

Vincent Munoz:

I think what we need to do is explain how our principles of free speech, free inquiry will help serve the cause of justice.

Betty Friendan:

The First Amendment, the constitutional freedom of speech and freedom of conscience that is the bulwark of our democracy.

Bettina Aptheker:

There was a passion in what was being said affirming this, what people considered a sacred constitutional right, freedom of speech and freedom of association.

Michelle Deutchman:

From the UC National Center for Free Speech and Civic Engagement, this is Speech Matters, a podcast about expression, engagement, and democratic learning in higher education. I'm Michelle Deutchman, the Center's executive director and your host. Many of our Speech Matters episodes are dedicated to discussing how the pillars of our democracy, including expression in higher education, are cracking under the pressures of political polarization, voter suppression, and the curtailment of rights for women, members of the LGBTQ+ community, and others. Today's guest, Dahlia Lithwick, has been sounding the alarm for years now about the ongoing damage to democracy. She does this through her work as a senior editor at Slate, where she has written her Supreme Court dispatches and jurisprudence columns since 1999, and through her award-winning Slate podcast, Amicus. As a huge fan, I am over the moon that Dahlia is joining us today and I think I'll have to talk extra fast because there are so many issues I hope we can cover.

But first, let's turn to class notes, a look at what's making headlines. Class notes today will be quick since we are covering so much in our main show. For starters, according to a new Wall Street Journal NORC poll, confidence in the value of a college degree has reached a new low. The survey found that 56% of Americans think earning a four year degree is a bad bet. This number is up from 40% a decade ago. Cynicism was strongest among people who have college degrees as well as among people ages 18 to 34. This decline in confidence correlates with the 15% decline in US college enrollment, which has also occurred in the last 10 years.

Much attention has been focused on the Sunshine State and its recent legislation aimed in undermining higher education, but Florida is not an outlier in this regard. It has been joined by states including Tennessee, Montana, Arkansas, Texas, and Ohio. Ohio's Senate Bill 83 stands out as being particularly egregious. Provisions include banning many diversity initiatives, requiring annual faculty performance reviews, creating new graduation requirements, potentially barring Chinese students from enrolling, as well as mandating the language that colleges must include in their mission statements.

Finally, this past Thursday, there were two pieces of news related to the transgender community. First, the U.S. Department of Education announced a proposed rule interpreting Title IX that will prohibit colleges from categorically banning transgender students from competing on certain athletic teams because of gender identity. Second, the U.S. Supreme Court refused to reinstate a West Virginia law that prohibited transgender athletes from playing on girls sports teams.

Now back to today's guest. As I mentioned at the top of the episode, Dahlia Lithwick is a senior editor at Slate where she writes about the courts and the law. She's also the host of my favorite podcast, the insightful and informative Amicus. I'm always Sad Dahlia on the off Saturdays. Her work has appeared in

publications including the New York Times, Harper's, the New Yorker, the Washington Post, the New Republic and Commentary. She teaches at the University of Virginia School of Law and is the author of *Lady Justice: Women, the Law, and the Battle to Save America*, a must read for people interested in learning about some of the unsung heroines on the front lines of safeguarding democratic values. Some people get starstruck interacting with Hollywood celebrities. I'll admit that it's happening to me just from having you, Dahlia, on this podcast. Given the political and legal headlines in just the last week, you know, the indictment of a former president, expulsion of two members of the Tennessee House of Representatives for exercising their First Amendment right to protest and the ruling by a Texas District court judge to invalidate the FDA's approval of mifepristone, a commonly used abortion medication, I can only imagine how busy you are. Thank you so much for taking time to join me today.

Dahlia Lithwick:

Michelle, it's such a treat to be with you and I am so psyched that you gave that introduction because I think we forget that each and every one of these banner headline grabbing stories actually has a First Amendment speech valence, and every single one of them is massively inflected by First Amendment speech concerns and it's just really, really hard to get. It's easy to sort of look at these in sort of atomized silos, but every single one of them in some way or another raises urgently important speech and freedom of speech concerns, and so I'm very, very psyched to be here on a week where, yes, it is true my head is exploding. But also, I think that the extent to which we can lift up for listeners the ways that speech is on the line in almost every single one of these cases is really, really useful and important.

Michelle Deutchman:

Thank you. I mean, of course that's how I feel since the center focuses on expression and engagement and democratic learning and we focus on it in higher education college campuses, so that's where I thought I would start today. Much has been made of an incident that happened a few weeks ago at Stanford Law School, which I believe is your alma mater. As a refresher for listeners who haven't been reading the reams of commentary about this event, I'll do my best to set the table for our conversation. Stanford Law School's Federalist Society invited Fifth Circuit Court of Appeals Judge Kyle Duncan to give a speech on campus about guns, COVID and Twitter on March 9th. Students gathered to protest Duncan's arrival, many with posters condemning him and his role as lead trial and appellate counsel in a case that stopped transgender people from using the bathroom of their choice at state institutions. He entered the classroom building filming protestors on his phone. Soon the protestors outnumbered attendees and Duncan was continuously interrupted and ultimately cut short due to the heated interactions between Duncan, the student protestors and Stanford Law School's Associate Dean for Diversity and Inclusion. Tirien Steinbach. Two days after the event, Stanford's President and its law school Dean issued an apology to Duncan. Later that month, law school Dean Jenny Martinez announced that Dean Steinbach was on leave and that all Stanford law students would take part in a mandatory half day of training, quote, "on freedom of speech and the norms of the legal profession," close quote. Commentary about this incident has appeared in publications including the Washington Post, the Atlantic, the Wall Street Journal, and of course in Slate by your partner in crime, Mark Joseph Stern. Yesterday's Sunday New York Times featured the incident in an article on the front page. So Dahlia, all this lead up to ask you what is it about this incident that seems to be capturing the zeitgeist?

