

# **“The State of Free Speech in America”**

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**National Constitution Center**

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**Panel Transcript**

Jeffrey Rosen: Ladies and gentlemen, welcome to the National Constitution Center. I am Jeffrey Rosen, the president of this wonderful institution. The National Constitution Center is the only institution in America chartered by Congress to disseminate information about the US Constitution on a nonpartisan basis. It's a precious role. We take it very seriously and we're grateful for it and the program tonight is part of our role as America's town hall. This is the one place in the country where citizens of diverse constitutional perspectives can hear the best arguments on the constitutional questions that transfix America that are in the news and suffuse our history and make up your own minds.

We're talking about the most timely question imaginable, the future of free speech in America. Just this morning, the Supreme Court heard important arguments on a case that will decide whether corporations have the same religious liberties under the First Amendment as natural persons and we're going to discuss that and many, many other questions. I want to ask you to look at our website [Constitutioncenter.org](http://Constitutioncenter.org) for upcoming programs. On Thursday, Alan Dershowitz will come to discuss his life in the law. We have Senator Jim DeMint, Lynne Cheney, Justice John Paul Stevens in one of his only public appearances about his great new book and just a thrilling series of programs.

I'm also especially excited that tonight we are presenting this partnership with the Foundation for Individual Rights in Education or FIRE. FIRE's mission is to defend and sustain individual rights including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience at America's colleges and universities. It was during my first weeks on the job that Greg, who you'll meet tonight from FIRE, came to me and said we should present a panel on the future

free speech and we really assembled the dream team of free speech commentators and thinkers here tonight. This is an ideologically diverse panel. Broadly, I think you may find that two of our panelists may be more ardent in their defense of the traditional American free speech position than others but I'm not going to tell you which ones and we're going to expect them to defeat our expectations.

We don't know, maybe we will change our minds after listening to each other. Let me briefly introduced them to you and then we're going to get right to it. Dr. Stanley Fish is the Floersheimer Distinguished Visiting Professor of law at Cardozo Law School. He's well known to all of us as a contributor to the Opinionator blog for the New York Times. Greg Lukianoff, as I mentioned earlier, is the president of Foundation for Individual Rights in Education, a member of the bar of the US Supreme Court, and author of *Unlearning Liberty: Campus Censorship and the End of the American Debate* that's recently come out in paperback and it's great. Please get it after the show.

My old friend and co-worker: Eric Posner is Kirkland & Ellis Distinguished Profess of Law at the University of Chicago, a fellow of the American Academy of Arts and Sciences and a prolific commentator on international law, constitutional law, and comparisons of American international attitudes toward free speech and, finally, I just have to say my old, old friend. It's such a joy to welcome you, Jonathan, to the National Constitution Center. We go way back in Washington DC. Jonathan is the most prominent and important defender of gay marriage in this country as well as one of the most persuasive and eloquent defenders of free speech and his reasoned and calm voice expressed in this beautiful book which has been recently reissued in paperback, *Kindly Inquisitors*, and in other works and in many articles has greatly enriched public dates so welcome to the National Constitution Center.

Jonathan Rauch: Thank you.

Jeffrey: I'm going to begin with you Jonathan. Yesterday, the Supreme Court delayed a decision about whether to hear a very important case. It raises the question whether a photographer can refuse to photograph gay weddings because of her religious objections and claims that religiously motivated individuals can refuse to serve gay people in the form of gay marriages are

popping up with increasing frequency. The biggest theme of your recent writing and, in fact, you have a new afterword to *Kindly Inquisitors*, has been that the First Amendment is good for gay people. That a regime that allows speech is good minorities in general and the progress of gay rights in the past two decades proves it. Do these recent cases cause you to reexamine that thesis?

Jonathan:

No, they don't. I am not the best person to comment on the legalities of these cases. I don't know the case law, but let me give you a personal perspective on how I think about these cases. There are a bunch of these cases and they all involve one way or another the clash of religious conscience with anti-discrimination law which often means homosexuality, gay marriage. In the case of the ObamaCare law, it means contraception and there's a lot of these. The other day - there's a case in Colorado now - it's not a legal case - a suit has not been filed, but a Christian dog walking company fired a customer because the customers agreed with legalizing marijuana. They said, "Get your dogs and get out of here. We're not going to walk them anymore."

So, I regret this. This is not the kind of society I want to live in where people were picking these fights. I've urged the gay community publicly and privately. The right answer to this is sensible, reasonable accommodations worked out through the political process. I worry that by litigating all this stuff and turning it into First Amendment jurisprudence, which locks in one answer or another forever, we lose the flexibility to negotiate. There is no reason we need to have one national rule. Different states and cities should be striking different balances and gay people, for example, or abortion rights activists, for example, and people of religious faith should be sitting down at the table forced to negotiate over statutes that will strike balances. That's the right way to handle it.

Jeffrey:

Wonderful. Greg, you have spent the past 13 years defending free speech on campus. How do the battles today look different than they did when you started and what are the most important battles today? You recently noted that you've been maintaining a growing list of 120 speaker controversies in recent years including high-profile "disinvitations", or decisions by speakers to withdraw under pressure, including Ben Carson, Geraldo Rivera and Calderon so forth. What's the

pressure point of these free speech battles on campus today and how has it changed in the past 13 years?

Greg Lukianoff: Well, my journey –

Jeffrey: You can share with us.

Greg: I went to law school as the weird law student who went to law school specifically to do First Amendment law. My passion was free speech, I can get into why I came to that, but that's why I went to law school. I specialized in it. I interned at the ACLU. I took every class that Stanford offered on freedom of speech. I even did six additional credits on censorship during the Tudor dynasty because I loved it so much.

Jeffrey: Beautiful.

Greg: And even with all that preparation, when I showed up and became the first legal director of FIRE back in 2001, I was stunned by the kind of things that can get you in trouble in the modern college campus and 13 years later, I am still stunned on a daily basis. So that's one of the reasons why I wrote *Unlearning Liberty* is because I got really tired of people saying, "Well, that's one example." I'm like, "Okay, how about the following thousand that I can point out?" So I talked about dozens of examples in the case not to completely exhaust people just by sheer number of examples. But one trend - there are a lot of trends that I've noticed - is it felt like when I first started back in 2001, 2002 that universities when they were censoring students, they would at least make some kind of bow to some kind of higher purpose to what they're doing even if it was entirely disingenuous.

