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Intimidation threatens free speech

By Jay April, J Robertson
and Sanford Inouye

As the country celebrates Free Speech Week Oct. 19-25, we ask the community to consider what this First Amendment right means today, as we face so many divisive issues in a highly politicized national environment. What is the current state of free speech in the U.S.?

As the leaders of Oahu's 'Olelo Community Media, Akaku on Maui, Na Leo TV on the Big Island and Ho'ike on Kauai, we believe that free speech in its pure form is in jeopardy throughout our country.

The very freedoms — of speech, association, expression and the press — that are protected in the First Amendment are under siege because of a frightening disintegration of respect for diversity of opinion and of others.

What has happened to our respect for each other? The word, as defined by Merriam-Webster, means "to consider worthy of high regard."

A truly civil society — rooted in democracy such as ours — is one in which public discourse should be respectful, without fear of being disenfranchised. Unsurprisingly, fear of intimidation puts a chill on free speech.

Views in the media that you disagree with? Dismiss them as "fake news." Bow to "popular opinion," while ignoring minority ideas.

We believe that if we emphasize respect for each other's opinions, there will be greater unity as a society. Of course, our beliefs and opinions will diverge on many — or perhaps all! — issues, but the beauty of our American democracy is that no one opinion is more valuable than any other.

While we fear for free speech and

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Jay April, left, is CEO of Akaku: Maui Community Media; J Robertson, center, is managing director of Ho'ike: Kauai Community Television; and Sanford Inouye is CEO of 'Olelo Community Media. Stacy K. Higa, CEO of Na Leo TV, also co-signed this commentary.

the freedom of expression, we believe that Hawaii has lessons to share with the rest of the country.

In June, Black Lives Matter protests were organized across Hawaii with 10,000 marchers reported at one in Honolulu. This is only one of the most recent local showcases of free speech and peaceful protest, but we have a long history of this on a wide array of controversial issues — from same-sex marriage to land use, Mauna Kea (the Thirty Meter Telescope) and labor protests — that elicit strong emotions.

These active assemblies were peaceful opportunities for the people of our state to stand together in solidarity. They exercised their rights to free speech and assembly, and the rest of the community respected that, whether or not those opinions were shared. We are grateful that people here generally view other's opinions and consider them "worthy of high regard."

We contrast that with what is taking place in too many cities across the continental U.S. — most prominently in Portland, Ore., where violent demonstrations have taken place for the past several months. Clearly, these uncivil and intolerant acts are not respectful of others.

There is something about our local culture that has taught us to show more respect to each other. Perhaps it's our cultural and ethnic diversity, our close ties, dense neighborhoods, multi-generational

households or the "island" knowledge and "aloha" spirit that we all need to cooperate as neighbors, but we in Hawai'i generally have a culture of respect for each other.

During these challenging times — as we face such divisive issues particularly during this stressful time in a global pandemic — the people of Hawaii have shown a level of respect for each other that makes us, on the eve of Free Speech Week, hopeful for the future of free expression here in the islands and throughout our great country.

So, we ask: What does free speech mean to you?

Others may well not agree with our views on this issue. As Hawaii's non-profit, noncommercial media, we encourage everyone to use their right to free speech, while showing respect to others and their opinions. Express yourself, use your creative freedom and take advantage of this most treasured right. Please use your voice on whatever issues matter to you; we can only become stronger and less divisive as a society. We want to hear your voice!

For more information on free speech, visit olelo.org.

Free speech clashes with dubious Hunter Biden story



KATHLEEN PARKER

As you might expect in the final weeks of an election, there seems to be some confusion about what is news, what is manipulation and what is censorship. Let me see if I can help sort things out.

First, there has been a lot of speculation about a much-discussed New York Post story alleging, without much evidence, that Joe Biden's son Hunter may have arranged for a meeting between his father, then the vice president, and a Ukrainian businessman.

And then there is some confusion about what social media companies owe their audiences when it comes to distributing these stories.

Here is what you need to know about the New York Post story: We are supposed to accept that Hunter Biden dropped off his laptop at a Wilmington, Del., computer shop in 2019 and never retrieved it, despite probably knowing that its contents would ruin him and his father.

Makes perfect sense. We are supposed to accept that there is nothing odd about the prospect that the shop owner then called the FBI, but not before making a copy of the hard drive and giving it to Rudy Giuliani, the president's lawyer, defender and top Biden-hunter, so to speak.