Dahlia Lithwick:

It has something for everyone, doesn't it? It's really, it's amazing. It could be a Netflix movie in that it sweeps up all the words. We get woke. We get cancel culture, right? We get bullying, tone policing. It's

got absolutely a frame in which everyone can see their own ending, which I think is so interesting in this case, right? I mean, the reason it surfaces is, Ed Whelan at the National Review online posts a pretty carefully edit snippet of it that kind of initially frames, "Oh, this is a well-meaning federal judge getting shouted down by evil students," And then there's other film that is put up that shows different things and then you get a kind of unerring circular he says, she says that really I think allowed everybody to frame it exactly the way they wanted to to suit their own purposes.

I think in some ways for me it goes to the zeitgeist of a moment in which the whole world is a public arena for performing both fury and umbrage and grievance, and you can cherry-pick from any incident enough video and audio to suggest whatever you want to suggest. So, nothing about this is new. I guess what's new to me is, as you said, it's in the pages of the Wall Street Journal. It's in the New York Times. There's nobody who hasn't opined on this and yet nobody, as far as I can tell, Michelle, tell me if I'm wrong, has in any way suggested what the fix is. Like the fix is Dean Jenny Martinez has tried really hard to lay out a robust argument for free speech on campus, but it's kind of the thing we've seen before and it's kind of the thing we'll see again.

Every op-ed reads like a version of an op-ed I've read 10 times. But I guess I want to ask this question. One of the things this is so salient around is what are we teaching our students? What are we teaching our law students? And put aside the umbrage and the outrage of cancel culture and wokeness. I'm trying to figure out what lesson the Stanford law students learn from all this other than the grownups don't know what they're doing.

Michelle Deutchman:

Well, and you anticipated kind of where I was going. You're a lawyer, I'm a lawyer. Of course this isn't the first shout down that's happened on a college campus, but there have been a number of incidents in recent memory happening sort of in these hallowed halls of elite law schools. Not just at Stanford, but at Yale and at University of California College of Law in San Francisco, and so I sort of wonder again, what does it mean for young lawyers? What does it mean for the legal profession, and should we be doing something different in law schools for instance than when we are responding to these things in other situations?

Dahlia Lithwick:

I mean, it feels to me that one of the first orders of business has to be that we don't respond reflexively to the first, right, the first cut of what happened and that every one of these incidents is staged in some ways, probably by both sides in some ways, to construct a narrative that elicits immediate response, right? If people can get fired, if you can make sure that the speakers involved can write 10 op-eds in 10 legacy journals in the next two weeks, mission accomplished. Doesn't really matter what happened and doesn't really matter what's going to happen because you've kind of planted your flag in this debate, and so I think one of the lessons is despite the imperatives of Twitter and cable news to get this thing resolved in the first 20 seconds, every time we do that, we miss part of the picture, and I actually think that while that piece you referenced in the Times felt like it was retreading a lot of ground, one of the things that was interesting is the new ground that it resurfaced, including a really interesting relationship between the head of the Federalist Society at Stanford and the administrator who ended up being put on leave over this.

I mean, it actually looks as though this particular episode actually did damage to a longstanding free speech relationship across ideological lines that had evolved over time and care at Stanford, and so I think it's not just that we react reflexively and badly to snippets of things that we see on social media. That I think we could stipulate is a mistake and certainly a mistake on college campuses to react to that.

But I think that we are also burning down preexisting relationships and trainings, and one of the most interesting things that Dean Steinbach says repeatedly is she actually was doing her deescalation techniques. She was doing the thing that she believes she was trained to do, and while she may have erred in saying some of the statements she said, it's really heartbreaking to me not just that these episodes, as you say, get inflamed to the point that we're making policy based on 12 seconds of video, but we're actually destroying whatever structures had been built up in these institutions to try to stop this from happening or at least to minimize the damage.

I think maybe one of the useful things for us to think about is if we could agree that this was mishandled at Stanford, could we start to have a conversation about all the things that could have worked that were in place, that there was a relationship there, that there was trust built there and that all of these folks who kind of bigfoot in both on campus and I think in the press, what do they do to do violence to structures that actually were trying to forestall the very harm that happened? Does that make sense what I said?

Michelle Deutchman:

It absolutely does, and I'm often familiar with this idea of talking about free speech issues involves a lot of nuance. It's like peeling an onion and people don't have patience for that, right? They want to know the answer. They want a quick fix. They want something that they can tweet or message off so they can get a lot of likes. I think you make an excellent point to talk about the difference between deescalation and enforcing codes of conduct because the Dean went really out of her way to explain that wasn't her role, right? And again, the relationship that you point to that came out really in the New York time piece is very much like a P.S. except it's integral to what happened, and we're talking we're almost six weeks out of the event and that's just coming to fruition. So, I think those are really important points. I guess the only other thing I'll ask you about this incident is there's been lots and lots of editorials and a lot of them have been saying, "See? Here we go. Just another example of the mob woke left being censorious," and I'm curious like how you would respond to that argument in particular, because I think it gets a lot of traction.

Dahlia Lithwick:

I mean, I think, look, there's some truth to it, right? There is some truth to the fact that students in many ways go into these events and they always have and they always will, and this is not new, right? This was happening when I went to law school. This was happening in the 1960s, right? Students go into events with speakers whose values and opinions they hate and they interrupt and they are rude and they try to shout them down, so none of that is new. What's new I think is this framing that is this is somehow emblematic of a catastrophic failure of education at every level and that the thing we need to do to cure for this is either, I don't know, ban books or not let certain speakers come to campus.

