

RICHARD Thanks to the Law Review for inviting me to moderate this panel and for this great conference.

SCHRAGGER: Thank you all for coming. It's my privilege to introduce-- I'll introduce the panelists. And then we're just going to have a conversation, maybe have some questions if we have time. There'll be more opportunities over lunch and after that. But, again, thank you to everyone for great organizing and setting this up.

So we've got a terrific panel on unpopular student speech today. And I'll go from right to left, left to right, whatever that mean-- my left. Immediately to my right is Professor Mary Anne Franks. She's a professor of law and Deans Distinguished Scholar at the University of Miami School of Law, where she teaches First Amendment law, Second Amendment law, criminal law, and procedural law, and technology. She is the president and legislative and tech policy director of the nonprofit organization Cyber Civil Rights Initiative. And she is the author of *The Cult of the Constitution, Our Deadly Devotion to Guns and Free Speech*. Thank you for being here.

Susan Kruth-- I got that right?

SUSAN KRUTH: Yes, you did.

RICHARD Fabulous. I asked right before and then I forgot completely how to pronounce your last name.

SCHRAGGER: But I got it right anyway-- received her BA from New York University, University's Gallatin School of Individualized Study in 2007. She went to the University of Virginia School of Law. She's our alum, JD 2011, licensed to practice law in Virginia and Pennsylvania. After law school, she worked for the Thomas Jefferson Center for the Protection of Free Expression here in Charlottesville. And she's currently in Philadelphia at the Foundation for Individual Rights in Education. FIRE is the acronym for that. And she previously served as the editor in chief of FIRE's blog and is a member of FIRE's litigation team.

Latarndra Strong is the founder and co-leader of the Hate-Free Schools Coalition. She is a winner of the Triangle Tribune Newsmaker of the Year in 2017 Award. She spearheaded the student protest-- or the change in policy in the Orange County school system to ban symbols of hate and prioritize equity. Thank you for being here.

And then last but not least, Anna Cecile Pepper is a second year student and will be a recently published author in the University of Virginia Law Review. She is on the editorial board of the

Virginia Law Review. And her academic interests include legal history, Fourth Amendment, and property law issues.

So I'd love to start perhaps with Ms. Strong just talking a little bit about your advocacy in the Orange County schools and say a little bit about that, and then maybe get some reactions from the panelists on those local issues.

**LATARNDRA
STRONG:**

So I'm Latarndra Strong. I started a Hate-Free Schools. We are currently in eight counties in Virginia and North Carolina. And we work actually to quell first amendment rights in schools to rid the schools of symbols of hate.

And I think when we think about First Amendment rights-- I kind of changed up what I had planned to say today, because I think there is a part of this conversation that's not being had. And that is, who are we extending first amendment rights to? Because first amendment rights are largely extended to white people and not people of color. And we're not talking about these things like just in the schoolhouses, we're also talking about them in the context of what's happening in the community.

So oftentimes symbols are indications of what's to come. And I would say, if perhaps people knew Dylann Roof and knew that he was brandishing first amendment symbols in the town where he lived, then perhaps people wouldn't have gotten shot. So I think we have to think about what symbols mean and the violence that have historically been connected to symbols. And we have to make decisions with that information and not as if we just all have the same rights in this country.

**RICHARD
SCHRAGGER:**

So thank you. So that raises a really interesting question. Maybe, Ms. Kruth, you want to address, which is, one, I think public safety. But, two, who actually gets to exercise first amendment rights and the differential, the racial differential. And that's a core question that lots of students are asking in their responses to, for example, hateful speech.

SUSAN KRUTH:

Yeah, I mean, I certainly agree that on a practical level, white people, privileged people have more first amendment rights. Like on the ground, it is easier for them to say what they think and not get in trouble for it. And I think that that's part of why it's so important to maintain robust free speech protections where you are not giving anyone the power to decide based on content or viewpoint what is being said, because as much as we may want to pick certain things that we don't want people to have to see or hear, like us as individuals, we are not going to be the ones who are going to be in power and making those decisions.

And so I think it's safer to have a situation where no one is making those decisions, than a situation where someone who would marginalize minorities even more has those decisions and has that power. So I think for me, I'm coming from just like a place of distrusting authority to make those decisions, to be consistent about them, in a way that actually would protect the people who need to be protected the most. Like it's hard for them because they're not in power. And that's exactly why having neutral, like content and viewpoint neutral rules is so important I think.

RICHARD Yes. Do you want to weigh in, Professor Franks a little bit? I know you've written skeptically
SCHRAGGER: about kind of First Amendment absolutism.

MARY ANNE Right. And I'll just touch on some of these very questions that you're raising about the harm
FRANKS: that certain speech causes. And it's not just-- I think it's important-- not just in terms of the physical harm that does result certain kinds of political speech--

AUDIENCE: Talk louder, please.

RICHARD Put yours on. There you go.
SCHRAGGER:

MARY ANNE I was being silenced.
FRANKS:

RICHARD Yes. Censorship.
SCHRAGGER:

MARY ANNE So-- that we have to care about the social harm to individuals, the kind of actual harm that can
FRANKS: come from incendiary speech and incitement to violence. But what I think we also really need to carefully think about is in exactly this question of whose speeches, how much can speech silence others speech? That is it's not just a question of what happens when someone gets shot, when we have a tragedy, but it's also what happens to all the kinds of self-censorship or all the questions that a person has to raise for themselves if they have to worry that their speech or that their ability to speak out is actually going to cost them, either greatly in terms of the kind of experience they will have in their communities or in their homes or even on the pain of death.

