

A CRITIC AT LARGE

WHERE THE BATTLE OVER FREE SPEECH IS LEADING US

Doxing, deplatforming, defunding, persecuting, firing, and sometimes killing—all are part of an escalating war over words. What happens next?

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In the debate over speech freedoms, we'd do well to remember that any standard we apply might be applied to us. Illustration by Miguel Porlan

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The United States is in a speech war. Normally, human beings fight over money or land or love, but that is not what is happening today. Today, people are fighting over words. People's lives are being damaged and sometimes destroyed not for something they did but for something they said. We live in a society of doxing, trolling, cancelling, sanctioning, slandering, deplatforming, defunding, persecuting, prosecuting, firing, and sometimes killing over the expression of an opinion. A big part of the craziness is that some of the people going to war over words are casting themselves as

champions of free speech. It's the people they are trying to silence, they claim, who are the enemies.

The lord of misrule here is the person you would expect. On January 20th, his first day back in office, Donald Trump issued an executive order titled "Restoring Freedom of Speech and Ending Federal Censorship." It accused the Biden Administration of chilling speech it disagreed with and announced that

It is the policy of the United States to:

- (a) secure the right of the American people to engage in constitutionally protected speech;
- (b) ensure that no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen;
- (c) ensure that no taxpayer resources are used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen;
- (d) identify and take appropriate action to correct past misconduct by the Federal Government related to censorship of protected speech.

The President and his Administration then proceeded to ban the Associated Press from certain press events because it did not refer to the Gulf of Mexico as the Gulf of America, sanction law firms that represented clients whose political views the Administration regards as unfriendly, arrest and seek to deport immigrants legally in the United States for opinions they expressed in speech or in print, defund universities for alleged antisemitic speech and leftist bias, sue the *Wall Street Journal* for libel, extort sixteen million dollars from the corporate owner of CBS because of the way a "60 Minutes" interview was edited, set about dismantling the Voice of America for being "anti-Trump" and "radical," coerce businesses and private colleges and universities to purge the word "diversity" from their websites, and order the National Endowment for the Arts to reject grant applications for projects that "promote gender ideology."

After threats from the head of the Federal Communications Commission, a late-night television personality had his show suspended because of some (rather confusing) thing he said about Trump's political movement. Other media outlets were advised to get in line. Trump has proposed that licenses be withdrawn from companies that air content critical of him. The Administration has opened Justice Department investigations into and yanked security details from people whose political views it dislikes. It has also warned that it may revoke the visas of and deport any foreign nationals who joke about the death of Charlie Kirk. West Point cancelled an award ceremony for Tom Hanks, after having already winnowed its library of potentially offensive books.

The President is suing the *Times*, which he calls "one of the worst and most degenerate newspapers in the History of our Country," for libel. (In the initial iteration of the case, the judge threw out the eighty-five-page-long court filing as "decidedly improper and impermissible.") A top complaint in his lawsuit is that the paper ran its "deranged endorsement" of Kamala Harris on the front page. Apparently, this is tortious behavior. At press conferences, Trump makes noises about investigating reporters whose questions he doesn't like. (Who's the snowflake now?)

This is not social shunning. This is not speaking from the bully pulpit. Apart from the libel suits, which the President can add teeth to by threatening regulatory sanctions or by slow-walking mergers and other business deals that require government approval, this is the persecution of people and organizations based on point of view. Much of this is exactly what the Supreme Court has said the First Amendment prohibits the federal government from doing. The Administration is not even pretending to follow the law, let alone its own proclamations about free speech. It's getting results, so why should it?

Compared with all this, a bunch of college students shouting down the conservative political scientist Charles Murray—an incident at Middlebury

College now immortalized through endless retelling—is small potatoes. Somehow, though, in the war of words, college students tend to get the blame. “Charlie Kirk was assassinated while speaking on a college campus,” the president of Barnard College, Laura Ann Rosenbury, wrote in a recent Times opinion piece. “This is a grim moment for higher education, for our country and for freedom of speech. Violence is never a legitimate means of disagreeing with a speaker on a college campus.”

What is she talking about? Neither Kirk nor his alleged shooter was a student. The incident says nothing about tolerance for speakers on college campuses, and it is irresponsible for a college president to suggest that it does. Rosenbury notes disapprovingly that there was a petition to rescind Kirk’s invitation. A petition is classic First Amendment-protected expression. Surely the president of Barnard is not suggesting that students are inciting violence when they sign a petition. She is effectively throwing a bone to the White House, which can claim that Kirk was the victim of academic cancel culture.