Like the idea that this thing that has happened since the time of Socrates, which is the students just like to yell and it's their right to yell and we can try to modulate and this is what the conduct codes do, right? Like can you cut someone off? Can you hold up a sign? Can you make noise? That's the nuance you're talking about. That's the thing we're trying to regulate. But oh my god, the idea that this represents a structural failure of higher education is opportunistic in the extreme. And so I think that the thing we need to hold in our minds is A, and this is by the way all the stuff that Stanford has been trying to figure out in all these other campuses. Chicago and everywhere you look has been trying to figure out how do you hold in your minds, A, controversial speakers need to be allowed to come to campus period. B, students need to figure out how to listen and be civil and not ultimately make it intolerable for speech to happen on campus. Those two things I think are the starting points we all agree on.

The problem is when you weaponize that conversation in order to say, "Now we are going to dismantle free speech protections as we know them on campuses and we're going to in the interim time also dismantle campuses and defund universities and create our own"... Like that's the real danger, and so I think you're asking both a micro question that is really inchoate but important, which is how do we ensure that students, particularly law students, encounter ideas they hate, can respectfully engage with, right? This is the heart of the legal process. This is why we do Socratic method. So, how do we ensure that that happens? But then this might really huge macro question, which is much I think more chilling, which is what are we doing when we're stepping into a moment where, and we've seen this some, in this case Republicans want to what? Bar these kids from practicing law. They want to take away Stanford's accreditation.

Like that's the macro stuff we should be very, very worried about, invalidating an entire law school based on an episode, and that's I think where this stops being a conversation about free speech and starts being a conversation about using free speech as an opportunistic effort to sort of defund and deregulate places of higher learning, and that's the stuff that really, really scares me more than any of these episodes, which I think you and I would agree are complicated and fraught and need to be thought about in complicated and fraught ways, but that's not where this is going. This is going to, we're taking money away from your university or we're taking away its accreditation. That's not about speech anymore. That's about power.

Michelle Deutchman:

No, I think you've captured it so well. I mean, one of the things I really enjoy about the work that the Center does is that campuses are a microcosm, but I think they're very representative of the larger things that are happening in society and I think that you've explained that very well. The same way that there's a narrative that the sky is falling, there is this crisis of free speech and students, particularly students who have conservative viewpoints can never speak on campus, right, and that just furthers, I think, the idea that this is why we need legislators to come in and make content-based decisions about what can be taught and who can teach it and how they can teach it, right? That we're then using this sort of narrative as a stepping stone to much more terrifying things that ultimately are going to undermine not just higher education but democracy.

I think I want to kind of move that way kind of via Charlottesville and we're going to get to these questions of how we're using, how the First amendment is being used. I mean, it's obvious to me that you have written so much about your experience processing and responding and living through what happened in 2017 in your then hometown of Charlottesville, Virginia, and of course I want to acknowledge that what happened during those events of Unite the Right went far beyond protected speech. Nevertheless, I want to focus on that piece of it and I want to actually quote Friendly Justice. Your then 12-year-old son who the day before Unite the Right said, quote, "If we engaged with the Nazis, we would lose, and if we ignored them, we would also lose." And then you continued by writing, quote, "He was correct on both scores and the lingering question of how to deal with bigots who feed off the outrage they engender seems like the defining question of our lifetimes," unquote. So, I'm going to have to pose that defining question to you, not to ask you for the answer or a answer, but just to share your thoughts on this conundrum, one that I know I struggle with in these sort of spaces where people are largely all leaving unsatisfied. What can we do to alter the framework potentially so it's not lose lose?

Dahlia Lithwick:

I mean, first of all, I just have to say that my now 17-year-old son is bitterly, bitterly upset that his only quote in the book is, as he says, nihilism. He's like, "The whole world thinks I'm like this mini nihilist," and so I want to just offer him both deep admiration for construction of a sentence with the word nihilists in it, but also that it makes him super, super sad that this lose lose formulation is often one that I am questioned on. But he just feels like he hates the idea that he is sort of an avatar for hopelessness because he's actually a cheerful and funny guy. Okay. I just needed to get that off my chest. Look, I think in a lot of ways the whole Kyle Duncan, Judge Duncan moment you and I just deconstructed is perfectly replicated in Charlottesville, right?

If you go back, and I really urge people to go back and read the trial transcript from the case that Robbie Kaplan and Karen Dunn brought against the perpetrators of that, just to get grounded in the fact that that was constructed as exactly the same problem, a free speech problem, right, where you have a bunch of guys who come to town. They want a permit. They say that this is going to be a lawful demonstration of alt-right power and they get a permit and it's analyzed, right, by the judge somewhat correctly under good old-fashioned ACLU principles about free speech, after Skokie, right?

Everything is constructed exactly as you've just described Judge Duncan, which is, "Oh, by the way, I came in filming myself," right? "Because I wanted to both provoke a violent response," and it's very clear if you look at the planning memos of the organizers of Unite the Right. This is not Judge Duncan, but at Unite the Right, that was the point, to provoke lawless violent response that could be responded to in-kind. So, we're not in Skokie land anymore. This is not a speech problem. This is a violence problem. The day after the Unite the Right rally in August of 2017, Mark Stern and I wrote that you can't analyze a case like that under pure Skokie structures if people are carrying weapons, right? Once they have guns in their hands, and this is going to become more and more prevalent. In some sense, this is Kyle Rittenhouse. In some sense we're going to see this over and over.

If you are allowed to open carry a gun to a protest, you can't analyze it as a protest. It is now something else, and we don't have First Amendment doctrine and we don't have Second Amendment doctrine that tells us how to think about that, I think, doctrinally, and so then you're being set up, right? You're being set up to look at this as a pure free speech problem under the good old like mid 20th century values of incitement and imminent lawless action and whatever else. Chaplinsky. Whatever test you want to use that is totally in apposite when you have people coming into an event to incite lawless response and then to respond by crashing skulls together, which is the texts that these guys were sending each other.