Could happen, I suppose. And we are supposed to accept that the hard drive purportedly contained emails — which no one can verify — that suggest that, as vice president, Biden met with an executive of the Ukrainian gas company, Burisma, in 2015. At the time, Biden's son Hunter served on the board of directors, earning a hefty sum.

Hmmm. If I had a mustache, I'd be twisting it now. The New York Post played the story bigly with several splashy articles, and so, predictably, did Trump, in part because Biden has long denied discussing Burisma with his son.

Other news organizations, including the Washington Post, have been unable to authenticate the story or even the key emails that suggested (to some, anyway) there was a White House meeting.

The confusion about the New York Post story quickly gave way to a confusion about what social media companies should do when it came to sharing it around. That unfolded Wednesday when Twitter and Facebook deployed measures to limit the articles' spread.

Sen. Lindsey Graham, R-S.C., joined Trump in slamming Twitter and Facebook for blocking the articles from wider distribution. Fox

Kathleen Parker writes for The Washington Post.

THE LAST WORD

“Don't go around in groups of more than five. Don't do that, so we can get into Tier 2.”

Mayor Kirk Caldwell

On Oahu residents following coronavirus safety protocols, so the city can move to a more relaxed stage of restrictions



DENNIS ODA / DODA@STARADVERTISER.COM

Black Lives Matter demonstrators gathered at the state Capitol in June.

Hidden bomb in Voting Rights Act case

By Aviam Soifer

Chief Justice John Roberts' majority decision in *Shelby County v. Holder* (2013) eviscerated a crucial provision of the landmark Voting Rights Act of 1965 that required preclearance by the federal Department of Justice for changes in voting in state and local governmental units which had a pattern of past discrimination). That decision flew in the face of the U.S. Supreme Court's precedents. Its *laissez faire* attitude has triggered huge efforts to suppress the vote and a flood of subsequent litigation.

As Justice Ruth Bader Ginsburg pithily suggested in her already-famous dissent in this case, putting aside an umbrella that has kept you dry during a rainstorm will leave you drenched when the storm returns. Though the Court ignored its own frequent celebration of the right to vote as "a fundamental right," its more dramatic offense was its clear failure actually to pay attention to the very constitutional text upon which it relied.

Roberts — joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas and Samuel Alito — declared that while the Voting Rights Act once had been necessary, it was no longer needed and was therefore unconstitutional because it placed too much of a burden on the states. In failing to accept Congress' regular renewal of the Voting Rights Act by overwhelming majorities, the majority described Congress' actions as a failure to keep up with the times. This novel constitutional doctrine ignored the Court's repeated refrain, particularly from "textualist" or "originalist"

judges, that they had to honor Congress and its laws as written to avoid imposing their own values as would "activist judges."

The core of the states' rights argument in *Shelby County* was the Court's reliance on the Tenth Amendment, which the chief justice cited as follows:

"Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10."

This is the actual text of the Tenth Amendment, however:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This little-noticed departure from the text is striking in itself, and almost surely not the product of bad law clerks. Yet it becomes startling when one considers, for example, the current legal imbroglio about the possibility of crucial constitutional differences between "the people" and "citizens" who gets counted for the Census, as well as and in other important contexts. By limiting federal powers only to those powers "specifically granted," Roberts' Tenth Amendment embraces what was a losing position that was repeatedly rejected at the Constitutional Convention and by the First Congress, the actual drafters of the Tenth Amendment.

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In fact, James Madison — often regarded as the leading Framers of the Constitution — three times led successful efforts to defeat just such a limitation on federal powers. In the earlier Articles of Confederation, Article II had included just such an explicit restriction on federal powers, limiting them only to powers "expressly granted." That limitation had not worked well, to put it mildly, and this failure led directly to the Constitutional Convention in 1787, convened largely because there had been inadequate federal authority to respond to the increasingly bitter rivalries among the states.

So in its *Shelby County* decision, why would the Court's paraphrase of the Tenth Amendment depart in two major ways from the actual Tenth Amendment's text?

Why replace "people" with "citizens," and why insert a specific limitation on federal power? Putting aside sloppiness as a possible but unlikely explanation, these changes probably mark an effort to plant a doctrinal timebomb for future use. Later decisions could rely on citations to *Shelby County*, thereby eliding what the Tenth Amendment actually says.

Such judicial activism is illustrative of a long tradition, not least among self-proclaimed textualists, to read the text of the Constitution as you would like it to be, rather than as it is written.