They would say basically, "Well, don't make fun of tuition prices" or "don't make fun of the dean in the name of, oh I don't know, in the name of tolerance and diversity," they would actually invoke these and then sometimes sincerely, sometimes for the greater good but sometimes half sincerely. It seems like in the past two years, I've seen more case where they're not even bothering with that where it seems that there's been a lot of these very old fashion examples of "just don't criticize the university", "I don't really have to justify it, just do as I say" which I think is partially a result of a lot of bureaucratization and a lot of just getting used to power of over a long time.

With regards to disinvitation season, that's our name for - every time around this time of year, a lot of speakers end up getting disinvited from campus or they're forced to withdraw their names and we've been laughing darkly within the FIRE office about disinvitation seasons that happens every year and that's not so much of First Amendment problem as a cultural problem. I think that we're teaching students to think that if you don't like the opinion of someone who's speaking there, you don't challenge them. You chase them off, you get them disinvited and I think that's the wrong way to think about open discourse.

Jeffrey:

Great. Eric, not long ago, the president of the United States and the president of Egypt disagreed about how to treat a prominent free speech issue. This was the video, *Innocence of the Muslims*, that was alleged to have led to the Benghazi riots and under pressure, the president of Egypt said this has to be removed because it blasphemes a group of believers and entire religion which is illegal in Egypt and the president of the United States while defending Google's and YouTube's right to post the video called on the companies voluntarily to remove the video because he said it was causing violence.

In fact, Google and YouTube and Facebook refused to remove the video because they concluded it did not violate their terms of service which prohibits criticizing a religion but not a religious leader and later evidence suggested that the video might not have caused the riot. Are American and non-American free speech traditions - they're obviously very different - and America is more protective of free speech, is that a good or bad thing and did Google do the right thing?

Eric Posner:

It's a bad thing. So I teach international law and one of the things that I've instructed about again and again is the difference between American norms and norms in other countries and this is sometimes put under the rubric of American exceptionalism and one way that the United States is really quite different from other countries is its commitment to free speech. Now you can make three distinctions. So there are countries like Egypt and authoritarian countries, they obviously don't like free speech and there is no reason to want to be like them, but European countries have a different attitude toward free speech from that of the United States. Europeans tend not to be as absolutist.

They take seriously the fact that people can be offended by speech, that it can cause turmoil as illustrated by this video and what's striking is that these human rights treaties which have provisions about freedom of expression but the provisions are much narrower than you find in the United States. The provisions will say, "Free speech is a right, subject to various constraints such as public morality and public order." So I think President Obama did a reasonable thing. This video was causing foreign policy problems for the United States because the United States was trying to improve relations with Muslim countries and he wanted to at least show people in these countries who don't share our views about freedom of speech that we respect their views.

Now he couldn't obviously order Google to take down the video. If he had had that power, it would have been an interesting question whether he should use it but I think people are wrong to criticize President Obama in this case on the grounds that basically the rest of the world doesn't share our views and they just have to "get with the program". They've got to be like us and if they're not like us, well, you know, who cares about them. I don't think that's a practical way to run foreign policy but I think the problem here is that we love our First Amendment so much and we think very proudly of American traditions about freedom of speech, which actually only go back a few decades not to the beginning, but this is such a part of American self identify that it's very hard to make compromises even when they're warranted and that's a problem.

Jeffrey:

Great. And Professor Fish, you've written a book on free speech called *There's No Such Thing As Free Speech and It's a Good Thing, Too* in case you're wondering where Professor Fish falls on this spectrum I've suggested and now you've written a book on versions of academic freedom from professionalism to revolution. What in your view is the relationship between these two concepts?

Stanley Fish:

Before I answer, I want to say how much I agreed with what Eric just said. You all recall Salman Rushdie and the fact that fatwa was issued against him for the writing of the *Satanic Verses*. I was at a conference, a humanistic conference - don't go to humanistic conferences. But I was at one nevertheless. I used to be in that game and this topic came up and someone

stood up in the audience and said - and meant it; this was not a joke, "What's the matter with those Iranians? Haven't they ever heard of the First Amendment?" That's exactly... Now the relationship between academic freedom and the First Amendment, I think can be simply described: free speech is established by the First Amendment is an inclusive democratic idea. Academic freedom is a notion that only lives coherently within an academic structure which is determinately exclusive.

What academics do - our trade - is to make judgments on each other and what we do is not foster speech or flourish or ensure that it will flourish, rather it is the case that we devise mechanisms by which we give ourselves the right - at least those of us who have tenured positions - to say who can and who cannot speak freely. Another way of looking at the difference between academic freedom and free speech is to think of the topic of holocaust denial which has been with us for quite a while and will be with us I predict for a very long time. Holocaust denial in our society, under the strong absolutist First Amendment views that Eric referenced, is something that cannot be stigmatized or oppressed. Holocaust denial can be promoted on websites, radio programs, videos and so forth but in the academy, holocaust denial is interdicted.

It's not that the question of holocaust denial never arises in the academy. It's rather that when it does arise, it never arises as a live option for belief. It's not something in the academy which is regarded as an alternative position that one might sincerely have, rather holocaust denial is regarded as one might view flat-Earth denial or Elvis is dead denial. That is, it's the property of kooks and crazies. Therefore, although you can write about it and get a position for writing about it in the history department or get promoted in a history department for writing about it, if you advocate it, you will neither get hired or promoted. So why is there this difference?

Again, it's the difference between a structure of inclusion and a structure of exclusion, and this goes again to Eric's point - and we didn't talk about anything ahead of time - Eric's point that the First Amendment that we now have which would I call, not in a friendly tone, a libertarian First Amendment. The First Amendment we now have is a recent development and I would say that it only emerge fully in 1964 with the famous case *New York Times versus Sullivan* which is a case dear to the heart of

all free speech ideologues and which I think was one of the worst decisions ever issued by the Supreme Court.