So I think part of the problem you're posing is what do you do when we keep thinking of this? And I guess this was my answer to the defunding university's question. We keep thinking of these as speech problems and wokeness problems and cancel culture problems where in fact they are structural democracy problems, and for me a huge part of that is vigilantism and violence, right? Which I think about all the time because to me Kyle Rittenhouse is not a story about anything other than empowering vigilanteism. So I think, getting back to your original question, I think that part of what my son was trying to express in that chapter and what you and I are trying to think through now is that in an attention economy when everyone is filming themselves, right, and everyone needs to be the first one out the shoot framing the narrative because that's how you get clicks and money and your sub stack gets a million, right?

So, we know this is the economy. It's getting people to pay attention. And in that economy, I think my son is kind of descriptively right. If you pay attention to Marjorie Taylor Green. If you pay attention to Donald Trump, you are in big trouble. If you don't pay attention, you are also in big trouble. The other thing I just want to pull through from our discussion of Judge Duncan is that you may recall from some of the stories that what Stanford tried to do was create like a third space, right? You engage directly with him, you ignore him, or you go to this safe space and you are in this intermediate land of, you can

be together but not alone, and that was one of the solutions they put forward in Charlottesville, right? They really had an alternate event that people could go to so they wouldn't feel inclined to punch a Nazi.

It seems to me that response, and I guess I'm curious what you think, but the response that we just have a split screen where some of us go to a venue and agree with other people that we agree with and we let the Nazis and the Klansmen and the supremacists go to their venue and we let them agree with themselves has to be descriptively wrong. I mean, that can't be the solution. I understand it's a solution in a world where people carry guns, stipulated, but I think one of the things that we're trying to do is build red state blue state debate in which we only talk to ourselves and then we say it's the curative for this everybody loses problem, and I think actually the more we don't engage with each other, the more likely it is that everybody ultimately loses. Maybe not in this street battle, but in the next one. I don't know if that's way too meta for a Monday conversation, but I'm very struck by the ways in which thinking that the best thing to do is hive off the people who agree with you and all talk about how mad you are at the other people has to be the opposite of a marketplace of ideas.

Michelle Deutchman:

That's really interesting and I'm processing it because when I work with students and staff and faculty at universities and we talk about how the law is a blunt instrument, right? The law isn't going to help us solve the problem of how you respond to ugly speech that is protected, right? One of the things we do talk a lot about is, and I guess my framing is sort of in this attention economy, what a lot of these provocateurs and speakers want is attention, right, and that they want to become martyrs. Same thing. Charlie Kirk came to Davis twice. I mean, he comes, he has his phone, he's ready. He wants to capture him being shut down. I mean, right? That is the goal. And so part of me thinks it is kind of a good idea not to go hive off necessarily other people, but like why give these provocateurs what they want?

So, take sort of the air out of their sails and go somewhere else and be thoughtful about and elevate different kinds of issues. I hadn't really thought about it from your perspective. I don't know how you see that, but to me I feel like that could be an effective way to respond to some of the issues, though of course not all of them. I think part of the problem is being able to make an assessment of whether the folks that you are wanting to protest are actually interested in engaging in dialogue with you. Right? I don't know how one as students make those decisions about they're going to go to an event, is there going to be an opportunity for question and answer? Is there going to be an opportunity to listen and respond? Or is the goal of the event to really further some of the performances that we had been talking about before?

Dahlia Lithwick:

I love that pushback and I think it really goes to the heart of the problem, right? When the first Nazi torch rally or white supremacist torch rally happened in Charlottesville, my husband, now I'm telling you all about my family, but my husband who's a sculptor actually rejected that there were two side-by-side protests, one of white supremacists and one of people literally singing Peter, Paul, and Mary in the park, and he walked across the park and tried to engage Jason Kessler, who was one of the leaders of Unite the Right in a conversation, and he came away saying, "It was really interesting. Like I was asking him meaningful questions and he had no answers." He had not thought about any of this. He was just saying his white supremacist talking points and there was...

He kind of described it as running up against this blank screen that was just there to screen talking points, not there to engage, and I think that one of the things that worries me when I watch the video of Judge Duncan at Stanford is that by walking in holding a phone and telling students that they're idiots

and telling them read the opinion and saying to them, "I wasn't on that panel" when I think he was on the panel, it just gives the appearance that you're describing. This is not somebody who actually wanted to engage in meaningful kind of discourse on the merits. This is a person who was performing something and we can debate what it was he was performing. But if it's not in fact the exchange of ideas in good faith, then what is the point of engagement? And then your larger question, which I think really echoes my son's question, if you engage with people and you just give them attention and there is no meeting of the minds. There's no sort of good faith standing on the battlefield of ideas and weighing one another's claims, but simply holding up phones to show that you are the victim here, then really what is the point, and there is a cost, I think, of elevating that.

I wish I could give you and my then 12-year-old son better answers, but I do think that this is... I mean, I was one of the people who said, "Why are we all sitting around watching this Donald Trump indictment?" You know, watching a grainy film of a door in a courtroom. Why are we giving this attention when there's so many other things going on? I think that the media in so many ways is subject to the sort of whiplash quick episode, episode, episode, umbrage, umbrage, umbrage. What am I mad about? What am I mad about? What am I mad about? That really allows us to kind of feed every single troll who wants attention, fill up their cup and move on to the next one, and then that passes for analysis or passes even for news, and I just think it's that feedback loop of we love being angry. We love it more than anything. It gives us all the feelings, and the media I think has learned to refract that back to us.

