

*Book Review*  
*of*  
**FREE SPEECH ON CAMPUS**  
**BY ERWIN CHEMERINSKY AND**  
**HOWARD GILLMAN**

*By*

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If you haven't noticed on your own, at the frequency of about every other day for the past three years a piece has appeared in the "Chronicle of Higher Education" that references "free speech."<sup>1</sup> It is by now pure platitude to say that free speech issues permeate college and university life for students, faculty, administrators and campus guests,<sup>2</sup> that the issues presented are complicated,<sup>3</sup> or that there is no answer to questions that require reconciliation of First Amendment ideals with the evolving cultural norms and mores of college and university life.<sup>4</sup> While the issue of free speech on campuses is, as Erwin Chemerinsky and Howard Gillman write in *Free Speech on Campus*, "as old as universities and as current as the daily news," they wrote the book because they "believe that colleges must promote inclusive learning environments in a way that also preserves and respects the unfettered expression of ideas on campus."<sup>5</sup> To be sure, the need for an explication of this topic has perhaps not been greater.

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1 An online search of the *Chronicle of Higher Education* ([www.chronicle.com](http://www.chronicle.com)) conducted May 22, 2018 for articles containing the term "free speech" reveals that 638 pieces containing this term were published in the past three years.

2 See, e.g., Alina Tugend, "Colleges Grapple with Where—or Whether—to Draw the Line on Free Speech," *The New York Times*, June 5, 2018, available at <https://www.nytimes.com/2018/06/05/education/learning/colleges-free-speech.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news>.

3 See, e.g., Lata Nott, "The First Amendment Doesn't Guarantee You the Rights You Think it Does," *CNN Politics*, August 8, 2017, available at <https://www.cnn.com/2017/04/27/politics/first-amendment-explainer-trnd/index.html> (saying of the First Amendment's text that "[t]here's a lot going on in those few sentences").

4 See, e.g., Susan Kelley, "Psychologists: 'There is No alternative To Free Speech,'" *The Cornell Chronicle*, May 2, 2018, available at <http://news.cornell.edu/stories/2018/05/psychologists-there-no-alternative-free-speech>.

5 FREE SPEECH ON CAMPUS, Erwin Chemerinsky and Howard Gillman, Yale University Press, 2017, xi.

The reasons why this book makes an impact are numerous but chiefly *Free Speech on Campus* is an accessible, concise, and yet remarkably thorough reference on issues faced by campuses with regard to the First Amendment. It goes into significant depth and detail while maintaining a level of accessibility and clarity that will aid students, faculty, campus counsel, and broader administration alike in comprehension and understanding of the issues. For anyone seeking to explain to students or colleagues the complexity of free speech issues on campuses, or the interplay of freedom of expression and academic freedom and its centrality to the advancement of knowledge and our democracy, this book is a tremendous resource.

The authors begin with a summary of notable instances of free speech episodes on college campuses.<sup>6</sup> This compendium works not only to contextualize the book but also to convey the depth and breadth of freedom of speech issues in the context of daily college and university life. From controversial guest speakers and articles to trigger warnings, Halloween costumes to Greek life, the very act of compiling recent events is evidence of the timeliness of and need for the book. From there, Chemerinsky and Gillman explain their central thesis that:

[A]ll ideas and views should be able to be expressed on college campuses, no matter how offensive or how uncomfortable they make people feel. But there are steps that campuses can and should take to create inclusive communities where all students feel protected.<sup>7</sup>

The challenge stemming from this argument, they admit, “is to develop an approach to free speech on campus that both protects expression and respects the need to make sure that a campus is a conducive learning environment for all students.”<sup>8</sup>

To support the claim that all ideas are entitled to expression on college campuses Chemerinsky and Gillman outline a thorough history of free speech, contextualizing its importance as central to freedom of thought and in turn our democracy.<sup>9</sup> The authors follow this discussion with a chapter tracing free speech and expression specifically at colleges and universities with a focus on the interplay of free speech and academic freedom.<sup>10</sup> For anyone working or living in higher education who may benefit from a renewed sense of purpose, this chapter should be required reading. The authors’ account of the importance of the free exchange of ideas in educational institutions would give even the most cynical or faint of heart renewed inspiration about the hallowed role of education in society and to democracy. The authors provide an account of the transformation of education from a system of indoctrination, primarily religious, to a system of free thought, pointing out that “[i]f we still thought that the purpose of higher education was indoctrination, there would be no need for freedom of thought and speech. If one starts from an assumption of already knowing the truth—religious, political, or otherwise—then higher education is merely about instructing students to become

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6        *See id.*, Chapter 1.

7        *Id.*, 19.

8        *Id.*

9        *Id.*, Chapter 2.