Now before *New York Times versus Sullivan*, it was possible and in fact, it was done by the Supreme Court to withdraw constitutional protection from speech either because of what it did - the effects it had - or because of what it said. There was contents test and then the effects test. The effects test was called a "bad tendency test" at the beginning of the 20th century. The idea was that some forms of speech have a bad tendency - they incite illegal activity - don't deserve protection. That was then followed as many in this room will know by the Holmes Brandies clear and present danger test would said, "Well, yeah the effects may be bad but we should wait until we see how bad they would be, see when the danger is imminent and then step in" but still an effects test.

The content test was a test would said, "Look, there are some forms of speech which are trivial and worse and they don't deserve constitutional protection." I have a quote here, one of my favorite quotes from 1942 cases. "Some utterances are no essential part of any expedition of ideas and are of such slight social value as a step to truth that any benefit derived from them is outweighed by the social interest in order and morality." All that changed in 1964 when the *New York Times versus Sullivan* Court said that all speech must be protected independently of either its content or its effects and independently whether it was defamatory or it caused distress of a variety of kinds because the important things of the *New York Times versus Sullivan* Court was to keep the conversation going in a wide open, open, robust, and uninhibited way --

Jeffery: We've been encouraged to have a conversation here.

Stanley: -- which I've sometimes called the "John Wayne theory" of the First Amendment and that was the beginning of the end of everything.

Greg: And that's why the world ended in 1964.

Jonathan: Actually, it was the beginning of the beginning of everything. Let me remind you what the world was actually like in 1954 when a magazine you've never heard of because I hadn't until about yesterday called *ONE* published in L.A.

Stanley: Oh yeah.

Jonathan: Great, good for you. This was *ONE*. Anyone heard of this magazine? O-N-E was the first openly gay intellectual magazine and it was not publishing sex ads or anything like that. It had articles and it had short stories and it was openly gay and the United States post office shut it down because the content was unacceptable to society. They took it off the stands. They said, "You can't mail it" and just for good measure, the specific issue that they banned had a cover story "*You can't say that', an attack on the censorship policies of the US Government.*" That's what they were doing in 1958 in a *Per Curiam* 2-line decision. There is no reason at all. The Supreme Court struck down what the Postmaster General had done creating a wide open field for debate of gay rights in this country, a position considered obscene and dangerous to children in my lifetime, and allowing the field open for people like me to make our arguments and eventually win those arguments.

Stanley: I think you could win the arguments by gaining control of the political process since that's the way the arguments are always won anyway and in fact, that's what's happening now.

Jonathan: No, ideas won the arguments, we had no political power.

Stanley: Ideas never won anything.

Jeffrey: I am delighted that this first panel first of all doesn't need a moderator.

Jonathan: Go away, go away.

Jeffrey: What am I? A potted plant? And that the debate has been joined so fiercely and in fact, we've had fighting words so now we know where everyone stands.

Jonathan: Can I shout "FIRE!" now? Is this a crowded theatre?

Jeffrey: Please come back because the self-moderating panels are so much easier to preside over. We have on my left the two First Amendment libertarians, as Professor Fish put it, who defends the American free speech tradition which holds generally that speech can only be banned if it threatens and is likely to cause imminent lawless action, and on the right, we didn't actually plan this. We have, I don't know, I'm going to call them the First Amendment dignitarians. You can choose another. You can fight with me about that who are defending a more European notion that speech that blasphemes groups or

offends their dignity may be banned as in Europe where holocaust denial can be banned.

I want to ask Greg as a libertarian to respond to the dignitarian's argument that the *Innocence of the Muslim*'s video should have come down. After all the Google people weren't convinced that there was evidence of imminent threats. In retrospect, it turned out they were right, the video didn't cause actions to those Google kids. Many of these are 22 years old and flip-flops were basically making a decision in the middle of the night. Did they make a better decision than the president of the United States?

Greg:

I actually wrote two very long articles in the wake of the decision to take the video, to go after the videos because almost as soon as the videos went up, I mean people who are contrarians on free speech on campus are actually in my experience in the mainstream. Fifty nine percent of campuses maintained what we called red light speech codes ones that would be laughably on constitutional. Every single time they've been challenged in the court of law, they've been defeated. So in a sense, Stanley Fish has won on campus.

The extent to which free speech is really appreciated on campus -- I've seen a marked decline within my own 13-year-old career and there is an advantage to doing six credits on the history of Tudor censorship, one of them is remembering where we came from and the idea - the spectacle of academics arguing essentially for blasphemy laws saying that we should be banning speech because it offends someone's religious faith? And I remembered someone challenged me on this and I said, "No, no, really? Blasphemy was the first freedom." You're not actually free until you can question someone else's faith, someone else's deepest belief and that was so well established. Because of the horrors of the religious wars in Europe - that by the time you get to the establishment of the First Amendment, it's relatively well-taken for granted. Now to the argument of whether or not we just recently started taking free speech seriously.

I also dismissed that argument as well. I mean as Stanley well knows. Milton was writing about free speech in 1644 and I'd like to point out that that means that pretty much -- almost as soon as the masses had the power to communicate ideas, they were arguing for free speech but for the version of John Lilburne, the people that I used to cover during the Tudor

dynasty...even long before Milton. So free speech was a powerful weapon and a powerful goal throughout intellectual history, starting as soon as people were allowed to speak it out loud. What Stanley is conflating is that the First Amendment was not found to apply to the states until 1925 and that is because of something called the *Slaughterhouse decisions*. It couldn't actually have applied it before the 14th amendment which came after the civil war.

Unfortunately, there was a really stupid decision by the Supreme Court that prevented that from actually having full force, well not quite full force until 1925 when it started to being incorporated through the due process clause of the constitution. But from 1925 on, you see this progress - in my opinion progress - towards better and better protections of free speech with a little dip in the second Red Scare in the early 1950's but of course, I see 1964, I see *Times v. Sullivan* as being this wonderful moment and when people argue against it - the Obama administration argues against *Time v. Sullivan* -- can you imagine a Rand Paul or a Sarah Palin being able to sue a journalist because they said something that might be vaguely critical of them?