Michelle Deutchman:

Yeah. I mean, there's a reason why in our conversation I'm choosing not to ask you about the indictment because, for all of the reasons that others have written about and talked about, because I think I'd our attention to be diverted some somewhere else, but I think this kind of existential question we're talking about how to respond. Again, it's not new. I mean, I remember when I was at the Anti-Defamation League and the Westboro Baptist Church was making its tour around the country and ADL was very direct with saying to people, "Do not protest near them. Do not engage with them. They want to film you. They want to make money. They're litigious." All of these things. And some people were really angry at us because they felt like, "Who are you to tell us not to exercise our rights?" Right? And so it becomes very complicated.

On that idea of rights, I feel like I want to spend a minute on Tennessee, because one of the things I grapple with daily is working with largely students and people in kind of the younger generation who've basically lost hope in the First Amendment and free speech. They feel like it's been totally weaponized and almost like there's no point, right? And so I spend a lot of time trying to reflect to them how the First Amendment has assisted in social and progressive movements in the past and that it's not only a value of the right, right? And then we see legislators going to actually exercise their First Amendment rights and basically being punished for it. I'm not even sure what I expect you to say, but I feel like to be seeing all of this recasting and then this in Tennessee, I don't even know how to begin to help people reclaim a sense of optimism or empowerment about speech, something I really work on, and I don't know if you have any thoughts on that.

Dahlia Lithwick:

I mean, I have a couple thoughts and the first is back to what I said at the start of the show and you said it actually even before I started talking, which is Tennessee isn't just a fight about disenfranchising voters in some of the biggest minority cities in the state. Right? That would be one conversation. It's not just about vote suppression. It's not just about the optics of white men lecturing young black activists on

decorum. All of that is getting a lot of attention. Tennessee is also about speech fundamentally, right? Because, and Sherrilyn Ifill said this so beautifully on Amicus this week, those activists, the Tennessee Three walked into the chamber with bullhorns because their mics had been cut off, because debate had been structured in such a way that people had, what, 15, 30 seconds to say what they were going to say if they got to say what they were going to say at all.

So at its heart, we forget Tennessee is about who gets to speak and who controls the microphones, and if you are told, right, by the powers that that you may not speak on an issue that is giving voice to tens and thousands of voters who elected you and who want to be heard about gun violence, this is a speech problem again. It's not just a power problem, and so I think it's so apropos that we're talking about it this week on this show because it can and should be cast as a speech problem. What do you do when a super majority takes away your microphone and you don't get to be heard and the voters who elected you don't get to be heard? That's really I think another existential democracy problem, and that has I think a little bit fallen away in the conversation we are having about Tennessee.

But here's the thing I would say that is hopeful. You just said, and it is absolutely true, that in the years after Skokie, the guidance was deny them attention. Right? Go home, stay in your basement. It's a couple of guys in Nazi uniforms. They're there to own you. Just starve them of oxygen. And then God made on the eighth day the cell phone and now you don't need crowds. You need one person and the ability to upload video, right? So the fact that there was just Judge Duncan, a couple of Federalist Society people, a couple of students. There's an amazing moment in the Judge Duncan story where Dean Steinbach says, "I thought I was talking to the students. I wasn't making a speech about civility and public discourse for the world."

So one of the things that I think is so important about what you're saying is that it's a double-edged sword, right? You no longer have the ability to say starve them of oxygen because Marjorie Taylor Green will upload whatever crazy stuff she says onto the internet and tens and thousands of people will hear it. We cannot any longer rest on the sort of 1970s values of if you deny them oxygen, they'll go away. That's why Donald Trump was president. But here's the good news and it is good news. The only reason we know about representative Justin J. Jones, representative Justin Peterson and Gloria Johnson, the white woman who was not expelled from the chamber, is because we saw their speeches, because millions of people got to watch on C-SPAN what they had to say, and I actually think that that's the answer to, yes, speeches being cut off and it is horrifying and that is the most egregious abuse of power.

By the way, one of the things Sherrilyn Ifill said on my podcast that I hadn't fully thought about was that there was no due process. None. They were not told if you say X, then this will happen. It was an utter failure of warning or process or the ability to prepare or have a lawyer, and that's like [inaudible 00:37:14], but it's not unimportant. But I think what is important is that the flip of what you're saying is that you can just be one guy standing alone in a statehouse and millions and millions and millions of people can be rocked to their core by your words, by the truth that you are saying. It's kind of, you've heard me say this before. I say it so often. It's the Homer Simpson line about beer, the cause of and solution to all our problems. It's true of speech, too. It is the cause. It's also true of beer, but it's true of speech, like it is both the cause of the problem that these young black men unceremoniously ousted from a house that has done so, what, four times without process?

That's appalling as a speech problem. The fact that everyone in the country knows it, that the speaker in Tennessee had no idea what was coming, had no idea the peril he has just put himself and his super majority into, the millions of dollars that are going to pour into those special elections. That's because of speech. And so maybe this is a good link to where we started, which is we are in a different era than we were in when all of this First Amendment doctrine was constructed. It didn't assume the power of one woman and her cell phone to change the world, and that's both power to create enormous mischief as

we have seen over and over again and we just saw at Stanford. It's also the power I think to lift up everyone and to say in important and compelling ways to young people, do not give up hope on speech, because look at me standing in the well of the Tennessee statehouse speaking truth to power.

Michelle Deutchman:

That was beautiful, and I am both relieved and comforted by what you've said because that's ultimately what I end up saying to people that I facilitate workshops with, which is the marketplace of ideas is not equal. There's terrible, tremendous power imbalances. The cost of speech, it's not free. That cost is borne by marginalized groups more than other people. But what it does give us is the ability to use or choose not to use our voice on a day-to-day basis, and so I like that there is this sort of sense of empowerment, and I do try to believe that the pendulum I hope will swing back. That's a larger conversation. There's so many different things to talk about. It's hard to know where to go. I do want to go a little bit to the Supreme Court because I do think we're waiting, as you and Mark Joseph Stern talked about, I mean, what's going to happen between now and the end of June is going to be kind of cataclysmic and we could talk about so many cases, but I'm kind of pulling the through line of speech and one of the cases I want to talk about is 303 Creative versus Elenis.