As many people have rightly remarked, the response to Kirk’s murder is emblematic of the current hypocrisy. Kirk is being celebrated as a champion of free speech who was willing to debate anyone anywhere and who was killed by someone who could not tolerate his views. At the same time, Kirk’s admirers are campaigning to get people who make negative comments about those views—which are, after all, highly controversial and designedly so—fired from their jobs. And many have been. The Attorney General initially suggested that Kirk’s detractors could be prosecuted for hate speech (which happens to be constitutionally protected). Evidently, saying racist things is not hate speech, but calling someone out for saying racist things is.

All this suggests that Christopher L. Eisgruber’s new book, “Terms of Respect: How Colleges Get Free Speech Right” (Basic), is not ideally timed. Eisgruber is the president of Princeton University. It is a truth universally acknowledged that university presidents should not write books

about their own schools, to which they have a fiduciary duty. The terms of their tenure require that they not do or say anything that might damage the school's reputation or fund-raising capacity. It is therefore impossible for them to comment disinterestedly or openly on topics bearing on their own institutions.

Within the self-censoring limits of the genre, Eisgruber has sensible things to say, maybe too sensible. His main practical point is that, as he puts it, "speech must be both uncensored *and* regulated." This seems to mean that we should be in favor of what are called "time, place, and manner" restrictions on campus speech—no chanting in the library, no bullhorns in the quad, and so on. Fair enough. There are all kinds of things you cannot lawfully do in public spaces. The problems arise when you try to draw the line of permissibility, and Eisgruber doesn't help us much here. His own reactions to speech controversies at Princeton, as he relates them, seem to have been largely seat-of-the-pants. And, so far, reasonably successful.

Eisgruber also believes that speech should conform to norms of civility. "It is possible to believe in free speech *and* insist that people ought to address one another civilly and politely," he writes. Again, nice to say. But the right to free speech is intended to protect what the Supreme Court Justice Oliver Wendell Holmes, Jr., called "opinions that we loathe and believe to be fraught with death." In the free-speech marketplace, "fuck you" is legal tender. But private universities can constrain speech in ways public universities cannot, and, if Princeton wants to impose civility constraints on its students, it may. No one is being forced to go there.

The same is true of the workplace. There is what we might call a free-speech norm in the United States, such that we are sensitive to the suggestion that someone is being penalized—not getting a promotion, say—for things they have said or beliefs they espouse. Most Americans would not want to give up this norm. But it is unenforceable. You have a right to say what you like, but you do not have a right to host a late-night talk show. A lot of campus

speech regulation is an effort not to violate this norm, but this is not because students need a “safe space.” It’s because maintaining an ethos of free speech is central to the educational mission. You can’t run Princeton like Disney.

In general, Eisgruber thinks that “free speech is more robust on college campuses than in other sectors of our polarized society” and that “when it comes to getting free speech right, colleges and America’s young people deserve higher marks than they get.” A lot of what look like acts of censorship from the outside, he argues, are actually attempts to negotiate a level playing field.

There may be some whistling past the graveyard here. Many surveys show that college students are fearful of saying something that will alienate them from their peers or invite the disapproval of their instructors. And faculty worry that teaching certain subject matter and texts might offend students and, if students complain, lead to administrative sanctions. The faculty experience has been that administrations often side with the complainers. If this is so, it is because, until recently, the complainers have had agencies on their side that enforce federal anti-discrimination law (Title VI of the 1964 Civil Rights Act, Title IX, and the Americans with Disabilities Act, plus, for public schools, the equal-protection clause of the Fourteenth Amendment). Universities did not want to sanction the professors, but they did want the complaints to go away.

You could say, as Eisgruber does, that campus speech anxieties reflect the polarization in our society as a whole, but the freedom to say what you think is not the essence of most jobs, and it *is* the essence of liberal education. Without the ability to speak freely, teachers are not educating and students are not learning.

Eisgruber discusses some of the well-known campus disputes, many of them venerable chestnuts in the free-speech wars, like the picketing of Charles Murray, which happened eight years ago, and the blowup over Halloween

costumes at Yale, which happened when Barack Obama was President and we were still living on the Big Rock Candy Mountain. All the same, it is hard to fight off the sense that Eisgruber is mainly interested in defending Princeton. He is doing, much less recklessly, what Barnard's president was doing with her opinion piece: he is preemptively defending his institution against government attack.

