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 Apthekar:

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. It's been almost a month since the United States Supreme Court released the majority of its most consequential decisions, including opinions on speech matters that will affect the way the First Amendment is interpreted, particularly the way it is applied with regard to social media. Joining us to unpack these decisions, and how they might impact higher education, expression, and platform moderation is the foremost Constitutional scholar, and UC Berkeley Law School Dean Erwin Chemerinsky. We are honored not only that Dean Chemerinsky joins us today, but that he also plays a key role as one of the two co-chairs of the center's National Advisory Board. I have more to say about Erwin, but first, class notes, a look at what's making headlines.

Remember those intense inquisition like federal congressional hearings last academic year, where college presidents were called before the House Committee on Education and the workforce? It appears that some state legislators have taken up this mantle, calling in university leaders to question them about the responses to protests and encampments on campus. Thus far, hearings have been held in Minnesota, and Texas, and are scheduled in Pennsylvania and Virginia. Some argue that these hearings serve no purpose other than political ones, while others contend that they provide necessary legislative oversight.

One distinction between the federal and state hearings is that state lawmakers have preexisting relationships with university leaders in their states. Hopefully that will help lead to more productive outcomes in this next round. As colleges and universities prepare for the coming academic year, they're taking stock of what happened during this past one. According to estimates by the Los Angeles Times, the UC system spent more than $29 million on protest management across campuses during the spring term. The majority of the money went towards law enforcement, and other policing and safety measures. While UCLA and UC Berkeley spent the highest sums, 10 and 8 million respectively, UC Irvine, UC Santa Cruz, UC San Diego, and UC Santa Barbara, each spend between one and 3 million. The UC Board of Regents has been signaling that it would campuses to take a harder line on enforcing campus time, place, and manner rules, including about the presence of encampments. This in turn may escalate the use of law enforcement to take down tents, arrest resistors, control rallies, and patrol the grounds.

In other UC news, the UC Board of Regents voted to approve a policy which articulates how academic departments should handle the publishing of political statements on university websites. The new policy states that "discretionary statements," which are defined as statements that comment on institutional, local, regional, global, or national events, activities, or issues, must not appear on the main homepage of a website of an academic unit, and instead should be posted on a separate page identified for such statements.

This issue has been debated and discussed at regents meetings for the past seven months, with numerous faculty members arguing that earlier versions of the policy infringed on academic freedom. According to reporting by EdSource, the chair of the academic senate, James Steintrager, considers the latest policy, "A marked improvement over previous drafts, and generally consonant with free expression and academic freedom."

Now back to today's guest. Erwin Chemerinsky has served as the dean of UC Berkeley Law, and the Jesse H. Chopper distinguished professor of law since 2017. Prior to assuming this role, he was the founding dean, and distinguished professor of law at University of California Irvine School of Law from 2008, to 2017. Before becoming a dean, he was a professor of law and political science at Duke University, and a professor at the University of Southern California Law School, where he taught for 21 years. He is the author of 19 books, including leading case books, and treatises about constitutional law, criminal procedure and federal jurisdiction, and is the author of more than 200 Law Review articles. He's a contributing writer for the opinion section of the Los Angeles Times, and writes regular columns for the Sacramento Bee, the ABA Journal, and the Daily Journal, and frequent op-eds in newspapers across the country. He frequently argues appellate cases, including at the United States Supreme Court.

I have to add that Erwin taught me constitutional law when I was a first year law student at USC. That was way back in 2000, and I remember Erwin, that you deviated from the syllabus so we could talk about Bush v. Gore in real time. I will also share that I received my worst grade in law school in that class, darn that state action doctrine, which seems ironic given that the First Amendment is my area of professional expertise. All this to say that Erwin has been a mentor since that inaugural class, I've learned so much from you, I continue to learn from you, and that's one of the reasons I'm thrilled you're joining us for the second time on Speech Matters. Thanks for being here.

Erwin Chemerinsky:

It's such a pleasure, and I was clearly wrong in grading your exam, and apologize all these years later. Michelle, I'm so proud of all you've accomplished, and it's wonderful that we've known each other now for a very long time.

Michelle Deutchman:

Thanks. I always get the state action doctrine right now. All right, we're going to start our conversation talking about the Supreme Court, but if time allows, I hope we can also hear your perspective on preparing for the coming school year in light of the ongoing war in the Middle East, and the upcoming presidential election.

