, 2023, <https://www.npr.org/2023/05/18/1176856351/supreme-court-twitter-google-social-media>.

critics have turned against free speech because they have come to believe that hateful speech—when directed at members of vulnerable groups—is not just insulting to individuals but threatens the quest to forge a diverse and equitable society. In their view, this threat justifies the silencing of what they deem to be noxious speech—by shouting it down or calling on authorities to withdraw, ban, or punish it if necessary. The argument in favor of vanquishing offensive speech is frequently framed in terms of harm. Some falsely equate wounded feelings or even lingering psychological distress with physical violence, claiming that such repercussions should be grounds to silence speech. Social science research has documented that individuals subjected to pervasive discriminatory language and stereotyping—hearing racial slurs each day as they walk to school, for example—can experience psychological, academic, and even physiological consequences.¹² Short of such calculable and lasting effects, speech may cause people to feel vulnerable or discomforted, or may bring back disturbing memories. But such after-effects, while they may be difficult to endure, cannot be avoided in speech any more than they can be in life writ large. We are bombarded with stimuli on television, in social media, in newspapers, and in other contexts that may give rise to feelings of disquiet or upset. But the argument about harmful speech, rather than being applied with precision and sensitivity to a spectrum of distinct effects—from fleeting upset to lifelong feelings of inferiority—has become elastic and generalized. The putative harms of speech can be speculative, exaggerated, or projected onto others without any sign that actual harm has been experienced by any identifiable individual. Feelings of disquiet, anger, or frustration are too easily conflated with the notion of harm, and used as a justification to shut down speech, or suggest that certain subjects—guns, abortion, or immigration—should be entirely out of bounds for discussion lest someone be “triggered.”

The third factor shaping the place of free speech in American democracy is polarization, which has compounded the perennial problem of hypocrisy in the defense of free speech. Critic and columnist Nat Hentoff’s classic indictment of those

¹² For example, see April D. Thames, Charles H. Hinkin, Desiree A. Byrd, et al., “Effects of Stereotype Threat, Perceived Discrimination, and Examiner Race on Neuropsychological Performance: Simple as Black and White?” *Journal of the International Neuropsychological Society* 19 (5) (2013): 583, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3642236> (“African Americans who reported high levels of perceived discrimination performed significantly worse on memory tests when tested by an examiner of a different race”).

who defend “free speech for me, but not for thee” has curdled into an entrenched belief that some speech is more worthy of protection than other, with the “some” determined by who is doing the protecting.¹³ Some on the left invoke the potential of “harm” as grounds for shutting down speech on sensitive questions of race, gender, and other topics typically related to identity. Some on the right have convinced themselves that these new left-wing orthodoxies can be countered only through state intervention to dictate what books can be read and what topics studied. Even some right-leaning libertarians have been silent about book and curriculum bans, torn between the ends of combatting wokeness and of fighting censorship. The left, in turn, has protested legislation and book bans that target books by and about specific identities, while remaining mostly silent when conservative speakers are shouted down on campus, in an exercise of the censorious heckler’s veto. For both sides, the principled defense of free speech can be sidelined by the extremes that moral certitude demands.

These many attacks on free speech are corroding American democracy. Encroachments on free speech in education, the proliferation of misleading political propaganda, the denigration of credible journalism, the legitimization of restrictions on the role of the press, mounting constraints on protest and assembly rights—each of these threats has the potential to undermine the project of fortifying democracy. Each should be a call to action in defense of the role of free speech.

V.

In the education arena, both informal censoriousness and official censorship are thwarting the cultivation of a democratic citizenry. A February 2023 study carried out by the University of Wisconsin illustrates a series of interlocking challenges in higher education.¹⁴ When questioned about their willingness to consider viewpoints other than their own on issues such as immigration, abortion, religion, and

¹³ Nat Hentoff, *Free Speech for Me—But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (New York: HarperCollins, 1992).