And so we have to ask ourselves those questions about how certain forms of speech can

silence other kinds of speech. And we have to worry about the fact that historically speaking, those people who have had the most access to freedom of speech have been the people with the most power. And while that does underscore exactly as you're saying, we need to underscore the idea that that's why it's dangerous and risky for us to have any kind of regulation on the basis of content for fear that it will be used exactly to further silence vulnerable populations.

The fact of the matter is we make choices about regulations all the time. It's a lie, descriptively false to say that the First Amendment means that we don't regulate speech. We regulate all kinds of speech all the time. We regulate on the basis of privacy. We regulate on the basis of safety. We regulate on the basis of labeling. We regulate on the basis of confidentiality. There are any number of ways in which we have made a decision doctrinally and socially that sometimes certain forms of speech are going to have such a negative impact or are going to chill the speech rights of other people so much that we're going to have to make an intervention.

And it is true that we have to be worried about the government making those choices because we should always be concerned about the government turning against the most vulnerable members of society. But it would be a fiction to pretend that we're not making those decisions even if we're not government actors. It's not the case that every person who has to think about the consequences of their speech has to worry about whether or not they're going to get locked up.

Every domestic violence victim has to worry that her speech is going to get her killed. Every person who's ever been on the receiving end of racial violence has to worry that their actions will get them killed. This may or may not be about governments at all. This might be about our friends and our colleagues and people in our communities and harassers and people who have made it really clear to us that they don't want us to be allowed to speak, that they want us to stay silent. And so I think we have to be very cognizant of the fact that it's not just a question of the state and what the state can do, but what people can do to each other.

**RICHARD
SCHRAGGER:**

So this raises this question of so private-- and maybe, Ms. Kruth, you want to address this and Ms. Strong too. Like what you guys are talking about is the private acts of speech that have the effect of intimidating doing expressive violence to others. And it's not the state. The state is actually acting as a brake on some of that. So how do we understand the balance between government censorship or preventing speech and protecting folks from harm?

SUSAN KRUTH: Well, I do you think that it's really important to enforce the laws that track those unprotected categories of speech, like true threats and incitement to violence. I mean, I don't need to explain to everyone like there's good reasons why those are exceptions to the First Amendment. And I think that without them, things would surely be a lot less safe.

But I also think that to the extent that someone is, for example, engaging in hateful speech that is not violent and does not reach those unprotected categories, I think it provides really essential information for everyone else just in a social sense. I think it's important for people to know who they are surrounded by and what those people think, because if someone is going to be violent, I don't think that they're necessarily going to be less violent just because they can't fly a Confederate flag before they engage in that violence.

And so at least we have a heads up, and we know how bad the problem is. It's something that we can see and diagnose and figure out how to deal with it, as opposed to things just being hidden, but there still being the same potential for retaliation and violence.

RICHARD Ms. Strong, do you want to--

SCHRAGGER:

LATARNDRA So what I'm talking about is use of free speech as a weapon, weaponizing free speech. So for
STRONG: example, I'm running for school board in my town. And I live in a town that is really challenged along race line. And this week, they doxed me by putting a website with my name on it and listing any and everything, every ticket I've had since 1998, right. So the idea is that I would be embarrassed and get out of the race and then we wouldn't have a representation on our school board from marginalized communities.

And because of that, people in my community who were probably better fit to be on our school board, they know this element exists. And the arrangement of race keeps them from even trying-- even-- I'm sorry-- filing to run. So I just think that if we were living in a society where we have sort of harmony where we can have open conversations about controversial stuff and we can settle them then, well, then we wouldn't need to have regulation that would mandate it.

But, unfortunately, we don't live in that society. And because we don't we have to protect. We have to have regulations to protect folks. And that's where we are.

I think at some point, like with when *Brown versus Board of Education* was passed, it was it

was largely not acceptable for students of color to be in white schools. And now, I think we still have issues, but as a society, we understand things differently. And that's because of the regulations. So my hope would be that if we had fuller conversations in clean spaces where we don't have to worry about people being harmed by it, then we can move in a place where we wouldn't need the regulation.

**RICHARD
SCHRAGGER:**

So we're talking about-- so one thing is Confederate symbols in schools-- a number of contexts, right, harassment online, different forms of domestic free speech rights, or free speech rights related to weapons, the Second Amendment and the First Amendment. So there are a number of different contexts. And maybe they have different valences.

I want to get Ms. Pepper in here to talk a little bit about student walkouts and just say a little bit about how you're thinking about those issues too.

**ANNA CECILE
PEPPER:**

Sure. So in my scholarship, I looked at student walkouts. Student walkouts haven't received a lot of attention from appellate courts, district courts. And so in my paper, I asked, how much protection does student walkout speech get under the Supreme Court's current first amendment jurisprudence? And there's two precedents that are really important to school walkouts.

And so the first one is *Tinker*, which states that student personal political speech, even if it's controversial, even if it's unpopular, still receives first amendment protection within the schoolhouse gate. But if it could risk substantial disruption at the school or material interference, then schools can restrict that speech. The second important precedent to walkouts would be *Hazelwood*, which was a carve-out from *Tinker*, and said, if speech is school sponsored, meaning if it bears the school imprimatur, if it takes place in a non-public forum, then schools can restrict the speech.

And so in my paper, I looked at those two precedents, how they apply to walkouts and said, clearly, if a school doesn't permit a walkout, if they don't permit that type of student political demonstration that might involve controversial speech, that's probably going to be a substantial disruption. That speech probably isn't going to be protected if you have a lot of students getting up, walking out of classrooms monthly, weekly. That's going to be a pretty substantial interference in the school.