Erwin Chemerinsky:

Of course.

Michelle Deutchman:

All right, let's begin with a case that has less name brand recognition than some of the others, and that's Loper Bright Enterprises v. Raimondo. This decision eviscerated the Chevron doctrine, a 40-year precedent that gave federal agencies like the Department of Education, commerce or justice wide latitude to interpret and apply statutes. Rather than defer to the expertise and judgment of federal agencies, AKA Chevron deference, chief Justice Roberts' majority opinion made clear that, "Chevron's presumption is misguided, because agencies have no special competence in resolving statutory ambiguities. Courts do." So Erwin, why is this shift from relying on departments, to relying on courts so seismic?

Erwin Chemerinsky:

It is, as you say, a significant shift in authority from federal agencies to the federal courts. Chevron refers to a 1984 Supreme Court case, Chevron USA v. Natural Resources Defense Counsel. There the Supreme Court said, "If a federal law is ambiguous, and all of them have some ambiguity, an agency interpreting a statute should be deferred to, so long as its interpretation is reasonable." And this has been the cornerstone of federal administrative law for 40 years, and now the Supreme Court has flatly overruled it.

What does it mean? Well, those who are being regulated like businesses, always want to make it easier to have the regulation overturned. That's why businesses have wanted the Chevron doctrine to be overruled. So, if the Environmental Protection Agency's interpreting the Clean Air Act, and says, "This is how much of a pollutant that can go into the air," those who are being regulated want to be able to litigate it all over again in court. Overruling Chevron now means they can go to court. It means there'll be far more challenges to agency actions in courts, and many more overturned.

Michelle Deutchman:

And so what does that mean, right? So, we're talking, our audience is largely focused in higher education, so what does that mean for colleges and universities? For instance, I'm thinking about Title IX, or Title VI. How might the policymaking and implementation be different?

Erwin Chemerinsky:

Exactly. The Department of Education adapts rules with regard to interpreting and implementing Title VI. Title VI says, "Recipients of federal funds can't discriminate based on race." Title IX applies to educational institutions that receive federal funds, and say they can't discriminate based on sex. Also, in addition to the rules, the assistant secretary of education for civil rights, now Catherine Lehman, will often send out dear colleague letters that interpret Title VI, and Title IX.

When Chevron was the law, what it would mean is courts would refer to the rules of the Department of Education, even the dear colleague letters from the assistant secretary for civil rights. Now it means that no deference is required. Give you an example. The Department of Education under the Biden administration has said that it interprets Title IX to say that gender identity discrimination is also impermissible, and so therefore, there has to be the ability of people based on their gender identity to use the restrooms, or locker rooms that correspond to their gender identity. This is going to be challenged in court. Does Title IX apply to gender identity? Under Chevron, the court would defer to the agency, I'm sure here, finding it to be reasonable. Now, the courts don't have to defer to the agency at all, which would [inaudible 00:10:10] much easier to overturn these in court.

Michelle Deutchman:

Thanks, that sounds like it's going to lead to a lot of chaos, and potentially conflicting opinion, right? Depending on what circuit the higher education institution is in. So, let's turn to social media. There were so many cases on the docket, and I'm going to pivot to that. Let's talk about Murthy v. Missouri to start where, we had five individual social media users, including epidemiologists and physicians, who sued the executive branch agencies and officials alleging that the government pressured platforms to censor their posts which criticized COVID-19 policies, and mask, and vaccine mandates. Two state attorney generals also sued, alleging that they and their state residents were harmed by this alleged censorship.

The court ruled against these plaintiffs on standing grounds, and throughout a lower court ruling that had placed significant restrictions on the ability of government officials to communicate with social media companies about their content moderation policies. So, many news outlets touted this as a major win for the Biden administration, but given that the decision was based on standing rather than the merits, I'm wondering, Erwin, does it really warrant a victory dance?

