

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 Friedan:

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 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.

So much has happened since we've recorded our last episode one month ago. In the wake of Charlie Kirk's assassination, the landscape has shifted. Faced with intensifying political pressure to retaliate against faculty, staff, and students that did not appropriately respond to Kirk's death, colleges and universities sanctioned employees and students. This blatant disregard for First Amendment protections and extramural speech rights of faculty deepened the chilling effect across higher education institutions. Questions abound about what impact Kirk's murder will have on events, protests, and other expressive activity taking place on college campuses. Will public safety be used as a pretext to suppress speech? Why are more pundits and people not talking about open carry and the relationship between the First Amendment and its closest sibling, the Second Amendment? To help us untangle and make sense of all the ways that open expression and academic freedom are being undermined at this moment is Timothy Zick, the John Marshall Professor of Government and Citizenship at William & Mary Law School. If you are not already subscribing to his Substack, Thoughts on the First, I suggest you check it out.

But before we dive into our conversation with Tim, let's turn to Class Notes, A Look at What's Making Headlines. On October 1st, nine universities, the University of Arizona, Brown, Dartmouth, Massachusetts Institute of Technology, University of Pennsylvania, University of Southern California, University of Texas at Austin, Vanderbilt, and the University of Virginia, received a letter from the Department of Education inviting them to join what the Trump administration is calling a, quote, "compact for academic excellence in higher education," close quote. Under the compact, universities agreed to a set of conditions in exchange for preferential access to certain types of federal funds and other benefits. These stipulations include banning the use of race or sex in hiring and admissions, committing to a strict definition of gender, freezing tuition for five years, capping international undergraduate enrollment, requiring applicants to submit standardized test scores, and altering governance structures that punish, belittle, or even spark violence against conservative ideas.

The compact's demands are one of the clearest articulations of the administration's educational goals. If one of these universities declines the administration's offer, not to worry, the repercussions are only potentially forgoing all federal benefits. Hence, this is less like a compact

and more like extortion, as many higher education leaders have pointed out. According to leading constitutional scholars, like UC Berkeley Law Dean and Center Co-Chair Erwin Chemerinsky, the proposal is unconstitutional, inconsistent with academic freedom, and creates, quote, "unprecedented federal control over higher education," unquote. This past Friday, October 10th, MIT's President, Sally Kornbluth, announced the university's rejection of the terms of the compact, citing concerns over the compact's limits on free speech. Hopefully, the other eight university invitees will follow suit. In the latest twist, late on October 13th, Bloomberg News reported that the Trump administration is now inviting all US colleges to participate in the compact. We will continue to follow this story.

In a major First Amendment ruling, a federal court held that the Trump administration's practice of arresting and deporting non-citizens for their political speech was unconstitutional. Filed by the Knight First Amendment Institute at Columbia University, this case raised the question of if non-citizens lawfully present in the United States have the same free speech rights as the rest of us. Judge William G. Young answered this question with an unequivocal, "Yes, they do." Testimony in the case centered on the detentions of outspoken pro-Palestinian activists, including Mahmoud Khalil who studied at Columbia University and Rumeysa Ozturk who studied at Tufts University.

In other news, the Texas Tech University system is facing sharp critiques over its recent guidance restricting how gender can be discussed on its campuses. The system's chancellor, Tedd L. Mitchell, directed faculty to ensure that all courses, syllabi, and instructional materials recognize only two human sexes, male and female, citing compliance with President Trump's 2025 executive order, as well as state law. The memo sparked immediate concern among professors who say they are unsure of what they are allowed to say in the classroom. Advocates warn that the directive chills free expression and undermines academic freedom.

Now, back to today's guest. Professor Timothy Zick is a professor at William & Mary Law School who teaches and writes about the First Amendment, the Second Amendment, and other constitutional law topics. He's written on a variety of constitutional issues with a special focus on the First Amendment. He's the author of five university press books on the subject, including *The First Amendment in the Trump Era* and *Managed Dissent*, *The Law of Public Protest*. At the end of this year, Zick's newest book, *Trump 2.0, Executive Power and the First Amendment*, will be published by Carolina Academic Press.