That's what they're arguing for. They're arguing for a right of politicians to scare the hell out of journalist with threats of defamation. It's an incredibly good decision and I'm always puzzled by people opposing it. Do we want our politicians to be able to sue us for saying mean things about them? I don't.

Eric: Defaming them is not the same thing as saying mean things to them. Defaming is lying about them.

Greg: Under the standard of *New York Times versus Sullivan*, you have to make reference to the very opinion that you're decrying because that's where the "actual malice" came from.

Eric: So there is this flourishing political culture in Europe where they have strong defamation laws and these places aren't less democratic in the United States.

Stanley: Correct.

Eric: They might even be more democratic because people who might otherwise be deterred from entering politics by the kind of slimy media system that we have can go into it not having to worry about being defamed or humiliated in various ways.

Greg: I call this Europe worship.

Jeffrey: I see a lot of that here in America.

Greg: My dad grew up in Yugoslavia, my mother is British. I spent a lot of time over there.

Eric: Yugoslavia, I'm not [inaudible].

Greg: And it's funny how much it mystifies Brits and my friends about how much you'll hear sort of like, "Wow, Europe had such great laws with regards to speech." We would never tolerate their national security laws. Those by themselves are crazy and these laws that are in Canada, in Australia, in Britain. And the recent --

Eric: I mean these are not police states right. Canada is not a police state. It's authoritarian system right but well, what is the concrete harm that's taking place?

Jonathan: Well, people say among other things. There is a whole lot of chilling going on over there. Like for example, it's getting mighty hard to criticize someone of the Islamic faith for example. There are reasons both legal and extralegal for that but people say there is a lot of chilling effect and new laws about blasphemy. Just the other day -- I happen to have in my pocket by mere coincidence. Belgium the other day, I came determined to read this because it's so interesting. Belgium has passed a law just the other day against advocating sexism.

"For purposes of this act, the concept of sexism will be understood to mean any gesture or act that is evidently intended to express contempt for a person because of his gender or regards them as inferior or reduces them to their sexual dimension which has the effect of violating someone's dignity either in public meetings or in the presence of several people or through documents printed or sold or even in documents that have not been made public."

Eric: Was the law passed?

Jonathan: Yeah. It was passed.

Stanley: That's a silly law.

Jonathan: Okay, so I take your point.

Greg: But there're lots of silly laws in Europe right now.

Stanley: That's a silly law.

Jonathan: I take your point. These are not police states and Europe is a wonderful place. There is a lot you can do before you run into serious trouble.

Greg: Exactly.

Jonathan: But as a member of an actual minority group, I would rather be here where I don't have to worry about some prosecutor coming after me because he doesn't like what I said.

Stanley: Let me pick up something that Greg said about Milton. He was referring to Milton's 1644 track *Areopagitica* whereas Greg indicated there are extraordinarily powerful celebrations of the freedom of speech. In fact, some of them are chiseled down the wall of the New York public library. Two thirds of the way through that track, Milton pauses and says "Of course, I didn't mean Catholics. Them we burn."

Greg: Yeah, it's true. He does exclude papists.

Stanley: What I want to say is that everybody has a kicker up his sleeve. If it's not Catholics, it's something. Nat Hentoff spoke absolute free speech talk for a long time until a disciple of FIRE cons began going around on campuses saying things that Hentoff found hateful and then he said, "We can't have that." What I want to say that the "we can't have that" position is not only a possible position, not only a sensible position, that structurally and philosophically is it, in fact, the position that everyone has even if they're denying it.

Jeffrey: Let me first say that we're going to take a vote on this at the end of this great panel so you're going to have to decide whether you're for the libertarians or your dignitarians so listen closely. Also, those who haven't passed up audience questions can do so. My question is: is this debate between libertarians and dignitarians on whose law is going to prevail being made obsolete by technology? Here the deciders were not the president of Egypt and were not President Obama but these 22 year olds in flip-flops were the first responders in Dublin and India and places like that who report up to the top lawyers of Google and Facebook and the First Amendment doesn't bind Google and Facebook so really is this an academic discussion because the decision is going to be made not by courts enforcing the First Amendment but by young lawyers at internet service providers, Greg.

Greg: Well, I mean for me, what's the most interesting about that is that we're starting to see, and I look at the harm arguments and all of these hackneyed arguments for or against freedom of speech, and I realized one of the things that the information science folks, the Facebook and the Twitter people actually get almost better than anybody is that the most fundamental value of speech is not producing the platonic form of truth. It's not because discussion will actually let us understand what the form of truth is. It's the fact that I now know that you're angry at me, it's the fact that I know the price of rice over there is, it's now that I know what the trends are, all of these little key truths that can actually be revealed.

And I think if you look at Twitter, you have an unparalleled chance to see something that is as close as we're ever going to get for the collective unconsciousness of the species. And it's fascinating.

Stanley: What's a discouraging statement.

Greg: It is, it is but it's important to know what we're like for good and for bad. I think that this is important information and this really primitive idea. I make fun of my own people for it having - the British side - for having what I call sort of like, "Oh, so we're taking the dinner time response to unpleasant talk. We're not just going to talk about it." Meanwhile knowing that people have bad opinions and how people respond to them, or that people have strange ideas is incredibly valuable. The ostrich approach does not work, it cannot work.

Eric: We'll always know that but I don't think technology will change anything because it remains the case that the government can bring lawsuits against internet service providers. They can bring lawsuits against Google and require Google to take things down. You know there is a huge amount of stuff that's said on the internet by anonymous people that nobody pays any attention to so there is no need to sue them, nobody cares what they say. If it's somebody who's like a politician or a prominent person then everybody knows who he is and where you can sue. You know back at the early stage of the internet, the concern was actually the opposite.