Erwin Chemerinsky:

It is a major win for the Biden administration. Maybe a two cheers victory dance, a muted victory dance. Let me explain why this case is important in higher education, and then talk about what you ask in terms of who really won, and how much. Each fall, I sent out a message to students, saying that I hope when they speak, they'll do so showing respect for one another, exercising civility, refraining from hateful expression. Last year I got a response that I was chilling students' speech by sending out that message. Am I violating their First Amendment rights just by engaging in that speech? If I condemn speech as racist, or antisemitic, or Islamophobic, but impose no sanctions, is my speech then violating their free speech? That's what Murthy v. Missouri is really about, because what's going on here is the Biden administration went to social media platforms and told them if they didn't take down false speech about the COVID vaccine, and about the 2020 election, they could face more regulation in the future.

There's no threat of prosecution. No one actually prosecuted or sanctioned. It was just speech. The Supreme Court in a six to three decision, as you say, dismisses the case on standing grounds, Justice Barrett writes the opinion for the court, and she says, "These are private social media platforms. Many things account for what they put there, or don't put there. They can't show that it's the Biden administration speech that caused them to take down the false speech, therefore they don't have standing to sue."

Well, was it a victory for the Biden administration? Absolutely. Think if the court had come out the other way, and ruled against the Biden administration, and said that they can't communicate with social media platforms at all about false speech. Is it worthy of a victory dance? Well, there might still be a way of bringing a challenge to this. It's not a ruling on the merits of the First Amendment, but I think the Supreme Court has made it hard to bring challenges in situations like this. So, that's why I say two cheers, not three, but it's still worth celebrating.

Michelle Deutchman:

And I will take any moment at this juncture to celebrate. So, celebrate, we will. And then I'll go right to kind of a follow-up, which is right now I think everybody is highly focused on the presidential election, and so, one of my questions for you is, how might this ruling impact content moderation about election miss and disinformation?

Erwin Chemerinsky:

I don't think this case will have any effect. I think this case means that if the Biden administration wants to encourage social media platforms to take down false speech, the Biden administration can do so. For that matter, if the Trump campaign wants to encourage social media platforms to take down false speech, the Trump campaign can do that. That so long as the Biden administration, which is in power now, doesn't threaten prosecution, or threaten to impose sanctions, I don't see any problem.

Michelle Deutchman:

Okay, thank you. And I think I'm going to circle back to the example you gave about the email from the student in response to your message. And I'm wondering how you responded to that student, because it really seems to make the argument that you, or the administration, should never be able to speak then.

Erwin Chemerinsky:

Yes, and that's of course the position that some students would say, is, "If you are criticizing our speech, you are violating our First Amendment rights, because you're putting pressure on us not to express ourselves in the way we want." And the response to that is I also have speech. I can articulate values for our community. So long as there's no threat of sanctions, my speech doesn't violate anyone's First Amendment rights.

Michelle Deutchman:

So we're going to keep going, pulling on our thread of content moderation, and discuss the net choice cases. Numerous legal experts described this pair of cases as the most important First Amendment case in a generation. Simply put, the question at issue was whether social media platforms like TikTok, Facebook or X have the right to make editorial decisions about the content on its platform. So, in this case, the Texas and Florida legislatures passed laws that required large social media platforms to carry content that the platforms found hateful, or objectionable, because the lawmakers believed the platforms were discriminating against conservative political perspectives. And I'm hoping Erwin, that you can tell us about how this case played out, and what the decision means for online expression.

Erwin Chemerinsky:

Social media companies engage in content moderation all the time. Facebook takes down 5,000 hateful messages an hour. Social media platforms are constantly taking down child sexual exploitation material, even if it's protected by the First Amendment, they take down material encouraging terrorism, even it's protected by the First Amendment. As you say, Florida and Texas each adopted laws, and they're somewhat different, that prevents large social media companies from engaging in content moderation.

As you pointed out, they thought the social media companies were disproportionately taking down conservative speakers, and therefore adopted broad statutes saying large social media companies can't engage in content moderation at all. The Supreme Court didn't decide the case though, even though it said it wasn't deciding, it sure gave guidance what the law is likely to be. Justice Kagan wrote for the court, and she said, "This is an argument that the law is entirely unconstitutional. An argument about the Florida and the Texas statutes should just be completely struck down, in legal terms, facially invalidated."