But then I said if schools do permit walkouts or sit-ins or any other type of demonstration where student political speech might be occurring, that speech is so inherently personal,

political, and at the heart of the First Amendment, that schools shouldn't be able to use their discretion to say, you know, we sponsor this event. We were involved in the planning of the event. We can restrict the content of this speech. Students can talk about safety, but they can't talk about gun violence

So that's what I looked at. And I think that approach to looking at walkouts fairly balances the concerns of the learning environment on one hand and keeping an orderly learning environment, but on the other hand, making sure that that protection for students' speech, that really is at the heart of the First Amendment, stays in place.

RICHARD How does the rest of the panel feel about walkouts?

SCHRAGGER:

MARY ANNE FRANKS: Well, before talking specifically about walkouts, I think some of the really important issues that have just been raised I think really underscores, again, the notion that we need certain preconditions to have free speech. There's a reason why-- it doesn't happen by accident-- that certain people are able to exercise their free speech rights more so than others. It's because they feel secure in doing so. So it's not just the negative question of who doesn't feel safe enough. It's who feels safe and supported enough to be able to make all those statements.

And given that we're having a conversation about campuses and about schools and about students, the question of what it actually entails on the part of an institution to make it so that students feel safe to say things, to have those kinds of hard conversations, really has to be a part of what we're thinking about very carefully here, because if it costs certain students much more than it costs other students to speak out, we have to be able to think about that from an institutional perspective. Now with that being said, we have an institutional perspective that we would hope would generate some sort of reasoned debate and public discourse and all the idealistic things we think about when it comes to the marketplace of ideas. We like to think that schools are those places.

But what we also know is that the reason why speech is such a controversial subject is because speech is not just the kind of pressure valve. It isn't just that people who are maybe having a radical thought or maybe have some violent thoughts will talk about it and then they won't do anything. And it's also not the case that people who are just violent are always going to be violent and nothing would have changed them one way or the other.

Speech can get other people to come to your side. Speech can radicalize you. Speech can

make you into an extremist. Speech can cross so quickly into violence the moment that you have an assault rifle in your hand, as we saw here certainly in Richmond a couple days ago. Speech and violence and speech and conduct are extremely closely connected. And for us to pretend that there is some very clear boundary between the two is really just to pretend that we are not looking at the real situations that we've seen unfold just in our very, very recent history.

So I think one of the most important questions for universities and institutions, educational institutions generally is, what's the difference between those two types of settings? A setting in which you can talk about controversial subjects and actually have something like a competitive discourse about the nature of truth versus a place where people become more polarized, become more extremists, become more likely to use violence. And it's those kinds of things that I think we want universities and other educational institutions to be setting the standard for us for, that we should be looking to them to think, how does a good classroom environment conversation work? All of you in this audience probably know the answer to that.

That if the classroom environment was one in which people could simply just jump up and start screaming at each other and they could use racial invective at any point they wanted to or they could just walk in with a gun, which, unfortunately, in some places now they can, to ask yourself whether or not you think you would have a very sophisticated, productive discussion, or whether or not that would actually undermine the quality of speech itself. And anyone who's had that experience of what a good conversation is versus a bad one would know that there are certain principles and standards that we can put into play in a sophisticated sense that actually means more productive speech for more people, as opposed to having some sort of free for all idea that says we can't have any standards and we can't have any kinds of rules about the way that we engage with each other, hopefully, all as reasonable human beings that should be able to speak to each other.

**RICHARD
SCHRAGGER:**

And so I guess there's a question-- and this has been raised already a little bit, but maybe we should address it a little more directly-- who decides? And so I wonder what your thoughts are on that, panelists, Ms. Kruth?

SUSAN KRUTH:

Yeah, I mean, that's a huge thing for me. Like I was saying before, who decides, because the people who might make a decision that we like aren't always and maybe they aren't usually going to be the ones in power. So I am curious to hear the other panelists on that.

RICHARD Yeah. Ms. Strong.

SCHRAGGER:

LATARNDRA So in *Heyward versus Hardwick*, the ruling was that the schools have the right to decide whether we have symbols in schools. And it was directly related to school dress. And what I find, being an activist and actually going into school districts, is that's so flawed, because depending on the experience of the superintendent to make the decision, then that could vary. In Charlottesville, we have one superintendent who feels one way, so there's one set of rules. And in the same county, we have a different superintendent who feels it differently, and there's a different set of rules.

So, yeah, it is problematic. And that's why I think it's important for us to have mandates so that-- or at least have a guiding opinion, so that people can make those decisions.

SUSAN KRUTH: So something just occurred to me. One of the things that I really like about the Supreme Court's definition of harassment, which they define student on student harassment in the context of a Title IX case, but then that's been applied to racial harassment too is that it involves this assessment of how a reasonable student essentially in the victim's shoes would feel about something. So one of the questions you have to ask is, for example, if it's, you know, racial harassment against black people, like how would a reasonable black student in that situation feel and would they feel like they can't receive their education?

And I think that is a much more effective way of drawing the kinds of lines that many people are trying to get out from like a higher place of authority, but like keeping the-- I don't want to say discretion, because it's not like a purposeful decision, but keeping the line drawing like focused on what those marginalized communities are feeling and need. And without giving some like rich white dude the power to do that line drawing on his own.

RICHARD Yeah, this is tricky. So we're talking about say Confederate t-shirts or Confederate symbols being worn by individual students and then a student dress code, right?

LATARNDRA Yes.

STRONG:

RICHARD Which bars certain-- and that's been upheld. I take it FIRE is not that happy with that.

SCHRAGGER:

SUSAN KRUTH: No.

