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A Defense of Free Speech

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Review of *Free Speech on Campus*. By Erwin Chemerinsky and Howard Gillman. Yale University Press. 197 pp. \$26.

Free speech is under attack in colleges and universities throughout the United States. A survey taken in 2015 revealed that 72% of students at Yale believe university officials should take disciplinary action against anyone on campus “who uses language that is considered racist, sexist, homophobic or otherwise offensive.” Another poll found that about 50% of students nationwide support shouting down offensive speakers – and perhaps one in five do not oppose the use of violence. A not insignificant number of professors, no doubt, agree with these sentiments.

In *Free Speech on Campus*, Erwin Chemerinsky (dean and professor of law at the University of California, Berkeley School of Law) and Howard Gillman (chancellor and professor of law, political science, and history at the University of California, Irvine) examine the tension between protecting free expression and promoting a safe, supportive learning environment for members of minority groups. After a careful review of Supreme Court decisions on free speech, the authors assert “there is no way to define an acceptable punishment-worthy idea without putting genuinely important new thinking and societal critiques at risk.” And so, Chemerinsky and Gillman maintain that all expressions of ideas should be permitted in colleges and universities, “no matter how offensive or uncomfortable they make people feel.”

Acknowledging, however, that “words can cause real harm and interfere with a person’s education,” the authors also suggest steps campuses can and should take “to create inclusive communities where all students feel protected.”

Cogent, concrete, and controversial, *Free Speech on Campus* might well help launch candid and long overdue discussions, on campuses and elsewhere, of hot button issues, including “hate speech” codes, trigger warnings, safe spaces, threats and harassment, protests that disrupt public events, online speech, and racist symbols.

Chemerinsky and Gillman claim there is no middle ground. Colleges and universities must “choose between the absence of free thinking and a completely unregulated free marketplace of ideas.” Protecting free speech, they write, means that Professor Steven Salaita should not have been fired from the University of Illinois because he posted incendiary tweets during the Israeli-

Gaza crisis; a faculty member should not have faced sanctions for wearing blackface at an off-campus Halloween party; a tirade against Asians, spread over the Internet, should not result in institutionally-imposed punishment. Citing the Supreme Court opinion in *Snyder v. Phillips* (2011), the authors argue that speakers should not be disciplined or held liable for remarks that cause emotional distress.

Campus hate speech codes, Chemerinsky and Gillman point out, were repeatedly and unambiguously deemed unconstitutional by the courts in the 1990s. The provisions in the University of Michigan's code, a federal judge declared, were so broad and vague that it was impossible to discern any limits on their applicability. Inevitably, the authors conclude, hate speech codes punish political beliefs, "with arbitrary and often surprising results." At Michigan, for example, twenty blacks were charged (by whites) with racist speech; no white was disciplined for racist speech. Protecting all speech, including hate speech, is necessary, the authors emphasize, because the alternative, a grant of authority to government "creates even more harm."

As does "safe space activism." Although they strongly support programs that sensitize students, faculty, and staff to words and statements that might be offensive, Chemerinsky and Gillman assert that campuses should not accommodate the establishment of safe spaces designed to protect individuals *from* the expression of ideas; they should create safe environments *for* the expression of ideas.

Although they never quite say so, Chemerinsky and Gillman are not free speech absolutists. They believe that the state can punish defamation and impose penalties for false claims in advertising. They support the right of colleges and universities to set reasonable restrictions on the time, place, and manner in which speech is expressed. They concur there is no First Amendment protection for a "true threat" that causes an individual to fear for his or her physical safety. And they agree that freedom of speech does not confer a right to harass a person on the basis of his or her race, sex, religion, or sexual orientation.

Might these "exceptions" constitute a free speech "middle ground"? Proponents of free speech, it seems to me, may well differ about what constitutes a "true threat." Or what speech qualifies as "discriminatory harassment." Indeed, the authors themselves point to a recent decision in Oregon that designates a professor's offensive statements as discriminatory harassment. It might be useful, moreover, to learn more about the impact of "hate speech" codes in Western Europe. Have they had a chilling effect on free speech?

A no-holds-barred discussion in colleges and universities might also investigate the role of free speech, if any, on the choice of speakers brought to campus; the institution's responsibility to provide and pay for security for controversial speakers; and decisions to disinvite speakers.

When it comes to free speech, there is a lot to talk about. So, let's get started.