¹⁴ April Bleske-Rechek, Eric Giordano, Eric Kasper, et al., *UW System Student Views on Freedom of Speech: Summary of Survey Responses* (Madison: University of Wisconsin System, 2023), <https://www.wisconsin.edu/civil-dialogue/download/SurveyReport20230201.pdf>.

transgender issues, only 10 percent of students responding said they would be “extremely likely” to consider such opinions.¹⁵ Asked how comfortable they felt expressing their own views on the same set of issues, fewer than 36 percent were at ease voicing their convictions on topics including gun control and police misconduct.¹⁶ Conflating offense with harm, 65 percent of students said that if someone says something offensive, they are at least “somewhat” causing “harm” to those they offend.¹⁷ Fifty-seven percent of respondents reported thinking that expressing “offensive” views can at least “somewhat” be seen as a form of “violence toward vulnerable people.”¹⁸ Substantial portions of students agreed with a series of propositions about the rights and obligations of campus officials and faculty to silence offensive speech.¹⁹ In each of the areas, answers to the questions varied significantly based upon students’ reported political leanings, with progressive students being much more likely to endorse the muzzling of such speech.

Because universities are where many Americans first encounter individuals from backgrounds dissimilar to their own, the chilling of campus speech on sensitive topics sets a dangerous precedent. It teaches young people that in navigating a diverse society, silence and avoidance are key tools. If subjects like affirmative action, women’s rights, trans rights, the war in Gaza, and immigration policy cannot be discussed openly on campus, there is little hope for dealing with them effectively in workplaces or legislatures. To be prepared for their role as citizens, students need skills to confront views they disagree with, marshal evidence behind their viewpoints, find common ground, and compromise. They also need to cultivate the insight and empathy to engage with those who hold sharply different attitudes, rather than vilifying them or simply tuning them out. For colleges to perform their indispensable role in cultivating democratic citizenries, robust and freewheeling campus discourse is essential.

Education is under siege on a second front: the wave of book and curriculum restrictions that have surged since 2021. PEN America has documented more than six thousand instances of book banning, mostly in schools and classrooms but also

¹⁵ *Ibid.*, 18.

¹⁶ *Ibid.*, 19.

¹⁷ *Ibid.*, 24.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 29.

affecting public libraries, between 2021 and 2024.²⁰ Overwhelmingly, book bans target stories by and about members of historically marginalized racial and ethnic groups and gay and queer individuals; more than half of all books banned fall into at least one of these categories.²¹ And increasingly, book bans are being imposed by state legislation rather than arising from the complaints of individual parents. In some jurisdictions, just a single objection to a book can force volumes off shelves throughout an entire county. Lists of controversial books, or simply books identified as promoting discussion on diversity, are passed around from state to state and district to district as the basis for wholesale bans; a book can be removed from shelves without anyone in the local community having read it. In some districts, the restrictions are so broad and ill-defined that classroom and school libraries have been silenced or emptied of books to avoid falling afoul of the rules.

New laws are also constricting teaching and learning in K–12 and higher education. Twenty-one states now have laws on the books that PEN America has dubbed “educational gag orders,” to restrict topics, theories, and perspectives that may be introduced in the classroom.²² The most notorious is Florida’s so-called Don’t Say Gay law, which was expanded by the state school board in April of 2023 to restrict discussions of queer identities not only through the third grade (as had previously been the case) but up through the twelfth grade.²³ Other gag laws restrict discussions of racial justice, aspects of American history, and other topics deemed divisive. Additional measures passed in Florida give parents the right to contest readings and headings on school curricula, abolish campus offices of diversity and inclusion, and aim to fundamentally remake the New College of Florida, a liberal arts university, into a conservative institution modeled on a religious private college.²⁴

These measures amount to a response to efforts within schools and universities to serve student populations that are more diverse than ever before in terms of race,