And she said, "In order to strike down a law on First Amendment grounds, is facially unconstitutional. You have to find that it's unconstitutional applications significantly outweigh its constitutional ones." She said. "The problem here is that both the Federal Court of Appeals is to Texas and the federal court appeals to Florida only considered a few social media platforms. They need to do a much more in depth analysis to be able to include that overall the unconstitutional applications outweigh the constitutional ones, and therefore sent the cases back to the lower courts." But Justice Kagan then went on and said, "We should give some guidance to the lower courts." And she said, "It's clear that the United States Court of Appeals for the Fifth Circuit in striking down the Texas law was just wrong as to the law." She said, "Private companies get to decide what's going to be in their newspapers, on their broadcast stations, on their social media platforms."

She relied on a Supreme Court case in 1974, Miami Herald v. Tornillo. It involved a Florida law that said if a person was verbally attacked in a newspaper, they had the right to reply in that newspaper. The Supreme Court unanimously declared that unconstitutional. The courts said a newspaper gets to decide for itself what its content is going to be. Justice Kagan was saying social media companies get to decide for themselves what their content will be. So, though the court didn't hand down a decision striking down the Florida and Texas laws, the court gave guidance that I think makes clear that the Florida law and the Texas law are unconstitutional. Those who run the social media platform are private entities. They get to decide what to include. That's why Justice Alito writes an opinion, joined by Justices Thomas and Gorsuch that's so angry at how the Supreme Court handled this.

Michelle Deutchman:

Yeah, there is a lot of vitriol in the back and forth. I want to ask you about a critique of the decision. Tim Wu, who's a professor at Columbia, wrote a piece in the New York Times and he explained that, "By presuming that free speech protections apply to a tech company's curation of content, even when that curation involves no human judgment, the Supreme Court weakens the ability of the government to regulate so-called common carriers like railroads, and airlines, a traditional state function since medieval

times." The headline over this piece talked about... Said something like, "The First Amendment is out of control." And I'm wondering what your response to Wu's concerns are.

Erwin Chemerinsky:

I have high regard for Tim Wu. We're friends, and I totally disagree with him. The reality is, there's an enormous difference between a social media platform, and a railroad, and airline. A social media platforms engage in speech, so the First Amendment applies. Whereas a railroad or an airline, they're not engaged in speech. With regard to social media platforms. They have the First Amendment right to determine their content, and they can do it however they wish. Whether it's a human judgment, or an algorithm written by humans, it's still the choice of the private entity to include what speech will be there. And so, I think that what Professor Wu says here has no support within the First Amendment, and it also will be very frightening if we somehow say social media platforms, the most important development for speech since the printing press, somehow have less First Amendment protection.

Michelle Deutchman:

Okay, thank you. And of course, so much of what people are thinking and talking about now is another development in technology, is artificial intelligence, and there's a lot of questions about speech, and the First Amendment, and how that might apply. And I don't know if you have any just general thoughts about how that area of law is developing, even though I know the court didn't touch on it this term.

Erwin Chemerinsky:

I think this does go to what Tim Wu was raising. Is there a distinction between speech that's written by human beings, and speech that's written by a machine? And if it's written by a machine, do we then say the First Amendment doesn't apply? This is something that's going to be so important in the years to come. We don't have cases. My conclusion is though, that the First Amendment should apply whatever the author of the speech, whether it's a human being, or whether it's AI. Of course, ultimately AI comes down to the programs that human beings wrote for it. But beyond that, the reason we protect speech is because we want the ideas to be out there. That's why the Supreme Court said corporations have First Amendment rights. Not because the corporation has an autonomy interest, but because when the corporation speaks, it puts ideas out there. So, I don't think the identity of the speaker, human, or machine, or corporation, is going to matter, because ultimately we want the ideas to be there, and we don't trust the government to choose what we can and can't see, hear, read.

Michelle Deutchman:

Thank you. And I'm sure we'll be having you back in future years to talk about cases that have to do with AI. So, the next case I want to turn to is one that seemed to fly under the radar, but I found particularly interesting and it's National Rifle Association v. Vullo. So even though the NRA is involved, this case isn't actually about firearms and the regulation under the Second Amendment.

Here are the facts. The NRA brought suit against Maria Vullo, who was the former superintendent of the New York Department of Financial Services, DFS, alleging that Vullo pressured groups the DFS regulated to disassociate from the NRA, and other gun promotion advocacy groups. NRA officials argued that part of that pressure campaign included threatening enforcement actions against those groups that refuse to disassociate. The question in front of the Supreme Court was, does the government violate the First Amendment when it pressures others not to do business with a company based on that company's politics? Now the answer was the unanimous one, one of the few unanimous rulings this term, with the opinion written by Justice Sotomayor. Erwin, can you tell us about the court's holding, and why it's consequential?