10       *Id.*, Chapter 3.

disciples.”<sup>11</sup> Chemerinsky and Gillman harken to the plight of Galileo—whose theory of a heliocentric solar system was widely rebuked and denounced—as an example of the degenerative qualities of a system of indoctrination as opposed to one based on free thought and open inquiry.<sup>12</sup>

From a discussion on the centrality of free speech and expression to democracy and the academy, the authors turn to what has become a centrally controversial topic on campuses: hate speech.<sup>13</sup> Chapter Four is an invaluable resource summarizing the basic rules around hate speech and tracing the caselaw on campus speech codes. This chapter culminates in perhaps the toughest assertion of the book: that attempts to limit hate speech “inescapably” result in a “ban [on] the expression of unpopular ideas and views, which never is tolerable in colleges and universities.”<sup>14</sup>

Acknowledging that “[t]hose of us who believe in free speech values will not win over this generation of students by mocking them, calling them weak or coddled, or dismissing their legitimate concerns,” the authors then devote the following Chapter Five to the question of “What Campuses Can and Can’t Do.”<sup>15</sup> The authors affirm that Colleges and universities “can never punish the expression of ideas” and that the central purpose of colleges and universities necessarily “requires protection of all views, no matter how objectionable or offensive they may be to some students and faculty.”<sup>16</sup> Affirming that campuses can instead censor and punish speech that falls within the legal definitions of harassment, true threats, or other unprotected speech areas such as destruction of property, the chapter is substantively rich with how current doctrine might apply under various factual scenarios to colleges and universities. Offering advice in terms of “can and can’t do”<sup>17</sup> scenarios, this chapter is functionally a desk-top reference for current fact patterns on campus that may involve threats, harassment, or other unprotected speech, providing helpful guidance and frameworks for faculty and administration navigating these issues in real time.<sup>18</sup>

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11 *Id.*, 50.

12 *Id.*

13 *Id.*, Chapter 4.

14 *Id.*, 110.

15 *Id.*, 111.

16 *Id.*, 113.

17 *Id.*

18 An aspect of these issues that the chapter does not treat in detail is the impact of social media and strategies for dealing with social media. For an interesting account of the impact of social media on the recent events at U.C. Berkeley see Andrew Marantz, “How Social-Media Trolls Turned U.C. Berkeley into A Free-Speech Circus,” *The New Yorker*, July 2, 2018, available at <https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus> (“Speech is fundamentally different in the digital context,” [Carol Christ] said. ‘I don’t think the law, or the country, has even started to catch up with that yet.’ The University of California had done everything within its legal power to let Yiannopoulos speak without allowing him to hijack Berkeley’s campus. It was a qualified success that came at a steep price, in marred campus morale and in dollars—nearly three million, all told.”).

Chapter 5 concludes with “An Agenda for Campuses,” a bulleted list of suggested action items for campuses seeking to ensure both the free exchange of ideas and the well-being of students in an inclusive living and learning environment.<sup>19</sup> All on the list are good suggestions but each would certainly have differing applications in practice across the spectrum of higher educational institutions. For example, what constitutes a “clear and effective grievance procedure for those who believe the institution is not taking seriously its legal obligations to create nondiscriminatory workplace and learning environments”<sup>20</sup> may differ from public institution to private, or research institution to liberal arts college. In my view, however, most if not all of the items on their list are fundamentally educational in nature: trainings, clarity around procedures and reporting, effective grievance procedures, clear and strong position statements, “sensitizing” a community, and speaking up and speaking out. This educational purpose cuts across typology in higher education, and is centrally positioned in the core mission of the advancement of knowledge within the context of academic freedom. Each suggestion is rooted in their central tenant that “[o]ne of the most powerful tools that campuses and their officials possess—and one too often overlooked—is the ability to speak.”<sup>21</sup>

My greatest evidence for the impact of this book came when I was an invited guest in a political science seminar called the “Politics of Higher Education” at Hobart and William Smith Colleges where I serve as Vice President and General Counsel.<sup>22</sup> The class session could easily have been described as a microcosm of the data on the issues surrounding the topic of free speech. *Free Speech on Campus* was assigned reading for the class and the message back from at least this subset of students was clear: students today question wholesale worship at the altar of the First Amendment that comes at the expense of respect, dignity, and a sense of personal safety.<sup>23</sup> Students in the seminar grappled with the notion that something could be deliberately hurtful, indeed hateful, and yet still “protected.” Vigorous discussion ensued. While the conversations were not easy by any measure, *Free Speech on Campus* provided a clean and succinct framework for discussion and open critique, and a resourceful entrée to the issues. Ultimately, I think, the students left with a deeper understanding of the nuance of the issues at play. This could indeed be the ultimate success of this work and the authors’ success in having written it: to have made a complicated subject less so, to have used words and dialogue to educate students about the multiple perspectives which these important issues raise.

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19 Chemerinsky and Gillman, *Id* at 150.

20 *Id.*

21 *Id.*, 146.

22 I am grateful to Associate Professor of Political Science Justin Rose for the invitation and to the class for their insightful discussion.

23 For survey data on this topic see the Knight Foundation’s “Future of the First Amendment: 2016 Survey of High School Students and Teachers” as cited in Jeffrey Herbst’s presentation at the National Association of College and University Attorneys’ February 2018 CLE Workshop on Free Speech and Campus Unrest.