²⁰ PEN America, *Banned in the USA: Narrating the Crisis* (New York: PEN America, 2024), <https://pen.org/report/narrating-the-crisis/>; and PEN America, “2023 Banned Books Update: Banned in the USA,” April 20, 2023, <https://pen.org/report/state-laws-supercharge-book-suppression-in-schools>.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

ethnicity, and gender. The proponents of these restrictive measures point out, rightly, that some efforts to promote equity and inclusion may be heavy-handed, reductionist, or even counterproductive.²⁵ Theories that are predicated on racial essentialism or pressing individuals to feel guilt over their race or identity are ill-conceived and do not belong in the classroom. But the proper way to handle misguided lesson plans is through established channels of communication between students, parents, teachers, faculty, and administrators. Where curricular materials are poorly thought-out or ill-conceived, the problems should be pointed out and the materials replaced. The imposition of legislation dictating curriculum sends the message that any politically sensitive lessons may prompt reprisals. When such laws are in effect, teachers adopt a cautious approach, skirting controversy and eschewing open discussion. This runs counter to the spirit of unfettered inquiry and freewheeling debate necessary to prepare citizens to engage in the democratic process.

VI.

Protest rights are a third arena in which traditional free speech protections are being pared back. Since 2017, when protests erupted after the presidential election of Donald Trump, a wave of bills have been introduced by legislators at the state and federal level to limit assembly rights.²⁶ These measures are typically invoked in response to mass protest movements, including demonstrations for racial justice, against the creation of new oil and gas pipelines, against speakers considered offensive, and on contentious educational matters. While many such bills are justified by their proponents on the basis that they are necessary to tamp down violence, very few demonstrations in recent years have erupted into unrest, and existing laws against property destruction and lawlessness already allow for prosecution of those who cross the line.

Newly enacted laws narrow protest rights by making it easier for authorities to suppress “rioting,” a vague term that can be used to target peaceful protesters who

²⁵ See Elizabeth A. Harris and Alexandra Alter, “Book Ban Efforts Spread Across the U.S.,” *The New York Times*, January 30, 2022, <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html> (“Those who are demanding certain books be removed insist this is an issue of parental rights and choice, that all parents should be free to direct the upbringing of their own children”).

²⁶ See Nora Benavidez, James Tager, and Andy Gottlieb, “Closing Ranks: State Legislators Deepen Assaults on the Right to Protest,” PEN America, June 1, 2021, <https://pen.org/closing-ranks-state-legislators-deepen-assaults-on-the-right-to-protest>.

find themselves at gatherings that teeter on the edge of violence, even if they themselves are not involved in the unrest.²⁷ Under a 2021 Florida law, the “imminent danger” of destruction of property can qualify as a riot, even if no actual damage occurs.²⁸ Other measures impose stiff penalties for protests that interfere in any way with the flow of traffic. For example, a measure enacted in Tennessee in 2020 imposes punishments of up to a year in jail for the offense of obstructing a sidewalk or street.²⁹ Eighteen measures enacted in recent years impose harsh punishments for protests taking place at or near critical infrastructure, including pipelines and other energy facilities. A 2018 Louisiana law provides for up to five years in prison for demonstrators who trespass near the construction site of a pipeline.³⁰ Eleven new bills impose fines and penalties on protesters for the cost of policing, clean-up, and other administrative burdens associated with the exercise of protest rights.³¹ Other measures expand conspiracy provisions to target not just protesters, but those who organize such assemblies. A 2017 law passed in Oklahoma imposes up to \$1 million in liability for organizations that “conspire” with protesters who trespass near pipelines.³² In a direct response to the vehicular murder of pedestrian Heather Heyer during the 2017 white nationalist rally in Charlottesville, states including Iowa and Florida have passed legislation to shield drivers from civil liability for hitting demonstrators with their vehicles.³³

²⁷ Ibid.

²⁸ See ACLU Florida, “What Did HB 1 Do?” April 21, 2021, <https://www.aclufl.org/en/what-did-hb-1-do>.

²⁹ See Natalie Allison, “Tennessee Legislature Cracks Down on Protesters,” *The Tennessean*, August 13, 2020, <https://www.tennessean.com/story/news/politics/2020/08/12/tennessee-passes-law-targeting-protesters-makes-capitol-camping-felony/3354879001>.