There's this famous case involving Yahoo and France. Yahoo had not seen memorabilia on their website and the French government sued them and the worry was since Yahoo has its

website appears everywhere that French I guess defamation law would apply in the United States. That turns out not to be the case because these companies can control what appears on their websites in different countries. So I think it's a bit of the red herring. These Google guys, they can get sued just like anybody else. They can get fired just like anybody else. I don't think it's going to change much. We've just seen Turkey shut down Twitter and I think what people forget is that the internet actually operates because the government allows it to operate. It owns a lot of the infrastructure. The NSA can tap into it and figure out what people are thinking and saying and so we're not going to live in a libertarian society.

Jeffrey: Professor Fish, Eric says Turkey shut down Twitter. What happened then is Greek football fans had a habit of saying that Kemal Ataturk, the founder of modern Turkey was gay. He wasn't as it happens but it's illegal to say that in Turkey because it's a form of defamation not against gay people but against Ataturk.

Greg: Which was against the law.

Jeffrey: Google was asked to take it down. They initially refused. Turkish prosecutors have said "take it down all over the world". Instead Google just blocked access to Turkish users using their internet protocol addresses and as a result, Google was banned from Turkey for a couple of years.

Professor Fish, it was the decider at Google who's woken up in the middle of the night. She has to decide "is this video actually blasphemous under Turkey's law in which case she'll take it down or is it political commentary in which case it'll stay up and by the way she doesn't speak Turkish and the multiply that by people criticizing the Thai king in Thailand and people doing stuff that's illegal in India. These lawyers are making these decisions. Are you confident that they will make the right ones?

Stanley: No, I'm not confident that they will make the right ones anymore than I'm confident that the laws like the ones that Jonathan rehearsed will no longer be passed. What I am confident, however, is that the strong free speech doctrine has no reality in fact and I would go back to a formula that the great Judge Learned Hand put forward that I'm sure everyone in this panel and many in the audience will know. It's a cost-benefit analysis basically. He said, "In matters of free speech what you

want to do is calculate the harm that will be produced by allowing the speech to flourish and then balance that against the harm that will be produced by trying to regulate it.”

And that suggests that it’s a case-by-case analysis and that you have to take account of the harms without entirely surrendering to them but not ignore them and therefore surrender to some abstraction and for a book, and some of you may know this book, that makes this argument more powerfully than any in recent years, I recommend Jeremy Waldron’s book, *The Harm in Hate Speech*. He’s a law professor at Oxford and NYU and a native New Zealander so some kind of international flavor to his work.

Jeffrey: Waldron’s book is a powerful defense of European hate speech laws.

Is it realistic in terms of taking account of who’s making the decisions? Waldron envisions European regulators enforcing their will in European courts and so forth but really it’s the terms of service of the internet service providers that are deciding things. Is the ability of European regulators to enforce their will overtaken by this new technological world even if you’re persuaded by Waldron and the dignitarians.

Jonathan: So you’re asking about the technology and not about the Waldron argument?

Jeffrey: What I’m saying are the dignitarians just missing the point? They can claim that the European approach is better but it can’t be enforced.

Jonathan: I agree with Eric on this. I think that although there is a lot more tools for freedom of expression popping up as no one in this room needs to be reminded, they’re also a lot more tools for monitoring expression popping up so I think -- one reason you’ll always want to be on a panel with Stanley Fish if you can is within five minutes he’s going to go to the fundamental issues and the technology does not begin to address the fundamental issues and that’s still very relevant to what kind of society do we want to have and what are the basic ground rules is going to be.

Stanley: That’s right.

Jeffrey: Greg, you talked about Twitter - what was your phrase? “The collective voice of our conscience or something?”

Greg: "Collective unconsciousness of the species."

Jeffrey: Collective unconsciousness of the species.

Jonathan: Speak for yourself by the way.

Jeffrey: So there was a Twitter scandal recently. There's one every week. The tweet heard around the world. The media company IAC has fired the chief PR executive.

Greg: Right.

Jeffrey: She tweeted, "Going to Africa. I hope I don't get AIDS, just kidding. I'm white." There was a Twitter mob against her and she was called a racist and she was fired. Jonathan said technology doesn't change things but you used to litigate these campus things on a case-by-case basis. Suddenly, the mob is global. Would you defend her rights to say that and how can you defend it in a world where the Twitter goes viral?

Greg: It's a crazily unsympathetic case and obviously if you're a PR flack and you make a statement that stupid, you're going to get fired for it but what was interesting to me was the extent to which it turned into an out-for-blood cause for the people. She was on a flight before she made it and by the time she got off, she was an international villain, negative celebrity and I see this happening a lot in the way we debate with each other. That essentially the social media has let us speed up the way we argue but it's also sped up polarization and it's also sped up sort of a sense of a sort of tribalism, so I think that that some level, the ability to argue this quickly, I'm actually optimistic on this.

I think it will teach us some amount of sophisticated lessons about what it actually means to live in a tolerant society but I feel like right now, we're going through some ridiculous growing pains. Ryan Holiday wrote a good article about this recently called *Outrage Porn*, just calling BS on the fact that we are addicted to outrage and partially we do this because it's really fun for us. It really gets our juices going. We actually really like it. I particularly like the fact that a lot of times I think we're harnessing the anti-bullying movement. Sometimes you end up seeing people harnessing really aggressive--I don't know--bullying energy to go after whatever target they're actually allowed to go after.

So I think that's a great conversation that we're having as I was kind of alluding to is teaching us a lot about our nature and I

wouldn't want to stop it unnecessarily for some idea that maybe we can somehow perfect ourselves, make ourselves different. I think we should actually take a long hard look at who we actually are.

Jeffrey: I can't resist the idea of "addicted to outrage" recalls the definition of obscenity. It has to "appeal to the prurient and be patently offensive", as Kathleen Sullivan said, "his means it has to turn you on and gross you out at the same time." Professor Fish –

Stanley: Yeah, I agree with what Greg just said and I think all of us on this panel would want to distinguish between the pressures that can be brought against speech which are social and cultural and the legal pressures or even regulations in criminalization. So the congressman who recently said that nothing would be lost to the world if the entire national basketball association would be shut down. The only result would be an increase in street crime. Well, when he said that, within 20 minutes, he had to - this is our new favorite phrase in society – "walk it back". I hope none of you are walking anything back but of course, he is paying a price but it's not a price exacted by any legal regime but it's a price exacted by the cultural norms and census of appropriateness.