Erwin Chemerinsky:

This actually relates to an issue we were talking about a few minutes ago, [inaudible 00:24:40] Murthy v. Missouri. When is speech by government officials enough to violate the First Amendment? The United States Court Appeals, the Second Circuit, ruled in favor of Maria Vullo, saying she was engaged in speech. The Supreme Court reversed, and said what was different here is that the government was threatening sanctions unless the insurance companies, and banks did what Vullo wanted. They're not doing business with the NRA.

The Supreme Court relied on a 1963 Supreme Court case, Bantam Books versus Sullivan. It involved Rhode Island Commission on Morality and Decency, that identified certain books as being indecent. And it said that bookstores that sold those books would face criminal prosecution. Police officers actually went to some of those bookstores and said, "You're selling book that have been deemed objectionable, you could be prosecuted." The Supreme Court in an opinion by justice William Brennan said that violated the First Amendment because there was a threat of sanctions.

Justice Sotomayor in this case said, "This instance where we have to take all the allegations the complaint is true, procedurally is before the court on a motion to dismiss where the allegation of the complaint have to accept is true." So, some of the NRA's allegations involved that Vullo told insurance companies and banks that unless they stopped doing business with the National Rifle Association, they would face sanctions for violating state law, and that the state would refrain from sanctions if they stopped doing business with the NRA.

Justice Sotomayor said, "This is just Bantam Books v. Sullivan. We're not extending it. The government was threatening prosecution, threatening sanctions, unless the insurance companies, the banks stopped doing business with the NRA." And Justice Sotomayor, at the end of her opinion made clear, they were going no further than Bantam Books v. Sullivan. So Michelle, what's different between this in Murthy v. Missouri, is in Murthy v. Missouri, there were no threats of sanctions of social media companies for having taken down... If they didn't take down false speech. When I send out a note to the students saying, "Speak with respect and civility," there's no threat of prosecution and sanctions. In this case, what was different was the court saw a threat of sanctions.

Michelle Deutchman:

And I think that's such an important distinction. And one of the things I guess I really liked about this case, was that ACLU represented the NRA, which I think some might say is strange bedfellows. And Anthony Romero, who's ACLU's executive director, actually published a piece on the ACLU website explaining to its constituents why ACLU represents a group with which they have such irreconcilable differences on how to address gun violence in America. I'm going to take the liberty of reading a short excerpt from that piece, because I feel it reflects one of the key principles underpinning expressive freedom in America, and oftentimes it's hard to find a really good, high profile example.

"Some may have wondered why the ACLU was representing the NRA, since the ACLU clearly opposes the NRA on gun control and the role of firearms in society. In fact, we abhor many of the group's goals, strategies, and tactics. So the reality that we have joined forces, not withstanding those disagreements, reflects the importance of the First Amendment principles at stake in this case, the ACLU made the decision to represent the NRA in this case because we are deeply concerned that if regulators can threaten the NRA for their political views in New York State, they can come after the ACLU, and allied organizations in places where our agendas are unpopular." I anticipate, Erwin, you agree with what Romero wrote, but I'm curious if you want to add anything to this sentiment, certainly as it applies to the world of higher education.

Erwin Chemerinsky:

I thought Anthony Romero made an eloquent statement explaining why the ACLU is involved. In fact, David Cole, the legal director for the ACLU argued for the NRA in court. I did not sign on to an amicus brief in this case, because I'm very worried about the Supreme Court articulating broad principles for when speech by itself violates the First Amendment. Thankfully that's not what the court did in this case. What the court did in this case was just follow Bantam Books v. Sullivan, and say if there's threats of prosecution, then that's enough to violate the First Amendment. But I worried, and I worried in Murthy v. Missouri, if the court articulated a more general rule for when speech by campus officials would itself violate the First Amendment, how that might really constrain what university administrators can do.

Michelle Deutchman:

And that's a perfect lead in, as we're talking about expressive freedom at large. I'd like to ask you to reflect on the past academic year, in light of all the protests, and encampments, and challenges, and vitriol that we've witnessed both at UC, and across the countries since October 7th. And as you look ahead to the next academic year, how do you think faculty and administrators should be preparing, and thinking about responding on a campus in a way that both uplifts expression, but also respects the importance of maintaining an inclusive campus environment?