RICHARD
SCHRAGGER: And so just to maybe say a little more about reconciling what you just said about the positionality of the listener and what effects that has on the listener, and yet also taking a position, well, that's OK even if it creates a kind of distracting or hostile learning environment. Is that just a balancing? Or what are we doing there?

SUSAN KRUTH: I mean, so, yeah, the idea obviously behind the harassment definition is that you can punish speech when it creates that hostile environment and people feel like they can't receive their education. But it has to be something that goes beyond just discomfort. It has to be something where it's not completely dependent on someone who's especially sensitive.

And that is in large part to make sure that people can have these like open political discussions and that people can just say what they think, again, even if it makes someone uncomfortable. And, you know, it's this multi-factor test. And I think each of the factors ensures that, yes, you can punish speech that is interfering with someone receiving their education. But we are also protecting real conversations.

RICHARD
SCHRAGGER: So this is a kind of a marketplace of ideas theory maybe, or maybe it's an idealized or maybe it's not idealized theory of how people are educated in what settings. Do you want to say something about that? I expect you--

MARY ANNE
FRANKS: You suspect that I--

RICHARD
SCHRAGGER: Might have something to say about that.

MARY ANNE
FRANKS: Well, the marketplace of ideas metaphor has always been one that's troubled me, partly because we don't take it seriously enough. I think it's not even so much that it's a bad metaphor. It's that it's exactly the right metaphor if we were realistic about the fact that there's no such thing as a well-functioning, unregulated marketplace. There just isn't.

I mean, if you imagine that a marketplace were just a free for all, where are the strongest people with the most goods were able to physically keep certain people out and were able to dominate the marketplace with just their wares. Now, on top of that, maybe their wares are actually toxic, they're bringing spoiled milk to the marketplace, and they are poisoning people. That is what would happen in an unregulated marketplace. And that's the reason why we

probably shouldn't be aiming for that, right. We want to have some kind of standards to be able to operate on some level that would actually be productive for society.

So I think then we're at this-- I think what we should be thinking about, especially in the university or college campus context is, or least a useful thing to think about is, what are the right ways of thinking aspirationally about what we want free speech to look like. That is we can pretend, and I think law professors particularly like to pretend that the First Amendment is all about the doctrine, and that that doctrine makes sense. And, you know, the thing is neither one of those things is true, right. First of all, it's not about the doctrine. And the doctrine itself is internally incoherent.

So once we get past that, we can all just sort of give up on the idea that there's something sacred or stable about what the first Amendment says to look to the fact that most of what really determines first amendment decisions are public norms, it's some sense of who gets to decide-- we're back to that question-- what they think is really harmful and what they think is not. If you look at the classic categories at the Supreme Court says, oh, these are categories that we have long decided don't deserve the same kind of protection as the First Amendment.

Look at how dumb some of those categories are, right. Obscenity, really? That's what someone would be really worried about? No, these categories don't make that much sense. But they were a determination based on the people with power who decided what kind of speech was not particularly important to them. So let's stop doing that. Let's start having a better conversation about what kind of ideals we'd want to have in an ideal free speech environment and try to promote those, at least as a matter of culture, even if we can't always do it as a matter of law.

And in that sense, I think it would be helpful to think about the difference between prohibition of speech, punishment of speech, and promotion of speech. That is I think a lot of people could come on board with an idea of the First Amendment and a free speech regime that says a lot of controversial speech should not be punished and probably shouldn't be prohibited, but maybe it shouldn't be promoted, given that the age that we live in now it has much less to do with whether or not you get direct access to something. It has a lot more to do with the fact that we're flooded with information and speech all the time. That really the scarce resource today, of course, is our attention.

So the question then is, if we've got scarcity of attention, who should be allowed to fill up that

space? So I think one of the useful things we can think about is, where would we put our energies for promoting speech? Even if we're going to be restrained when it comes to punishing or prohibiting speech. And if we did that, I would further suggest that you could think about the difference between a notion of speech that is truly fearless, as opposed to speech that is merely reckless. And I'm using those categories because I think they're instructive, especially in terms of the kinds of speech that we are thinking about a lot these days.

And I'm getting this notion of fearless speech, and some of you may recognize it, from the ancient Greek idea of what freedom of speech was supposed to be, which is parrhesia. And that's fearless speech, not free speech, but fearless speech. And when you look at what the Greeks thought was important about fearless speech for democracy, they said it was important because it meant you spoke truth to power.

People with less power would speak to people with more power. And they would do so in a way that would actually cost them something. They would risk being punished for it. They would risk being ridiculed for it. They might even risk death for it. That was what was considered to be true, fearless speech. That is what was essential to democracy.

By contrast I would suggest our First Amendment culture, certainly for the last, say, 50 or 60 years, has been focused on promoting reckless speech. And reckless speech, the major difference between I'd say that and fearless speech is who the risk falls on. Reckless speech is a speech that creates risk for other people. Reckless speech is neo-Nazi speech. Reckless speech is heavily misogynist speech. These are not speakers who are taking some sort of risk for themselves. They're putting risk on someone else.

And again, it may be the case that because of our First Amendment tradition, and it may be wiser for us not to prohibit that kind of speech, but we don't have to promote it. If we want to be thinking about aspirational goals for who should be our free speech martyrs and our free speech heroes, then it probably shouldn't be the neo-Nazis. We can do better than that. It could be Black Lives Matter. It could be the MeToo Movement. It could be people who are actually taking real risks with their lives with their livelihoods and make those at the center of our free speech culture and see if we would have a better outcome than the one we're getting right now.