³⁰ See “Pipeline Opponents Challenge Louisiana Law Targeting Protesters,” Reuters, May 22, 2019, <https://www.reuters.com/article/us-louisiana-pipeline-lawsuit/pipeline-opponents-challenge-louisiana-law-targeting-protesters-idUSKCN1SS2I0>.

³¹ For example, see Janelle Griffith, “N.Y. County Exec Vetoes Bill That Would Allow Police to Sue Protesters,” NBC News, August 11, 2021, <https://www.nbcnews.com/news/us-news/n-y-county-exec-vetoes-bill-would-allow-police-sue-n1276568>.

³² PEN America, *Arresting Dissent: Legislative Restrictions on The Right to Protest* (New York: PEN America, 2020), 15, 33–34, <https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf>.

³³ Ibid., 24.

Conservative legislatures have not been the only institutions to restrict and punish protest. In 2024, in response to student encampments protesting Israel's conduct in its war in Gaza, many university administrators suspended, expelled from campus, and had arrested student protestors. In some instances, the clamp-downs were carried out peacefully as a means of enforcing viewpoint-neutral time, place, and manner restrictions on demonstrations that were disrupting the campus learning environment. In other cases, university leaders and police resorted to overly aggressive methods of muzzling protests and unduly limiting students' right to peaceful expression. The controversies raised fresh questions about the proper limits of protest and how they should be enforced.

VII.

A free and vibrant press has long been recognized as an essential pillar of democracy. Thomas Jefferson famously concluded that if forced to choose between “a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.”³⁴ But the free press today is under siege as well. Economic pressures and changing consumer habits have all but eliminated the traditional financial base of support for many forms of news. The situation is especially acute for local news, giving rise to an “extinction crisis” for city- and state-based media organizations.³⁵ These news outlets have for decades played a crucial part in nurturing an informed citizenry and holding accountable those in government, business, education, and other spheres of power. The crisis has exposed systemic gaps in coverage and the atrophy of relationships between local news outlets and the communities they serve. Inventive new business models and philanthropic interventions are being explored in an effort to shore up these vital local institutions. But it is doubtful that such efforts will ever make up for the \$30 billion in lost revenue that resulted from the evaporation of print advertising as media consumption shifted from paper to digital.³⁶ The loss of local media has had an impact on the vibrancy of local democracy; in communities without local media

³⁴ Extract from Thomas Jefferson to Edward Carrington, January 16, 1787, Jefferson Quotes and Family Letters, <https://tjrs.monticello.org/letter/1289> (accessed May 30, 2024).

³⁵ Sullivan, “Every Week, Two More Newspapers Close.”

³⁶ Michael Barthel, “Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall,” Pew Research Center, June 1, 2017, <https://www.pewresearch.org/short-reads/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry>.

coverage, polarization has intensified, with voters less likely to split their tickets across political parties and more likely to self-identify as intensely partisan.

In addition to the demise of local media, democracy is being undercut by the eclipse of mainstream national news organizations that we used to rely on to provide a widely trusted collective account of events in our culture and society. Instead, partisan media outlets have arisen, reflecting and reinforcing the sharp bifurcation we see in the political arena. President Donald Trump's campaign to discredit the media and credible journalism through his cries of "fake news" helped to convince a substantial segment of the voting population that the mainstream media should not be believed. So, too, did some mainstream outlets backing away from neutral, fact-based journalism that aspired to objectivity.

Coupled with drastic shifts in media consumption from print to online, the result is an information ecosystem in which Americans are adrift in a sea of news sources without the tools to ascertain what to trust, to sniff out motives and biases, or to verify dubious claims. A substantial minority of the U.S. population is in thrall to media sources like Fox News that eschew traditional journalistic norms of objectivity and fact-based reporting. Such audiences are seemingly impervious to revelations that the network has deliberately fed its audience unreliable and false election-related information.