That's fine. That's his job. But you would never know, reading his book, that there was a pro-Palestinian encampment on the Princeton campus in the spring of 2024. You would never know that there were sit-ins and that students were arrested. There is virtually no mention of Trump in the book, apart from a vague reference to "multiple Trump administration executive orders that targeted higher education" and a remark that Trump has not done a lot for civility norms. This is despite the fact, also not mentioned, that last April the Administration suspended hundreds of millions of dollars in federal grants to Princeton.

Eisgruber spoke out quite assertively at the time in defense of academic freedom, but he has said little publicly since. That Harvard is in court and subject to multiple phony "investigations" as the government tries to bully it into submission goes unmentioned in his book, too. Yet he does see fit to critique Harvard's institutional-voice policy, which limits public pronouncements by the university to issues affecting higher education, that being the one subject academics are competent to opine on. He prefers an approach unconstrained by such "mechanical formulae." Again, fine as long as it works.

You also would not know from the book that in 2020 hundreds of Princeton graduate students, staff, and faculty—including professors from thirty-four of Princeton's thirty-six departments—sent the university administration a four-thousand-word petition demanding that it address systemic racism by, among many other things, rewarding departments that have hired underrepresented minority professors and denying new appointments to

departments that have not, and granting extra pay and sabbatical time to professors who are members of underrepresented minority groups.

The petitioners further demanded that the administration

constitute a committee composed entirely of faculty that would oversee the investigation and discipline of racist behaviors, incidents, research, and publication on the part of faculty, following a protocol for grievance and appeal to be spelled out in Rules and Procedures of the Faculty. Guidelines on what counts as racist behavior, incidents, research, and publication will be authored by a faculty committee for incorporation into the same set of rules and procedures.

This could be read, and by many people was read, as a chilling assault on the principle of academic freedom, which courts have interpreted as a component of the First Amendment protection of free speech.

Eisgruber's elision of this episode—there is an oblique reference to “widespread student and faculty interest in seeing the university do more to address the effects of racism on the university community and America”—is understandable. The petition was widely circulated in the academic world, and it was not received with enthusiasm. The idea of a faculty committee empowered to vet scholarly publications for racial bias has, ineluctably, a Star Chamber vibe.

The omission is particularly unfortunate because it bears directly on the main point Eisgruber wants to make, which is that free speech and equality are not rival ideals but, in fact, belong together. His key text is the Supreme Court's opinion in the 1964 case *New York Times v. Sullivan*. That is where the Court raised the bar in libel suits by public officials, ruling that, absent “actual malice,” meaning willful or reckless disregard for the truth, you can publish anything you want about someone the Court recognizes as public—a category that has expanded over the years.

Eisgruber, who is a scholar of constitutional law, believes that *Sullivan* is the cornerstone of American free-speech law. And it is significant, he argues,

that it was a civil-rights case. It involved an advertisement in the *Times* soliciting donations to Martin Luther King, Jr.'s defense fund that contained some factual inaccuracies. Those were the basis for the lawsuit, which was filed by an Alabama official. In ruling for the *Times*, the Court was in solidarity with the civil-rights movement.

But, of course, the authors of the 2020 Princeton petition were also trying to strike a blow for racial equality. For them, a highly permissive interpretation of free-speech law gives cover to racists, and a permissive interpretation of the principle of academic freedom allows for the perpetuation of exclusionary scholarship.

Fara Dabhoiwala teaches in the history department at Princeton, but he was not a signatory to the petition. Which is surprising, since his new book, “What Is Free Speech? The History of a Dangerous Idea” (Belknap), is entirely in its spirit. (Although it is a good rule never to sign a letter you did not write. You will be responsible for every word.)

When we see “a dangerous idea” in the subtitle, we naturally assume that Dabhoiwala means dangerously *good*, in the sense of dangerous to bullies and tyrants. But this is not what he means. He means that free speech is a bad idea. Eisgruber thinks that the maximalist character of American free-speech law is the best thing about it, but Dabhoiwala thinks it's the worst.

When we think of the history of free-speech rights, we tend to think of the Anglo-American legal tradition. A virtue of Dabhoiwala's book is that it is transnational, and there are discussions of free-speech traditions less familiar to American readers. The first free-speech law, for example, was enacted in Sweden, in 1766.

The point Dabhoiwala wants to make is that the Anglo-American concept is not universal. On the contrary, he says, “America is now the only country in the world where even local ordinances against ‘hate speech’ are treated as presumptively unconstitutional.” First Amendment jurisprudence is

absolutist and libertarian. Other nations have speech rights, but they are qualified. Hate speech can be prosecuted in the United Kingdom.