**RICHARD
SCHRAGGER:**

So there's a kind of distributional argument here, which is that the-- and let's go back to walkouts for a minute just to get the expert on the panel to give weigh in a little bit. So Black

Lives Matter walkout from a school, should we just say, no, you're not allowed to do that? Or you have to take the consequences? Which is to say kind of a civil disobedience. And is the reason we think the Black Lives Matter walkout is permissible under this schema maybe is because they're taking a risk, which is they're less powerful, they're more prone to be punished or restricted by the forces of the establishment or of the school? And that's different from, say, a school in which the white students regularly use racial epithets or wear intimidating kinds of clothing? Can we draw a distinction, or is it just we've got to treat all, say, walkouts the same? What's your thoughts?

ANNA CECILE Should we treat all walkouts the same, is that your question?

PEPPER:

RICHARD Yeah Or what's your worry? That is, if you want to protect walkouts, it's got to be on kind of
SCHRAGGER: neutral basis. It can be folks promoting the environment or--

ANNA CECILE I think that's a hard question to answer. I think what is difficult about school speech
PEPPER: jurisprudence is how dependent it is on the locality. So what things could potentially create a substantial disruption might be very different in Albemarle County than it would be in New York. But those decisions are also oftentimes in the hands of school administrators. And I think there is a worry that maybe school administrators would maybe permit say a walkout for students against gun violence, but then maybe wouldn't let students walkout supporting Second Amendment rights. Or vice versa, it could go either way.

So I think one of the challenges of First Amendment jurisprudence in schools is that it can look very different for students depending on where they live, what locality they're in, and the political biases of the people who are in charge. And that's a point I think Justice Alito made in his concurrence in *Morse* where he said we don't want to carve out anymore exceptions to student speech under *Tinker* because school boards inherently can be very political. And the decisions they make about who they let walk out or who they speak can be political. And that's why we need to have broad protections for students speech in schools.

RICHARD So this raises a question for me which is, what do we think-- maybe we don't know, because I
SCHRAGGER: now have a teenage daughter and a slightly younger son who thinks he's a teenage daughter. They're both rolling their eyes at me on a regular basis. I wonder what the First Amendment doctrine has to do with the culture of speech in the kind of the generation in schools, in secondary schools in particular, but also now in colleges. My sense-- and maybe you guys

have worked in this area little more than me-- my sense is that the kids don't think free speech is such a great thing for various reasons. Or they have a kind of-- it may not be that. It may be they have a kind of attitude-- maybe it's born of social media. Maybe it's other things that speech really hurts.

But there can be also a kind of authoritarianism to that, which is, well, we've got to shut that down. Those people are just unpopular. Obviously, that's wrong. So just the psychology of the kids, and maybe its relationship to what the adults have said is what First Amendment law is. I think there is a big disconnect. Maybe there's always been a big disconnect. I don't know. Thoughts about that? Anybody on the panel.

SUSAN KRUTH: Well, from my experience, just seeing what students are saying, obviously I'm not like physically on campus all the time, but from what I've seen, there's really a split. And in a lot of ways, there's a split between students who really do understand free speech principles and really do want to be fighting for it. And on the other hand, students who maybe understand in theory, but when then when you start asking them specific questions about like, OK, well should this be censored? Should this be censored? They're like fully onboard the censorship train.

And then within the people who think of themselves as free speech advocates, there is a split between people who truly think about it in a neutral fashion and people who, again kind of once they're tested, once it's like a situation that's opposite from the one that they're immediately dealing with, they can't really apply the same principles. And I was sort of chuckling when Professor Schauer was talking about the hypocritical liberal theory, or whatever, because from my point of view, a lot of the times it's the hypocritical everyone theory. Like lots of people are in this fight to serve themselves.

And one obstacle that we face is trying to get all the people who are pro free speech in one situation also fight that fight when they're in a different situation. So I mean, I think that like really there is enough students in every potential category you could be talking about here, to like if you wanted to cherry pick data, like you could make the case for any one of those arguments that they care, that they don't care, that there are true free speech warriors. That they're hypocrites on the left. There's hypocrites on the right. Like I feel like I see it all every day.

LATARNDRA So what I find is that oftentimes when people have really strong opinions around free speech,

STRONG: typically they happen in communities where there's been some type of controversy and there's sort of these groups that form up. And they use these ideas to help support their ideas, just like you're saying. And so you don't see these sort of arguments in places where you don't already have a controversy, and you don't already have some group trying to persuade people to think a particular way. And I think that is the important reason why it needs to be regulated, because oftentimes these arguments come up because there's a group that's sort of pushing the envelope in some area.

MARY ANNE FRANKS: I spent a lot of time in my book really talking about what I'm calling constitutional fundamentalism and specifically pointing this out in the First Amendment and the Second Amendment, which really I think echoes what you're saying about how most of people's very strong, passionate attachments to the Constitution are all about self-interest. And that it's really the same way that a lot of people use religion to cover over their own most selfish desires. Instead of just saying I want to be selfish and I want things to work for me to come up with some narrative that says, no, no, no, the Constitution commands it.

In the same way that we have seen people, you know, as the fundamentalists do and religious fundamentalism, is to look at certain passages that are cherry picked from the Bible or wherever you want them to be and to say, oh, that proves that homosexuality is wrong or something like that, and ignore everything else about the text that may not support that particular interpretation. And that people do this with the First Amendment all the time.

And I do think that it's everyone. There's not a liberal, there's not a conservative, who doesn't at some point make it clear that really what they're after is these are the rules of the game that I want to respect so long as I win. And that is something that everyone has to confront, that we're all going to be guilty of that, because that is the impulse that everyone has is not just be selfish, but to give ourselves some kind of grand narrative that says we're not being selfish, we're just being constitutionally faithful.