Jonathan: Yeah. We all do agree on that. And where you and I probably disagree is I think those cultural means are by far the best mechanism to discipline offensive and hateful speech and then, in fact, the official means when you get authorities criminalizing it are counterproductive.

Stanley: Yeah and I would say in response to that Brandies-like statement, that is the best -- Brandies made two powerful statements. He said, "the best remedy for bad speech is more speech". I'm only paraphrasing. And he also said, "sunshine is the best disinfectant", and my response to that is that the only counter argument is all of recorded history and that, for example, if you allow something like holocaust denial into the general atmosphere on the basis of strong First Amendment principles what you will have is not holocaust denial withering but growing, growing, and growing.

Greg: It's so funny because basically my whole argument - partially because I grew up with a father who took 12 century Russian very, very seriously - is that human history is such an argument for freedom of speech. When you start looking at the

blossoming - there is a great book about it which talks about "Liberal Science," *Kindly Inquisitors* is about sort of the rise of an intellectual system in which it's questioning...

[Jonathan pointing to his book]

Jeffrey: Buy it after the show, we're going to have a book signing.

Greg: That gets away from the time honored historically relevant theory that if you disagree with someone about fundamental issues, you better chase them off, you better behead them, you better set them on fire, you better ostracize them, you better get rid of them.

Stanley: Sounds good.

Greg: Wow. That's human nature. The idea of actually hearing out people you disagree with is actually, I consider, like a technology. It's an innovation and what I find interesting is, on campuses, I feel like the theory is going much more down the side of "sophisticated thinkers don't believe in free speech". Meanwhile when it comes to results of tests of what happens when you let pilots talk back to their copilots, or copilots talk back to the pilots or you let institutions actually have a back and forth that actually is an incredibly healthy and productive thing. I think the evidence is just getting better and better for free speech but we're losing more and more faith in it.

Eric: It's the matter of pilots call each other racial epithets. You don't want them saying that and I'm sure if they did, they get fired instantly.

Jonathan: But the information feedback though -

Eric: Some information, not all information and that's the difference between us and you. We think it's an empirical question.

Stanley: Yes that's right.

Eric: Time and again there is an empirical question whether the parameters for speaking should be broadened or narrowed. It depends on the circumstances. In some campuses, you might want broader speech and others, you might want narrower and some historical periods like the Weimar Republic, if you want to use a historical period, it was probably a bad thing that speech was so free or Rwanda is another example where freedom of expression over the radio led to holocaust. There

are other situations like United States now where extreme speech is not as harmful and protections aren't as necessary as in these other places but it's always an empirical question. It always requires a pragmatic judgment. This kind of fundamentalist approach you take based on some reading of history is not appropriate under any circumstances.

Jonathan: I would argue that it practiced the wonderful balancing test which we do so finely very quickly devolve into lawsuits in heavy handed governments in shutting down one and people with political power using it against people without political power. But even setting aside that very big issue of can you really have these very fine two tests that you talked about. I would argue empirically that history is absolutely on my side and I have lived it. I have seen in the past 20 years hate speech against homosexuals as a resource in the liberation of gay people in this country. I wouldn't have said 20 years ago. A man died the other day named Fred Phelps, a crazy person.

Stanley: Oh yeah Fred.

Jonathan: You know Fred Phelps? Now what he did would be illegal in any country in Europe. He picketed military funerals with signs that said "God hates fags". That's pushing it even for me guys, okay? That is way out there. The human rights campaign could have hired this guy in the sense that he did so much to expose the hate on the other side. It helps us when we have these people to argue against and when they are out there front and center, we've got 20 years of an extraordinarily successful minority rights movement in this country to prove it.

Stanley: It can work that way sometimes and it's an example that you've just given but it can work in other ways at other times which is what Eric just said and I think in this context of anti-Semitism. There is a general feeling in this country that anti-Semitism, at least in the United States, is a phenomenon of the past or at least virulent anti-Semitism of the kind that was very active in the 30s and 40s in this country and I happen to believe that that kind of virulent anti-Semitism could flare up tomorrow and each time there is something like the Bernie Madoff case, I'm afraid that it will. This may simply be a feature of an unfortunate fact that I'm older than you are.

Jonathan: Not that much older.

Jeffrey: I have to ask both the dignitarians and the libertarians about this morning's news, the Supreme Court heard the most important free speech case of the year, the Hobby Lobby case involving the question of whether a religiously motivated owner of an arts and crafts store called Hobby Lobby could refuse to provide the contraceptive coverage required by the Affordable Care Act – I know it as ObamaCare to some – because of his religious motivations. Eric, you know, the Supreme Court and the Citizens United case went from protecting the First Amendment rights of individuals to those of corporations on free speech grounds and it may now extend it to religious rights of corporations as well. You were skeptical of American libertarianism in the earlier discussion, did the court go too far in Citizens United and should not have extended this right to Hobby Lobby?

Eric: Yeah I think it did. I think this is a good counterpart to Jonathan's argument which is that the First Amendment as it's actually practiced in the United States doesn't always protect unpopular people or weak groups. It can be once the doctrine is in place, it can be used anybody including by powerful corporations and by powerful groups and, in fact, in this very interesting twist, sometime from the 1970s to the 1980s, First Amendment absolutism went from being a liberal position to a conservative position and it's now allied to property rights and the rights of corporations. Hobby Lobby really a kind of religious freedom case.

It's in the same ballpark. My view is you know let the political process work at these compromise. Another thing that Jonathan said early on which I think is intentioned with First Amendment absolutism. If you think people can work out these tensions between religious conscience and rights of women or other sorts of beliefs and concerns then you don't want the Supreme Court and the other courts applying this doctrine in order to defeat these compromises.