Erwin Chemerinsky:

I think what we witnessed last spring was unlike anything that we'd seen previously, at least for a very long time. Let me try to explain why. I was in college during the Vietnam War, and participated in the anti-war protests, but then the students were overwhelmingly on one side, and often it was oppositional to the university administrations that wanted to stop the anti-war protests. Last spring, the students were deeply divided, and there's those students who believe that Israel should not exist at all, that it should be an entirely Palestinian country, and there's those students who believe the existence of Israel is essential. There's not a bridge between those two positions.

And what I think makes this issue different is that many of the students on both sides have families in Gaza, and Israel often is tied very closely to their identity, whether it's a pro-Palestinian, or a Jewish identity, or Muslim identity. So campuses were in the position of having to deal with this situation, and also what made it different was it's all in the context of social media, that it's all something that becomes immediately seen by the world, and that's just what people read about in the newspaper the next day, or see on the evening news.

I don't think things are going to be better in the fall. The underlying issues with regard to the Middle East are still there. We all hope with all our hearts that the war in Gaza will end, the hostages will be released. But even that I don't see as ending the underlying issue, because once I come to the conclusion there should be no Israel, and another side that believes the existence of Israel is essential, we're no longer talking about a middle ground, a two-state solution, how to protect Palestinian rights, what to do about the settlements in the West Bank.

I think that there are many things to be learned from what happened this spring as we go to the fall. One is, it's so important that campuses have clear, content neutral, time, place, manner rules with regard to expression on campus. Are they going to allow encampments, or are they going to prohibit all encampments? If they're going to allow encampments, where are they going to allow encampments? Whatever the rules are for any particular view, have to be the rules for all views. Also, I think educational institutions need to think about when are they going to bring disciplinary actions with regard to violation of campus rules? Will they treat violation of campus rules different [inaudible 00:33:11] violation of law?

One of the things Michelle, that I learned last spring was that when we focused on the campus demonstrations, or what happened at graduations, it wasn't a First Amendment issue. I always think about campus protests from the lens of the First Amendment, but the reality is campuses can prohibit the encampments and clear the encampments. Campuses could physically remove those who are disrupting

commencements. The question was a much more political one, a pragmatic one about what was desirable for campus administrators to do.

And I think campus administrators need to think as we approach the fall, how do they want to handle it? Does it matter how disruptive the encampment or the protest is? Does it matter how much it's leading to discrimination against a group of students, or perceived discrimination? What's the threat of violence? How effective will it be to use the police, and what are the consequences of that? What's past precedent, and what precedent will it set for the future? I think campus administrations have to think about all of this. In my more optimistic moments, I think that the fall election will occupy a lot of the oxygen, and maybe shift attention to that, and there are certainly campuses which are going to be deeply divided over that, just as others have been divided over the Middle East. And I think for all campuses, the fall election is going to create real tensions that maybe manifest in all sorts of other ways.

Michelle Deutchman:

I mean, I think you make some excellent points, and I was at a coalition meeting summit a couple of weeks ago, and we were having a discussion about the First Amendment, and I made the point that the law's a really blunt instrument, and that the First Amendment, like you said, isn't going to help answer some of these more policy based questions. Because you can have all the best content neutral, time, place and manner restrictions, but if you don't implement them, and you don't implement them consistently, then they don't have any meaning. And so I think it's a real challenge.

Another challenge I'd like to ask you about is right now we're at a very polarized time, both at the Supreme Court, in our politics, on our campuses, and I'm wondering how you feel like universities can take an additional, or further role in modeling respectful dialogue? And I know there's really no answer, but as an educator, as someone who's been educating students for many, many years, what your thoughts are?

Erwin Chemerinsky:

Few things. First, campus officials need to articulate the values, the principles of community that they want followed. As we've been talking about, there's a difference between something that may be aspirational, and something that would have sanctions, in terms of discipline, or even criminal punishment. And I think it's so important that campus officials right at the beginning of the school year make clear, "These are our values as a community. Our values include that all ideas and views can be expressed. Our values include that we should be respectful, and speak to one another with civility. Our values include that we should refrain from hateful expression. Our values include that we have to make sure that we don't disrupt the speech of others." But we need to make clear the values that underlie our institutions.