So if we do that, then we have to actually say, well, then look at all the places where it doesn't make sense. Can we come up with a principle that actually works even when it's not our tribe, or especially when it's not our tribe? And so what I try to suggest is that the anti-fundamentalist approach is written into the Constitution itself. It's right there in the 14th Amendment. It says that we are obligated to have equal protection of the laws, which means that if you are fighting for the First Amendment rights of Milo Yiannopoulos, but you're not fighting for the First Amendment rights of Christine Blasey Ford or Anita Sarkeesian or any of the women who

have been coming out in the MeToo Movement, you don't care about freedom of speech. You really don't.

And if you care about the Second Amendment, when it comes to neo-Nazis marching through small towns, but you don't say anything when Philando Castile is shot on the spot when he is informing an officer that he has a legal right to carry a weapon, then you don't care about the Second Amendment. And that the first thing we then have to do is stop using the Constitution as a way to hide from ourselves that really all we want is for us to win, and to say the only time that we know for sure that we are actually advocating for principle as opposed to a preference is to do that test, to ask ourselves, would we advocate for the same thing? Do we advocate for the same thing for everyone else? For the person who is most vulnerable?

And vice versa, what are the things that we're paying attention to the most? If they're being deprived of those things, if there's something that I would never want to be deprived of and I see someone else has been deprived of it, do I speak out for them? And if answer is no, then we have to have that moment, not only a personal reckoning, but collectively as a society, we have to have a constitutional reckoning over that fact and reorient ourselves around that principle of equal protection.

**RICHARD
SCHRAGGER:**

So this sounds like the political address-- this urgency is addressed at the political community or social community, not necessary to the court at all. What's the court's role in all this? Maybe nothing? Maybe this is actually about norms. Maybe it's about-- because it's often between private actors, so the court doesn't get involved at all. Is the enforcement of the Equal Protection Clause by the judiciary need to then address the First Amendment is undermining equal protection. And are there are there ways in which the court can do so? Have they ever done so? And in what settings in terms of the First Amendment?

So one answer is that the courts have mucked this all up. It's terrible. A different answer is, well, they could do better in the following ways. I wonder what the ways that might be. Maybe they're doing a good job. They're upholding certain kinds of certain kinds of restrictions and not others. Thoughts about the court and its role, or courts in general?

**LATARNDRA
STRONG:**

It's tricky, right? Sometimes they do right things, and sometimes they don't. That's kind of, you know, my just general statement. So in our case, we had the ban in the schools. And then just to tell you how this story is going, because it's going to end up in court.

And so then what the Confederates did in our neighborhood is that made a pledge to put 100

Confederate flags in our very tiny town. We have a very small town. 20 by 40. So the first went up, and there was a plan to put more up. And we went to the commissioners, and they changed the uniform code to disallow it.

And now, that person appealed it. And now, they're getting ready to take this case to court. And so what's the answer? Like I wish we wouldn't have to have an answer. But unfortunately, we live in a day and time where there has to be a right and a wrong place. And that's the court's responsibility to do so. And we hope that they will make the right decision. So I don't know. that's a non-answer, but that's the reality of the situation.

RICHARD Courts?

SCHRAGGER:

SUSAN KRUTH: I think the best thing that the courts can do is just like be as content and viewpoint neutral as they can be. Like I know that it's going to result in some situations where people feel like their day-to-day life is harder on some levels than it would be otherwise, but I just think that it's too dangerous to create precedent for viewpoint-based distinctions, because like you know that as soon as there's a new judge in that place or justice that disagrees with the previous court, like things are going to get flipped around.

And I always try to urge people to think about like, OK, if you're thinking about writing a rule, think about like what it would look like applied by the worst person that you have ever heard of, like what would that look like? Because it's going to happen eventually. And so by staying neutral at least like there's only so good things can get, but it can only get so bad also. And I mean, I guess I just feel like it's safer to you know be on that middle ground, where at least things can't be like flipped completely and get worse.

RICHARD Well, thank you. Go ahead and then I'll take some questions.

SCHRAGGER:

MARY ANNE FRANKS: On that point, I mean when we talk about how things can get flipped or that we're worried about who gets in power and turns around it's going to be used against the most vulnerable. We're already in that world. We've been living in it for a while.

So the idea that somehow the way that we have been doing the First Amendment so far has somehow managed to protect vulnerable communities, where's the evidence of that? That's an empirical assertion. And it doesn't play out very well. We're not protecting the most

vulnerable. And we have had this at least quasi First Amendment absolutist approach.

So what do we have to get rid of. I think is the idea that there's any such thing as neutrality. There never has been. The Supreme Court has never been neutral with regard to First Amendment. What it has done is it has pretended that the values it cares about are neutral values. That's the trick.

You don't say I'm doing this so that white men can win. No, you say, I've come up with a neutral principle that says somehow there are certain categories that are just sort of invisible to the First Amendment, other ones that are not. And that is usually just a political and cultural assessment that gets wrapped up in this constitutional language.

So what has the court been doing for the last 20 years or so? It's been casting the most powerful members of society as the most vulnerable. Corporations need freedom of speech, right. Neo-Nazis need freedom of speech. Do they? Really? When you think about who it is who's actually not being heard, whose viewpoints are actually unusual or dissenting or really on the outs when it comes to power.

And if we talk about the concerns about kids today and whether or not they care about freedom of speech, most recent polls have actually shown that students have more liberal views towards freedom of speech, especially university students, than the average population. And definitely more than the average older Republican. And I'm not just picking on older Republicans here, but that's because the surveys that were conducted were asking about specific questions like how do you feel about flag burning? How do you feel about kneeling?