For a historian, Dabhoiwala is rather judgy. He calls free speech “a kind of secular religion, with its own shifting dogmas and hagiography,” an “inherently unstable fiction,” and “a contrived, invented concept.” Of course, all our concepts are invented. They are tools for dealing with the world, which happens to include a lot of other human beings, many of whom, sadly, don’t agree with us.

“The creation and interpretation of rules about ‘free speech,’ ” he says, “is a perennially mutable and politicized process: freedom is never equally distributed.” And he shows that, ever since the idea of free-speech rights arose in eighteenth-century Europe, the concept has been, as he puts it, racialized and gendered. Freedom of expression, like, to a large extent, the franchise, was understood to be a right enjoyed by white men. Even John Stuart Mill, the model nineteenth-century liberal and a feminist, did not think that Indians in British India were ready for free speech. In other words, free-speech rights—like all rights, really—reflect, and therefore can be enlisted to perpetuate, existing power relations.

But we don’t think the right to vote is suspect because the franchise was once restricted. Those restrictions may be shocking to twenty-first-century sensibilities, but aren’t they what we should expect? In a patriarchal and highly class- and race-stratified society like Mill’s England, it is not surprising to find legal rights reproducing those inequities.

We are in a different place today, and one of the things that make us feel we are is the expansion of First Amendment freedoms throughout the twentieth century, beginning in 1919 with the dissents of Justices Holmes and Louis Brandeis, and then in Court rulings in the nineteen-fifties and sixties that protected not only political speech but artistic expression. Yet Dabhoiwala thinks that the trend is all in the wrong direction. He says that, since the

sixties, “American free-speech jurisprudence has gradually abandoned any conception of the common good, beyond its abstract obeisance to ‘free debate’ as the highest ideal.”

The right way to determine what speech should be tolerated, he says, is to give up the “dubious distinction” between words and actions. “Their supposedly different potency,” he maintains, “is just a convenient myth.” We should regulate speech in the same way we regulate behavior. It is “perfectly reasonable to oppose utterances that you believe to be seriously harmful,” Dabhoiwala says, “and to argue that these shouldn’t qualify as ‘free speech.’”

Which is exactly what Trump argues. I hope that he has given Dabhoiwala second thoughts. When academics tried to stigmatize certain terms and beliefs, as they did at Princeton, they forgot the first rule of free speech: the postman always rings twice. Today’s policed are tomorrow’s policemen.

If the Administration’s actions are so blatantly unlawful, why does everyone seem to be caving? Some of it is just cost-benefit analysis. Paramount, which owned CBS, wanted to merge with Skydance Media, a transaction that required government approval. The company calculated that it was not worth jeopardizing the deal over a news program, which is a tiny piece of its empire. Jimmy Kimmel’s show was suspended after Nexstar, which owns some thirty ABC affiliate stations, put pressure on Disney, which owns ABC. Nexstar intends to buy a competitor, Tegna, which owns thirteen ABC affiliates, and the transaction needs F.C.C. approval. (The following week, after a “thoughtful conversation” with Kimmel, ABC reinstated the show, but Nexstar and Sinclair said that their affiliates would not air it.)

Government agencies can be challenged in court, and some of those challenges have succeeded at the appellate level. But the buck has generally stopped at the Supreme Court. For some whom the government now casts as enemies in the free-speech wars, that’s a worry. Universities that shut down

or rename their diversity offices are not merely trying to appease the President. They anticipate that the Court will back government agencies that interpret “diversity” as an alibi for impermissible racial classification, in violation of the equal-protection clause and Title VI. Professors who complain that their schools are “caving” when they drop the term “diversity” should know this. But university presidents can’t tell them the reason they are renaming diversity offices, because they would basically be telling the Court that they’re cheating and are just racially classifying students under a different rubric. So there is a lot of crosstalk.

In the case of the attacks on the First Amendment, one big concern (unmentioned by Eisgruber) is the future of *Sullivan*. Members of the Court, specifically Clarence Thomas and Neil Gorsuch, have indicated an interest in overturning that holding, thereby reinstating a lower bar for libel suits by public figures by removing the “actual malice” requirement. There is little reason to assume that, given the right occasion, this Court will not overrule *Sullivan*, handing Trump another weapon in his war against free speech. Of course, if the law were to change, it might not be a total win for him. After all, no one is more reckless with the truth than Trump. He could be sued almost every time he opens his mouth. ♦

*An earlier version of this article misstated the category of person covered by the “actual malice” standard in the original *New York Times v. Sullivan* decision.*

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