I want to, for the benefit of the listeners, kind of just give a quick truncated version of the facts, right, which is we have Lorie Smith. She's the owner of a website design company. She brought a pre-enforcement challenge, meaning nothing had happened to her yet, she was just anticipating that her rights might be violated, to a Colorado public accommodation law. She claimed that the law was compelling her to speak in a manner that violates her religious beliefs because it would force her to put her creative talents to work to celebrate a same sex union. Meanwhile, this is creating websites. That's her job. And this case raises similar issues to Masterpiece Cakeshop, which was heard in 2018, though there the court sort of did a dodge on the merits and I just am not certain they're going to do a dodge here, and this idea that Justice Kagan shared, it's of weaponizing the First Amendment. To me, this feels like weaponizing the First Amendment and I'm curious if you agree with that assessment and if you can talk about, again, what the potential implications are. Because I think like we've talked about, it's framed as a speech case but the implications are far broader and deeper.

Dahlia Lithwick:

There is so much that is worrisome about 303 Creative versus Elenis and the First Amendment provocation is a part of it, but I think you're right. It's only part of it. At its worst, it stands to invalidate public accommodations laws in half the states that were erected during the Civil Rights era to prevent racial discrimination, prevent discrimination against LGBTQ clients. They essentially just say if you are a business and you hang out a shingle, you provide service to all comers, period, end of story. Right? That's what's on the line. It's huge, and I think you're right, it's also the thin edge of the wedge for using First Amendment claims to further eviscerate civil rights protections around the country for people who object, and you're also right that it's styled as a First Amendment case in the shadow of Masterpiece Cakeshop, which was the cake baker case, except folks will recall that the court kind of just kicked that down the road, didn't fully address the speech issues and seem poised to do that now. Not because anything's changed, but because the composition of the court is now receptive.

The thing I would say about 303 Creative that is most frightening is that in addition to weaponizing speech, it is predicated on a set of events that have not happened. Lorie Smith, the web designer in this case, has never yet created a website for a wedding. She says she wants to move into that. She doesn't want to take the risk of doing it and being sanctioned, and so prior to doing anything at all, she's seeking to get a judgment from the court that her action in so doing is protected. If you think about any

standard for the Supreme Court granting review in a case, the utterly speculative non fact of this case are chilling because while we have a web designer who says she has First Amendment rights that are in peril, we don't have anybody on the other side who's been refused service. There are no sympathetic wedding seeking clients who were turned away.

So we have one half of the story, and if we go back to where you and I began about framing the narrative, the entire narrative belongs to one party in this case because there is no other party, and as a consequence, the court can show vast solicitude to this poor woman who has not yet done anything but wants to do a thing but wants to be protected from the consequences of doing this thing without giving any glancing attention to who will be harmed. That's really dangerous and terrifying. But the other thing that I want to say is that very much as was the case here, we are seeing the Supreme Court start to import into opinions and oral arguments things that are not true.

And so one of the things that Mark Stern and I talked a lot about last year at the end of the term term is folks will remember the Coach Kennedy case, the Bremerton case about a coach who wanted to pray at the end of school football games, and the claim was made over and over and it showed up again and again in the majority opinion written by Justice Gorsuch that this was a private, intimate moment of prayer between a man and his God, and Justice Sotomayor was so affronted by the palpable distortion that she affixed a photograph of the students who felt forced to take a knee and hold their helmets aloft to pray with the coach so they could get playing time.

I just think one of the things in additioning to weaponizing the First Amendment, which Justice Kagan is completely descriptively correct about in 303 Creative, I think the thing that we are seeing, and it has such huge implications for the First Amendment, is non facts creeping into the doctrine as though they are true, and folks do not need to look any further, by the way, than Judge Kacsmaryk's opinion from Amarillo about medication abortion in which so many factual distortions are present in the opinion that it would shock a first year law student to say these are not facts. And so as you said, there's a lot of layers to 303 Creative, but I think that once the court has untethered itself from facts, we are operating in a world in which it almost doesn't matter. It really almost doesn't matter what they decide because they're making it up as they go along, and if that doesn't really chill people to the bone, it should.

Michelle Deutchman:

I mean, it's dystopian.

Dahlia Lithwick:

Yes. And we don't check them on it. I mean there should be every single day an op-ed saying, "This is not true. This is not true. This is not true."

Michelle Deutchman:

I was just going to say what an interesting assignment in law school, which is to take the opinions and be fact checking them, right? To really look at it? I mean, to actually say, and then to have a discussion, like what does it mean if we're of a country that's based on the rule of law, but the rule of law is now based on things that are actually not true? I don't have an answer to that. I do want to give a shout out though to your December 3rd episode of Amicus where I think it was Hila Keren talked about the 303 case, and I thought she did such an incredibly impactful and beautiful job of talking about the way that, again, this case, these facts, this performance is framed is to give a certain visual that paints a certain picture without anything on the other side, and that people just kind of accept it as, yeah, well, I feel terrible for her. I mean, think of her and that baker, right?

And again, it goes back to all the things we're talking about, which is what does it mean that everything can sort of be cropped as like an old-fashioned way, like to crop a photo, right? It's just a little bit of editing. In this case, we made sure to bring a case where there's nothing to edit because there's nobody on the other side. I think we need to just spend a few more minutes before we end talking about the Supreme Court at large, which is that you spend so much of your time writing and talking on Amicus about how deeply partisan it is and how it's out of step with public opinion, and now we have this issue ongoing of lack of ethics. Judge Thomas's travel junket that was underwritten by a GOP donor, and I think the question is, what are we going to do about this court? Are ethics rules going to be enough? Do we need term limits? If you could wave a magic wand, what kinds of things might you do other than replace certain people on the court?