Second is university administrators, we have to model civil discourse, and we have to find ways of modeling how to disagree without being disagreeable. Many campuses are now creating debate type programs, where they'll bring in speakers with opposing viewpoints, but most of all what they're instructed to do is, show how it's possible to disagree, even vehemently, but be civil to one another. But we have to model that which we want students to be able to do. And third, I think we need to think about education. Students come to college, and even to law school with remarkably little understanding about the First Amendment. We need to teach them about the First Amendment and principles. We need to teach them how to talk across differences. So, we need to explain our principles, we need to model, and we need to create programs.

Michelle Deutchman:

And given all of that, you talked a couple of times now about the message you send when the school year starts at Berkeley Law. Do you anticipate that you'll add, or update your message in any way, given what happened last year, or not necessarily?

Erwin Chemerinsky:

Yes. I think that the message has to take into account the reality of the situation. The message can't be platitudes, and the message has to be contextual of the institution. Where Berkeley, which was the place of substantial protests, and unfortunately everyone in the school, and a large percentage of people in the country know what went on in my backyard on April 9th. And so, I can't ignore that. I don't think I'll discuss the particular instance, but I think I will discuss what we as a community want to be, in terms of how we disagree with one another.

Michelle Deutchman:

No, thank you. Thanks for sharing that. I think this is a real moment for all of the things that you've talked about. And of course, that's what the center is all about, in particular, about educating people about the First Amendment, and about how it works, because I often talk about how you can't have a conversation about principles and values, and discourse, if you kind of don't know the rules of the road. And so, I am continually surprised when I go into various workshops, or conversations with students, with staff, with faculty, with deans, with high level senior administrators, and people don't know all of the basics, including that the First Amendment is about the government, that the university, public university is the government, and of course, that ugly speech is protected. So, there is so much work to continue to be done. And on that note, is there anything else that you kind of would like to add on that note? And then I think I have one more question.

Erwin Chemerinsky:

I want to thank you for all you do for the center, and the center for all it does and the issues of free speech and civil engagement. I think the only thing that I add is, a commitment to free speech doesn't come instinctively, or naturally. I think the instinctive response is to want to stop the speech we don't like. And as you just said, we can't assume that students come to college, or professional school, or that faculty, or deans have different instincts than that. And so, it's our responsibility to constantly be educating people about why we protect freedom of speech, but also about the limits on free speech.

Michelle Deutchman:

Absolutely. And a lot of people ask me, do I think that the Supreme Court will ever make really significant changes to the First Amendment, in terms of especially protecting ugly, and offensive, and demeaning speech? And my feeling is likely no. But I think I should ask you, do you think that's really ever in the offing for our republic?

Erwin Chemerinsky:

I don't want to say ever, because ever is a very long time. I think what I am willing to say is, I don't think in the foreseeable future that the Supreme Court is going to say that hateful or disparaging speech is outside the scope of the First Amendment. In part it's because the core of the First Amendment is that all ideas can be expressed, and racism, antisemitism, Islamophobia are all ideas, however offensive or distasteful.

I think also what's been shown is, there isn't a way of prohibiting hateful speech, in a manner that's not unduly vague or over-broad. I think one of the reasons that European countries have laws that prohibit hateful speech, but not the United States, is we have such a strong First Amendment doctrine that says any law regulating expression has to be clear about what's prohibited, and what's permitted. And no one's

found a way of defining what's hate speech in a manner that's not unduly vague, and over-broad. So, I don't see a change from the Supreme Court on this in the foreseeable future.

Michelle Deutchman:

And I think there's a question about whether things are really different in the countries that do punish, and prohibit ugly speech. And my sense is not that different. I think probably sunlight is the best disinfectant. So, listen, we know that you are off to work on the toughest legal challenges right now, and we're so grateful that you gave us some time, and of course, so grateful for your role in helping to oversee the center, and I'll just say thank you.

Erwin Chemerinsky:

Thank you so much for having me on. It's always a pleasure to talk with you. And again, thank you for all you do.

Michelle Deutchman:

That's a wrap. Thanks for joining us for another thought-provoking episode, and we'll talk to you next time.