Well, guess what? It's not the liberal younger students who have a problem with those things. It's the President of the United States, who's telling us that he doesn't know why anybody should be allowed to kneel. He thinks that people who burn the flag, that's classic First Amendment protected speech, should go to jail or have their citizenship revoked. He doesn't understand, as he says openly as there's protests against Kavanaugh confirmation, he says, I don't even know why we allow protest when we don't know what side they're on.

Those are the kinds of things we should be really worried about, not whether or not there are students who are seemingly sensitive about certain issues in school. Not to say we can't be worried about many things at once. But there's a larger context here. And that larger context is the very forces that are in power everywhere. And that's the executive branch. That's every branch, right, right now are highly censorious.

And they don't care about civil liberties. Now, they may claim that they do. But they obviously don't. And objectively speaking, the claims they're making about who it needs to be protected are false. They're just false. It's what I call in my book I call a victim claiming-- when you have powerful individuals who pretend like they are the ones who are actually the most persecuted. Second Amendment people are being most persecuted. Powerful Republicans are being most persecuted.

What the Court could do I think is actually stop lying to us about this. They could stop pretending as though you had to take people at their word. You don't let people subjectively tell you how vulnerable they are. You're supposed to actually do some analysis to see is it true that this is someone who has less free speech rights than someone else? Is that actually objectively true that it's difficult for this viewpoint to make it into the marketplace? Because if it's not, then why are we even playing this game at all?

So I think we really have to cast aside not only the notion that the First Amendment is coherent, but certainly cast aside this idea that the court has ever been neutral and we're asking it to do something differently now. It's never been neutral. What we should be asking it to do is to be honest about the fact that it hasn't been neutral and now start to come up with coherent principles that actually work in situations that they don't necessarily anticipate or like.

RICHARD OK, so questions?

SCHRAGGER:

AUDIENCE: Hi. Good afternoon. Thanks so much for talking to us today. I was curious to ask you how courts and schools should react to changing forums and acknowledging media. And some of you mentioned briefly in our last panel, when you talked about *Tinker* and how hard it is for courts and schools to determine where the speech is increasingly done, or at least the most controversial speech is increasingly done online, sometimes anonymously and across geographic boundaries and school districts. And so what role do you think courts should play, school districts play in terms of that free speech versus based on the most popular?

LATARNDRA
STRONG: So our school district has a contract with some company that does scanning, surveilling of social media sites for students. And they're looking for specific words. And when they see those specific words, then that information gets turned over to the social worker in our school district. And then that social worker determines if it's worth bringing the student in and if that

student is going to be punished for that speech.

And for me that feels like an overstep. I was actually called in about that. But it is really tricky, because what if it's saying that I'm going to do something at school tomorrow, right. So for, one, I think that it's an overstep.

But I also think that sometimes there's a place for that. And I think it shouldn't be something that one school decides. I think that if we're in a place where we feel like we need to do that, it should be regulated by schools and not by particular people in schools.

SUSAN KRUTH: I think that just considering how so much more speech is online and on Twitter and social media, and then people like talk about it at school, for me, it just drives home how problematic it is that the interpretation of *Tinker* has sort of turned into this hecklers veto situation, because that is the point at which things that people say on social media are like brought onto campus, the people who are listening and are making a big deal out of it and potentially being disruptive. And I don't like the idea that a student could be tweeting something that they're not on campus, they're being an engaged citizen and saying what they think, and then someone else can be the one to take it on campus and make it into a disruptive thing. And that could end up with the speaker being punished, like that really bothers me.

And so I think if I were, you know, directing things I would get back to that part of the *Tinker* discussion. And I wish it required like more of a disruption from the actual speaker. So I think that that problem could get worse, just as more people are seeing what everyone else is saying off campus and bringing it-- or out of school and bringing it to school. So pretty pessimistic on that point.

RICHARD Yes.

SCHRAGGER:

AUDIENCE: I have a question relating to the brief conversation about harassment claims and as an avenue for tackling unpopular speech or speech that can be harmful to individuals. So you mentioned a judge who-- a reasonable person analysis, but oftentimes judges-- I questioning how much we should really rely on a judge and maybe of different race or of a different background and experience to really put themselves in the shoes of the individual who is on the receiving end of harassment. So how would you argue that the harassment-- like judges wouldn't do that and the ability for a judge understand and sympathizes-- or I guess relate to that experience. Like is that-- it feels a little--

SUSAN KRUTH: Yeah, I mean I definitely understand your skepticism. And I don't mean to suggest with anything that I'm saying that like the court system is perfect and it is neutral where it's supposed to be neutral all the time or that it understands the experiences of marginalized communities all the times, because it certainly doesn't. But I think that at least in that context, they have to like justify what they're doing and at least ostensibly think about that position. Whereas if we are just openly allowing viewpoint discrimination, they don't even have to like pretend to go down that road of trying to understand what anyone else is going through, because they can just be like, well, this speech offends people, or whatever.

So I think that maybe some of the difference between me and some of the other panelists is that I think that the potential-- like things feel bad right now. I get that they feel bad. But I think that from the-- I don't consider myself a free speech absolutist, but like closer to that side. I think from our perspective it still could be so much worse. And that it would get so much worse if we went further down the road of allowing just content-based or viewpoint-based restrictions from some person in a position of authority.

So I definitely understand where you're coming from. And I think that part of the struggle is trying to-- I mean I guess what can you do? Like you want judges who are going to actually be mindful of those things. And we don't elect all judges. So it's hard to try to make that happen. But again, like at least that's what the aim is legally speaking.

RICHARD In the back.