Dahlia Lithwick:

Michelle, this also I think dovetails really elegantly with where we started with Judge Duncan, which is institutions that are under attack for their legitimacy in a very polarized moment have a choice as to whether to protect institutional prerogatives or to jump into the show, and I think that whatever you may think of the Stanford students' behavior at Stanford, Judge Kyle Duncan made a decision to put aside judicial temperament and the rules of the road for a lifetime tenured federal jurist and jumped into the show, I mean literally carrying a camera, and literally becoming an insult comic and trashing students and calling them stupid. I think that it might be worth saying here for all that you may be frustrated with Merrick Garland and his slow moving prosecution of wrongdoers involved around January 6th and Donald Trump, he has made the opposite choice, which is to not be in the show, to be almost Casper the friendly Justice Department ghost, almost utterly invisible because he wants to lift up the integrity and the immutability of the Justice Department over his own interests.

So when I look at the Supreme Court, and I am trying to sound as objective as I can because everyone who criticizes anything now is told they're trying to de-legitimize the court. But if you can accept me at my word that I want the court to be legitimate because I deeply believe you cannot have a constitutional democracy or rule of law without a functioning court, it seems to me that at every turn the players in this who are nine people who have lifetime tenure and who are treated like Gods and can do and say what they want would and should take the decision not to be players in the circus. And yet time and time again, we have seen that with plummeting popularity ratings, with public approval ratings lower than they have ever been in the history of polling, the justices, some of the justices, I don't want to say everyone, takes the decision to re-up, the opportunity to look like you are on Twitter, to look like you're on TikTok, to pretend that you're just playing to your own favorite crowds, and in this case with Justice Thomas, owning the Libs.

I just find it shocking, I have to say, that an institution comprised of nine people, all of whom know, because this is no secret, it's in the Federalist papers, the court has no power beyond public legitimacy, that when they choose to participate in the performance, not just of partisanship. That ship has sailed. Being in the pocket of a donor, a donor who I guess collects Hitler memorabilia. Being in the pocket of a donor and not disclosing and then issuing a statement that's like, "I don't know. I couldn't read the ethics guidance, so I just relied on people telling me that I didn't have to disclose." I mean, it's such shabby, shabby behavior, not just because it assumes we're stupid, which we're not, but because it assumes that he doesn't care about the legitimacy of the court, either.

And so I guess my question is am I for massive court reform? Am I for putting checks on a court that unlike any other constitutional court in the world has unchecked power, right? We've got lifetime tenure. We've got no mechanism for removal. We have complete power of judicial review that is not cabined by any... I mean, I could go on, right? This is a juristocracy plain and simple. This is not in doubt.

The question I have is if you are concerned about the legitimacy of the court, the fixes are really easy. Right? This is low hanging fruit. You don't have to talk about adding seats to the court. You don't actually even have to talk about jurisdiction stripping or term limits. That stuff is hard. Do the simple stuff. Don't go to Federalist Society dinners and get a standing ovation. Don't fly across the country to the Mitch McConnell Center and then give a speech about judicial independence. Don't, Justice Alito, go after journalists by name for talking about the shadow docket.

And so to me, I guess I am at the very dispiriting point, and I hate sort of landing on a dispiriting note, where it seems to me that when journalists who write about this and worry about this are accused of discrediting the court or somehow diminishing the sanctity of the court. The nine actors who are 100% in control of that choosing to do nothing about having no ethics rules, choosing to do nothing. About Clarence Thomas' wife participating in January 6th and his refusal to recuse from that case. That's not on us. That is classic. I love the First Amendment lens here, but shooting the messenger, and I am just truly astonished, and I'm like saying that in the face of Wall Street Journal editorials that are going after, quote, "left-leaning" ProPublica for this well reported story about Justice Thomas's gifts over the years.

You can keep going after journalists. You can keep going after court watchers. You can keep going after people who have to argue before the court, who have to literally stand there and pretend that this is a court that cares about their interests, or you can just say maybe for a year or two, we just don't act like spoiled children. The choice to do the latter, to act like spoiled children in the face of this, gives me so little confidence that, and this somehow maps on to, you know, we're hearing in the sort of legal commentariat that Judge Kacsmaryk's opinion is so bad that there's no way that Brett Kavanaugh and Amy Coney Barrett are going to sign off on it. I have to tell you, I'm in this dispiriting place where I'm just not sure that justices who are incapable of being fair in assessing themselves and their conduct can be fair in assessing what the public will tolerate. Because if they knew how bad what's happening looks up to and including the non investigation of the leak, they would stop, and the choice to not stop and in fact to double down and double down again does not give me a ton of hope going forward for a court that is solicitous of what the public thinks about them.

Michelle Deutchman:

Okay. I mean, the thing is that I don't really disagree, but I think I'm going to say two things and then we're definitely going to, we'll wrap up though. It saddens me. I mean, going back to what you said about Merrick Garland, I do think one thing that you're kind of leaving me with is there's all these incentives to be in the circus, so how might we create a system that creates rewards? Right? More rewards and incentives for behaving in a way that includes integrity and thoughtfulness and intentionality? I don't know the answer to that. It feels like it's very difficult, which is I think a perfect sort of segue to our final question, which is that Lady Justice showcases the possibility for making significant changes by using the law, and I'm wondering, I mean, the audience is largely educators and people who are engaged in higher education, many of whom are aspiring or current lawyers, and jurists, and I'm wondering what are things that they might do or consider if they want to follow in the path of the female legal icons like you profile in Lady Justice? And I don't mean they have to be a Robbie Kaplan or a Venita Gupta. I'm talking about things that we might be able to do in our more day-to-day lives.