CONCLUSION

Solidifying free speech as a democratic cornerstone will require concerted action at every level of society, including legislatures, the executive branch, courts, universities, corporations, civic institutions, and more.

Legislators, governors, school board members, and other public officials need to renew their vows of fealty to the First Amendment, reaffirming its place as a constitutional value above politics. Those in leadership positions should enlist experts to inform and enlighten colleagues concerning their First Amendment obligations and why certain types of legislation and decisions run afoul of constitutional protections for free speech. Officials who believe strongly in the First Amendment need to speak out on behalf of speech with which they disagree or that they find objectionable, modeling a principled approach. Legislators should form free speech caucuses that enlist the advice of scholars and legal practitioners to advise them on proposed legislation and to rally across political and ideological lines in support of free speech principles. Officials should hold town hall meetings to educate their constituents about free speech and explain how the First Amendment and free

speech protections influence policy. They should engage openly with credible journalists and resist the temptation to vilify the press, even in the face of critical media coverage.

Courts have a crucial role to play in applying First Amendment principles neutrally and fairly, notwithstanding their own ideological leanings. At a time of expanding resort to bans on books and curriculum, courts need to fill in gaps in existing case law to fortify the freedom to read, teach, and learn.

Schools and universities are laboratories for democracy and training grounds for the exercise of free speech rights. But free speech, and civic education more broadly, has fallen out of favor in the U.S. educational system, sidelined in favor of science, technology, engineering, and math. The future of American democracy will depend upon a concerted push to educate rising generations of citizens in the principles of coexistence within a pluralistic polity, including respect for free speech rights. Curricula on free speech rights should be introduced from a young age, when pupils can make an intuitive link between their own desire to express their wishes and ideas and the principle of open discourse in society. When young people are introduced to the precepts of free speech and helped to understand the vast differences between open and autocratic societies, they become inspired by the benefits of free speech and are more willing to defend it. American history, government, and world history curricula should introduce students to the place of free speech and free press in democracies, and how it has been tested over time.

On college campuses, just as students are introduced through first-year orientations or similar programs to policies and culture regarding sexual assault, discrimination, and other fundamentals, so, too, should they be exposed to the role and importance of free speech as foundational to their college experience. Such training and education sessions can offer opportunities to voice and explore the linkages and tensions between free speech, diversity, and inclusion, helping students to see how these precepts can be reconciled and even mutually reinforcing. In the classroom, professors should introduce free speech norms at the beginning of each semester, stressing the importance of conscientiousness with language, but also encouraging students to be comfortable speaking their minds. They should also check periodically to assess whether students from varied backgrounds and perspectives feel able to voice their viewpoints in class and other discussions.

Just as universities have established offices or committees for diversity, equity, and inclusion, religious affairs, and other priority facets of campus life, they should

consider creating focused functions for the promotion and defense of free speech, such as campus-wide education and celebration, and providing advice to students, faculty, and administrators on free speech questions. Campus leaders should seize opportunities to communicate the importance of free speech, speaking up forthrightly in response to incidents when free speech principles are challenged.

Other societal institutions also have a role to play in fostering open discourse in our culture, pushing back against the demise and denigration of journalism, providing platforms for controversial viewpoints, and standing on the side of free speech when there are calls to ban or punish expression. Philanthropists, for example, should integrate support for free speech into their agendas to shore up democracy by funding litigation, public awareness, campaigning, advocacy, and public outreach. Other components of the private sector also have a role to play. This includes entertainment companies that platform edgy satirists, book publishers that put out works by politically and ideologically diverse authors, media outlets that seek to expose their audiences to heterodox views, and corporations of all kinds that demonstrate respect for speech rights within the ranks of their employees. As a society, we should maintain and defend those remaining institutions that serve ideologically diverse groups of consumers. Extending political litmus tests risks turning even more of our collective discourse into the balkanized world of cable news, where entire outlets are devoted to programming on just one side of the political spectrum.

Free speech is the lifeblood of American democracy. With democracy ailing, a recommitment to free speech must be part of the cure.