Jeffrey: Okay. I want a libertarian response to this powerful... The dignitarians are being consistent so at least Eric is and he says it shouldn't enforce the First Amendment too strongly in this context. You know there is some ACLU liberals who defend Citizens United and are you barking up the wrong tree now that you've embraced the First Amendment which is being used to strike down public accommodations laws and much of the regulatory state?

Greg: I just think it's interesting. I never heard anyone say so directly that in the 70s and 80s free speech became a conservative issue. I've always wanted to write an article saying "do you take that liberals? do you actually believe that this is no longer a liberal issue?" And it's true that, on campuses, I end up fighting a lot of people who come from the left side of the spectrum who think that free speech should be limited for any number of reasons, sometimes noble, sometimes not so much, but I do think that part of the tactic of labeling, for example, me a "fundamentalist" when it comes down to that I actually agree with the Supreme Court, for the most part, on freedom of speech issues, and that we're saying that "now liberals don't believe in free speech because now conservatives can use it"? I mean that's a kind of a startling argument to me that "oh, it's a negative thing that now that a right is available to everybody"?

Jeffrey: Just so I've got your position. Citizens United was correct and Hobby Lobby should be protected you think?

Greg: I don't know enough about Hobby Lobby. I do think Citizens United was correct.

Jeffrey: Jonathan?

Jonathan: To me, Hobby Lobby isn't freedom of speech, it's what's a corporation. I tend to think corporations aren't people and that the First Amendment should not be applied to them as it should be the people but it is not an area in which I specialized.

Jeffrey: Professor Fish, go for your thoughts on this.

Stanley: Well, I want to once again indicate my agreement with Eric. As far as Citizens United goes, the topic that was discussed in Steven's 90-page dissent and dismissed in the majority opinion was the topic of corruption, that is, is it a matter of empirical fact that a great deal of money expended in the ways that are now possible will corrupt the political system, or has a tendency to corrupt the political system? That's the kind of question that I think should be asked, not questions which depend on some abstract value like freedom of expression.

Greg: But it's just not an abstract value. I mean the Masses opinion that you were talking about, the Learned Hand one. One of the reasons why I make the point that it's not complete free speech absolutism is because- even baked into the law--that I find academics being so dismissive when it comes to freedom of

speech--there is something called strict scrutiny, that essentially, under the right empirical circumstances In constitutional classes, you always come up with the scenario that "yeah, in that case" that's how you end up with the incitement doctrine, that's how you end up with the limitations of free speech that I think that the Supreme Court and we agree with. But when it's this extremely highly subjective standard that gives also flawed people the power to decide which opinions they like and dislike, that is a formula for disaster that I watch take place on campuses all the time and it's amazing how quickly administrators learn and students learn the code words they need to do to silence the opinions they disagree with.

Eric: You just can't avoid subjective standards in the law, they're all over the place. Time, place and manner restrictions which give the government the authority to say the\at protesters can be over here but not over there or you need a license before you can march. Those raised incredibly complicated questions and the judges have to decide somehow using very subjective standards. So the issue isn't really whether the standards are subjective or not. The issue is really whether how much of the democratic process will determine the extent to which people are permitted or not permitted to say whatever they feel.

Greg: But essential part of the analysis in time, place and manner law is viewpoint neutrality and I think viewpoint neutrality and content neutrality are actually -- the closer you get to the expression of pure opinion, that's when you're on the clearest ground with the law and I think that's actually a very pragmatic standard. I think that works very well empirically and also making the point that essentially my opinion is something that I should be entitled to is something that can be very well maintained while at the same time trying to limit the influence of bias of power.

Eric: Well as you noted, I mean even in defamation law, it's still possible to defame somebody especially if it's a private person rather than a public person. When you defame someone, you're simply expressing your opinion. That means a judge somewhere is going to have to decide whether your opinion has enough evidence and is --

Greg: That's not entirely right, though. I mean, basically when it comes to defamation law; one of the threshold questions is whether or not this is a false assertion of fact and that also makes perfect common sense. Am I saying I hate this person? That's not defamation. Am I saying I know for a fact this person is a pedophile? That can be defamation particularly if you knew you were lying. So a lot of these actually are less problematized than I think you're making that to me.

Stanley: Since we've had in defamation law the rise of the idea that public officials - it's not that they can't be defamed - but it's much higher, a much higher standard to defame them and then first it was public officials then it was those who have dealings with public officials and so I think that the effect here was to weaken the possibility of defamation in what I would call the *New York Times versus Sullivan* spirit.

Greg: Interesting.

Jeffrey: And we should note that earlier this month, the New York Times celebrated its 50th anniversary so Happy Birthday, New York Times except from Professor Fish. We have a series of excellent audience, questions and I'm going to jump right in. What reassurance do we have that gay rights advocates will not trample on the First Amendment rights of those of us who have the nerve to disagree, Jonathan?

Jonathan: There are a lot more of you than there are of us and that's the assurance you have. This will have to be worked out through the political process but there are tons and tons and tons of Christians out there and they are going to stand up for their rights and they are going to be heard. That's how this process works. It's initially adversarial but I am very confident, Jeff, that we can and will get to a point in 10 years where we will have a pretty good well-agreed upon set of rules that will have worked out for where these boundaries are going to be.

Jeffrey: Is there a limit to hate speech, what is it, Greg?

Greg: I don't believe in a hate speech exception neither does a Supreme Court. I do think that the court struck a pretty good balance in the *Davis v Monroe County* opinion and outlining what harassment looks like and harassment ends up looking like in the law again what I think that harassment sounds like in the English language. If it's severe, persistent and pervasive, if it's targeted, if it's harassing somebody, then that's actually I

think a good guideline for what you're not allowed to do. Merely having an extremely obnoxious opinion, I think that should be protected and actually I would go farther I think that it's one of the aspects of actually truly respecting pluralism is to understand that sometimes people from different classes from different age groups from different backgrounds is going to have an opinion that you might right now consider obnoxious and actually I want to take an example here.