SCHRAGGER:

AUDIENCE: Earlier in you walkout context, we mentioned the kind of difference between school districts that maybe don't allow walkouts as a method speech or as protest versus ones that maybe if do it in some context. And I was wondering what those condoned walkouts look in practice and kind of how schools treat ones that are allowed compared with ones kind of rippling regulatory tests.

LATARNDRA
STRONG: Right, so condoned walkouts can take many forms. Sometimes schools might say, OK, you can go and protest in front of City Hall. Or you can gather in front of the school for the 30 minutes or the 17 minutes and say what you have to say. There was a large national school walkout after the Marjory Stoneman Douglas shooting where schools across the country, their students wanted to walk out at 10:00 AM for 17 minutes to commemorate the victims.

And some schools just let that happen. Some schools kind of supplemented the walkout and said, well, you can't walk out, but you can have a sit-in. And you can sit-in the cafeteria, and you can talk about things or voice your feelings. Or some schools said we're not going to let you have a walkout. But you can have a time where you write your feelings on Post-it Notes about what happened.

And so it's an interesting conversation, because some schools would argue that if we allow a sit-in or something else other than a walkout, like we're involved to the point where we can place content restrictions on student speech in that regard, which I think is probably wrong in those situations, even in situations where maybe the school has imposed kind of its own structure on the event that students should still be able to freely exercise their political speech in those instances without being subject to content or viewpoint restrictions on their speech.

AUDIENCE:

I was curious about the role of administrators in sort of K through 8 and high school and university, so allowing speech to occur whatever is, giving a speech on whether or not correspond to that university or school's values. And if that can be an appropriate tool for allowing in more speech but allowing some of the harm that come with it. Or if alternately, that could be seen as content restriction or exceptionally chilling speech in some way. So I was curious what rule you think that should be and if it is appropriate at all.

SUSAN KRUTH:

Yeah, I'm actually really glad that you asked that question, because I sort of wanted to make a related point when Professor Franks was talking about how there is a difference between not punishing speech and promoting it. And so I mean, this comes into play there. I do think that-- I mean schools definitely can have their own institutional speech. And part of that can be saying we don't agree with what this student says. We are doing our best to make sure that students are not going to be discriminated against, and that they're going to be safe, and all that stuff. And we support various communities. Like they can do that.

The key is really to make clear that there isn't going to be any institutional punishment of speech that is not what the school or what the administrators say. So as long as it's clear that students won't be punished for disagreeing, the school can express itself basically however it wants. And I think that that is a very important part of this, that the school does condemn racist speech and sexist speech and all of that. And that's a big part of how they can help shape the community is by making repeated very strong statements to that effect, while also making clear that like you won't be actually punished for disagreeing with them. So I think that's a huge part of things that they absolutely can and should be doing.

MARY ANNE

FRANKS:

I think that raises some larger questions too about institutional actors that have power and how they can use that power to express their own first amendment protected speech with the concern that that is an exertion of power that could have some untoward consequences on students. But I think that that is-- the deeper question really is about if we're returning to the educational institution in that setting the kinds of obligations that really professors and administrators and everyone should have towards their students, that one of the things that's been very disheartening about the last couple of years where the whole discourse about snowflakes and safe spaces has really taken off is just how contemptuous people seem to be of students and their vulnerabilities.

Whether or not you think they're ultimately coming to the right conclusions or not, certainly to watch professors and administrators ridicule students for getting it wrong has been a really disheartening thing to see. If they're getting it wrong, it's our fault. And it should be reminding us that it's a task of an educational institution to try to inculcate certain values, to try to get people to prefer expertise and prefer reasoned argument and prefer open discourse, rather than to be simply resting on prejudices or on outbursts.

And this is what I've said in my short piece for this symposium is the difference between internet culture and institutional and university culture. We would like to think, I would like to think, that the university should be setting itself up as a kind of opposition to what gets rewarded constantly online, which is nothing more than sort of instinctual outburst, right, as opposed to careful, thoughtful, reasoned analysis.

So I think one of the conversations that educational institutions should be having among themselves is, how do we take these signs of whatever it is, protests, counter protests, unrest, how do we take that as a sign of issues that are affecting people very deeply here, most of the time you are very vulnerable individuals, who are in the process of their education? And how can we do something affirmative and positive to try to deal with those underlying issues rather than having a crisis that then turns into a viral video?

RICHARD

SCHRAGGER:

Last question.

AUDIENCE:

So do we balance the needs-- we talked a little bit about locality specifics. So how do you the needs of the school in certain places where things have happened, so in Charlottesville, [INAUDIBLE] having [INAUDIBLE] specific because of the events that happened here. Or

someone walking in with a gun on their shirt or Second Amendment on their shirt in a school district [INAUDIBLE] they need something different because of what happened there. So how did balance the needs of the school to protect students feeling of safe in certain places with trying to be content neutral, being less controversial.

SUSAN KRUTH: Well, I think that the context of speech definitely has a huge effect on whether it would be perceived as a threat, for example, or whether a reasonable person observing that speech would feel like they can't, you know, go to school because of it or something like that. So I agree that context is really important. And I think that it essentially is or, you know, should be incorporated into First Amendment analysis in those cases.

It sort of feels like sometimes people miss like how much can be punished if you do a proper First Amendment analysis. And so while I don't support broad bans on flags and things like that, there are definitely situations where, in the right context, with the right background and the right people, a flag plus something else could rise to a level of speech that can be punished, if it's something where it clearly is meant as a threat or it clearly is going to prevent someone from feeling like they can safely go to school. It's, yeah, like you say, it's about context.

**RICHARD
SCHRAGGER:** Well, we've run out of time. But thank you all. And join me in thanking the panelists for their great comments.

[APPLAUSE]