Dahlia Lithwick:

I love that you're ending up here because I think in some ways you and I have been sitting throughout this conversation in the discomfit of the Multiplex First Amendment version of democracy. There's 12 screens. The popcorn buckets are bigger than your head. The Cokes are, you know? And we just sit here and we watch all these performances on all these screens of people who know how to capture

attention. If I go back to first principles, and you know these first principles better than me, that's not what we think of as democracy or governance or even a clash of ideas, First Amendment ideas. This is just showmanship, right? And the thing that Donald Trump and his lawyers have weaponized is if we can just make everything look like TV lawyering, it doesn't matter if real legal values or constitutional values or criminal justice values get sacrificed because people are having a good show and they don't care.

What I wanted the book to do, what I hope the book has done is convince young people that democracy is not a big screen enterprise. It's one of the reasons that the book doesn't center Ruth Bader Ginsburg, right? It centers Pauli Murray, a lawyer that nobody's heard about and has no tote bags or mugs. Because I really feel as though this minute to minute, hour to hour work of democracy, of getting on your school board, of getting on your election board, of doing what we're seeing happening in the State House in Tennessee, this is the work of change in democracy. I think that maybe this is a little bit like my meta answer to this whole conversation, which is if you're paying attention to Judge Kyle Duncan shouting at students on a screen, you're not doing the work. You're feeling all the feelings, but you're not doing the work.

What I think, and here I really am again parroting the wonderful Sherrilyn Ifill who makes the point time and time and time again that we are all sitting here on pause waiting for the 2024 election hoping that democracy and rule of law and constitutional values are self executing. If we've learned anything at all, they are not, and whatever it is that we're watching on a screen at this moment has nothing to do by and large with those values. So I think what I wanted the book to do, and this really has been by message to law students who post Dobbs have just kind of in droves written to me and say, "Maybe I'll just give up and become a dental hygienist." Like, "This is pointless. I don't know what to do with my JD." My answer to them is you and I went to law school in a moment when law was really about constraint. You can't do this. You can't do that. This doesn't work, right? We were taught to be very small sea conservative and to color inside the lines.

There's something kind of freeing about knowing that law students right now are just like, "Cool. What do I do? Give me my state constitution. Give me my city and local government. Give me an ordinance and I will move the world." Because I think in fact, unless you're willing to stipulate that every single piece of the machinery of democracy is broken, and it's not, then we are raising up... Here's where I think it's not just young law students. It's all those kids in Tennessee who marched on their state house. It's all of the kids who stood in lines for hours to vote in the Supreme Court election. So, I think that there are these young people who are coming up who are far less scared than you and I are or were of the rule of law as something that was fragile and delicate, and they're willing to pick it up with their bare hands and bend it toward justice using a hundred tools, and nobody taught me about in law school. Nobody did.

So, I'm hopeful because I just think ultimately at the end of the day, this is a kind of game of numbers and we have huge numbers, and the reason that they're stripping people of their seats in the house, the reason they're turning off microphones, the reason in Florida you're not allowed to show up in protest is because there's a lot of us. So, okay. You know what? As long as there's a First Amendment-

Michelle Deutchman:

Bring it on.

Dahlia Lithwick:

We can do it. We can [inaudible 01:01:08]. We can fight it. And I think that the kind of learned helplessness of, I guess I'll just finish here. Robert Mueller's going to come to save us. Oops. Ruth Bader

Ginsburg is going to come to save us. Oops. Jack Smith is going to save us. Fani Willis is going to save us. Alvin Bragg is going to save us. Yes, but we have to save ourselves. It's not happening on a screen. It's happening down the street at your local election precinct.

Michelle Deutchman:

I'm going to pull on the thread of what you talked about of the tools, because I feel like one of the things that keeps me going in the work that the Center is doing is that I'm hoping that we're equipping those people with tools that they can then take with them when they go down the street to their school board, to their precinct, to their state house, and that they have a plethora of tools, that they understand not just how to use them, but why they're important to use, and I guess in the end, that's how I am able to wake up in the morning and open up the newspaper in the Chronicle of Higher Ed and read about the panoply of things that are challenges and just to remember that we can keep working and that there's more repair to do. But like you said, there's lots of people who I hope want to do it. And with that, I want to just thank you so much for sharing your insight, expertise, brilliance with us today, and I want to give you an opportunity if there's any other final words you have before we let you go back to write whatever it is that you're going to write for Slate.

Dahlia Lithwick:

No. I want to say thank you, Michelle, for both this conversation and the work you're doing at the Center. I really do believe we need to find ways to tell people, particularly young people, that their voices matter and their work is vital, and that this isn't up to Elon Musk to decide for all of us. But I also really want to say that if you look underneath almost every conflict that we are seeing right now, moves to stifle speech and dissent, whether it's book bans, whether it's words you can and can't say in the classroom, whether it's who's allowed to protest where, whether it's the state of Texas now saying they're going to pardon someone for driving into a protest. I mean, speech interests are in every one of these conflicts. There's a through line here, and we have to focus on the speech part of it more than we do because it's probably not the sexiest part of any of these controversies, but it's really, really pervasive and the patterns are really clear. So, thank you very much for both highlighting that, but also for including me in this conversation, which I really think couldn't come in a more important time.

Michelle Deutchman:

Well, I mean, people ask me, how did you come up with the name of the podcast? And it's kind of simple, but that's what it is. Speech matters, and I guess that's kind of the mantra that I live by. So, thanks for again for joining us, and I think that's a wrap.

Thanks for joining us for today's episode. Next month on Speech Matters, we'll discuss how to prepare for and respond when guest speakers with controversial views and the desire to be part of the show come to campus. We'll be joined by two guests who have firsthand experience. In the meantime, check out the Center's website and subscribe to our mailing list to keep up with our work. Visit freespeechcenter.universityofcalifornia.edu. Talk to you soon.