There is a great example of Bertrand Russell being kicked out of CUNY when he had a job there in the 1940s before the doctrine of academic freedom became strong in the law and he was kicked out because he thought that masturbation was okay, that he was tolerant of homosexuality, and that, basically, he was a modern sort of political liberal in a lot of different places and he was kicked out because these ideas were considered immoral. I think that pointing out that without these systems that opinions that we now absolutely take for granted have been affected in the fairly recent past is something that's really crucial to remember.

Stanley:

Now I think that's wrong. That is I certainly think that it was wrong of the CUNY to kick out Bertrand Russell but what makes it wrong is that the fact that the city and then the courts that allowed it – how should I put this... What was happening was that Russell was being hounded out because of his political views, not because of any expertise that he might have had in philosophy or mathematics and that general principle which was introduced in 1915 by the American Association of University Professors in its general statement on academic freedom and tenure far predates *New York Times versus Sullivan* or any of its developments. It's a very strong distinction which I entirely support between academic work which is contemplative and exploratory, and political action. And therefore, neither professors should not perform political acts in their classroom nor should they be vulnerable to dismissal for political views they have outside their classroom. That's a 1915 idea and so I don't think it was the gift of *New York Times versus Sullivan*. What *New York Times versus Sullivan* has given us is holocaust denial.

Jonathan:

Yeah do we all agree that holocaust denial is a terrible thing that should never be allowed?

Greg:

Can I ask a different question?

Jonathan: I'm a Jew. I want to hear it. I think that banning holocaust denial is like fixing global warming by breaking your thermometer.

Eric: I think it depends heavily on context. If you've got a society which is generally tolerant and people are making all kinds of arguments about all kinds of crazy things and this is one of the crazy arguments that people are making, it's probably not a big deal. But if you've got like a country with a small number of Jews and people don't like them and this idea is beginning to develop but hasn't quite yet dominated society, I think you can make a pretty good argument for law against holocaust denial and I think Germany you know as a kind of penance for what happened in that country, there are laws against holocaust denial and there are sort of laws against passing Nazism are pretty sensible in that context.

Stanley: Every other European does it.

Jonathan: A problem with that view is that in situations that are actually like the ones you described where there is a small embattled minority and a large hostile public; you're not going to pass laws that are going to protect the small minority. You're going to get what you see and you see in Uganda and Nigeria right now which has the majority passing laws to oppress the homosexuals and using speech laws in Russia -- using speech laws to oppress the homosexuals.

Eric: It depends.

Stanley: It does depend because speech laws were used in order to allow the rag-tag Nazi band headed by someone named Frank Collin to march in Skokie, Illinois. The march, in fact, never occurred for other reasons but if it had occurred, it would have occurred because of a strong First Amendment opinion written by a judge who practiced what I called the "rhetoric of regret". He kept saying, "this is awful, I hate it, it's going to do a lot of harm, I absolutely regret the fact that we have to allow these horrible things to happen but there's the First Amendment". There is a bad argument.

Greg: I always get this when I speak at universities, and I totally agree with Stanley that when it comes to does someone who's espousing holocaust denial views measure up to academic standards and should get a job there? Of course not. It's horse malarkey but that's one of the reasons why I think that a lot of

times when you pass laws that ban it, you actually are going to encourage it because listen if someone has to say, "I believe the holocaust didn't happen." "Okay, prove it. Defend that position." "I can't." "Here're the following 10,000 pictures." If you have to defend it on public, it's –

Stanley: But they can, have you ever gone on the websites?

Greg: Hold on.

Stanley: They defend it in 300 to 400-page volumes. I've read this stuff.

Greg: And basically, if you're a paranoid fanatic and basically your whole idea is to say, "The holocaust never happened but I'm not allowed to say it because it's a conspiracy against me to say it" and then you never have to defend it. That's actually a formula for permeating the society and I'd actually say that holocaust denial is more successful in countries that have these kinds of hate speech laws and it isn't the US where it's completely relegated to the fringes because of free speech.

Jonathan: You know it is interesting to remember that the Weimar Republic had robust laws controlling speech and tried to shut down the Nazis and the Hitler used those laws to catapult himself to power and made themselves a national symbol of resistance to this kind of thing. You don't want to give these haters the platform of a Supreme Court case.

Greg: And that's definitely one thing. I always love when people bring up Nazism as an argument for hate speech laws. The Nazis were not a result of excessive concern for individual rights.

Jeffrey: Gentleman this self-moderating panel...

Jonathan: Are you still here Jeffrey?

Jeffrey: I'm still here and I'm loving every minute of it.

Jonathan: We haven't heard from you in a while.

Jeffrey: I did not realize that a topic like the First Amendment, which everyone in America thinks that we all agree on, could generate such nuanced and thoughtful and provocative disagreement. It's time for a vote, ladies and gentlemen. We're going to reduce this complex and nuanced debate to yes or no.

Stanley: Can we have predictions from the panel?

Jeffrey: Sure. 2-minute predictions, are you going to win?

Stanley: No.

Jeffrey: Eric?

Stanley: Not on the vote.

Jeffrey: Eric and Greg, are you going to win?

Greg: I don't want to influence the vote.

Jeffrey: Jonathan, are you going to win?

Jonathan: I'm going to say yes.

Jeffrey: Okay. Who is persuaded by Professor Fish and Posner that the European dignitarian position on free speech is convincing? And who is persuaded by Jonathan and Greg that the American libertarian position is more persuasive?

Eric: Okay. I have a question, wait.

Jeffrey: You'll end the panel with a question to the audience. Thanks a lot. This is perfect.

Eric: Raise your hand if you changed your mind.

Jeffrey: No, no, no.

Greg: Oh yes, thank you.

Jeffrey: Ma'am, which way did you switch?

Female Speaker: **[Inaudible 01:03:53]**.

Greg: All over the place.

Female Speaker: **[Inaudible 01:04:00]**.

Jeffrey: What a beautiful summary of the spectacular panel. Please join me in thanking our panelists. That deserves a handshake. Great job. Wonderful!

Greg: You're my favorite.

Jeffrey: Please come and join us downstairs, buy the books, have some more drinks. Thanks for a great discussion. Come back soon.

**[End of Audio]**

**Duration: 65 minutes**