Professor Zick has been a frequent commentator in local, national, and international media regarding the First Amendment, Second Amendment, and other constitutional issues. He has been a guest on national television and radio broadcasts, and his commentary has been published in the *Atlantic*, *Slate*, *US News & World Report*, the *Washington Monthly*, *JURIST*, and *The Conversation*. He's been quoted frequently in the national press, including the *New York Times*, the *Washington Post*, *Los Angeles Times*, *The Boston Globe*, *FiveThirtyEight*, *PolitiFact*, *CNN*, *NBC Reuters*, the *Associated Press*, *Bloomberg*, and the *Christian Science Monitor*. He testified before Congress on the Occupy Wall Street protests and rights of speech assembly and petition.

Welcome, Professor Zick. I've admired your work for some time, and it's really a privilege to have you join us.

Timothy Zick:

Thanks, Michelle. It's a delight to be here.

Michelle Deutchman:

To say that there's so much to discuss is an understatement, and it's a little hard to know where to begin. I have enough questions for numerous podcast episodes. Each of your thoughts on the first subset post is worthy of its own conversation. For listeners, the episode notes will include a link to Professor Zick's excellent Substack, Thoughts on the First. Given the enormity of the task before us, I'll do what the king in Alice in Wonderland suggests when he says, "Begin at the beginning and go on until you come to the end, and then stop." While I don't know where the end is, I do think it makes sense for us to begin with Trump's first term as president. As I mentioned at the top of the episode, in 2019, you published a book called The First Amendment In The Trump Era. How about you spend a couple minutes setting the table for our listeners about themes that arose around expression during President Trump's first term?

Timothy Zick:

Sure, I'd be happy to. You could think of Trump, let's call it, 1.0 as opposed to 2.0 as sort of heavy on rhetoric with regard to free speech and press issues, and dissent and retaliation and those sorts of things. President Trump engaged in what you might call a war on the institutional press. He described the press as the enemy of the people. He went after individual reporters and the like, right? That was a big part of his first term. More broadly speaking, he demonstrated a sort of intolerance for dissent and a demand for loyalty and a penchant to try and impose, if he could, through just ordinary bullying, orthodoxy with respect to how one should think about patriotism or race, or whatever issue he happened to be talking about. He clearly wanted to, in some cases, took some steps toward, retaliate against his enemies, real or perceived. He wanted to sort of retaliate against broadcast stations and newspapers, and people in the public sphere who just criticized him.

And for lots of different reasons, a lot of that didn't come to fruition. Maybe he was just finding his way as a chief executive and didn't quite know how to go about it. Or maybe, as people have said, during Trump 1.0, there were these guardrails, norms or personnel who were talking him out of doing things. Most infamously, of course, the prospect or the idea of shooting protesters in the leg to sort of slow them down or remove them from Black Lives Matter demonstrations. So it was all there right in front of us, this sort of rhetorical part of a campaign to retaliate, to impose, to censor and just a general, I would say, disrespect for First Amendment freedoms, whether they were free speech or press or, in the case of protest, freedom of assembly. I think that's sort of what I took from... When I wrote the book, the first Trump term wasn't even over and there was plenty already to write a book about. I published the book before January 6th, and a great many other things that happened during the first Trump term.

Michelle Deutchman:

I was just thinking about how your book came out before January 6th, and it is sort of unbelievable that you nonetheless had enough material. I think this leads naturally to the next question, which is, can we talk a little bit about what's similar and then what's distinct in what you would call Trump 2.0 vis-a-vis these First Amendment protections?

Timothy Zick:

Yeah. The rhetoric is the same, so a lot of what the president has to say about his political rivals and free speech and the press and so forth is very, very familiar. All of that existed during Trump

1.0. The principal difference is that in this iteration of the Trump presidency, he is now using executive power to further a campaign of retribution against speakers he disfavors or speech he dislikes. That has come in the form of... I've tracked 40-plus executive orders that relate to or impact either free speech or press. He's suing, actively suing press outlets for defamation. That's been going on for a while, but that's stepped up with suits against, for example, the Wall Street Journal. And he is going after broadcast stations and those sorts of things. But even if you just focus on the executive orders, there's this sort of effort to, through those orders, direct federal agencies to carry out a campaign, a sort of whole of government and whole of society, frankly, campaign, against a lot of different institutions, civic institutions, but beyond that as well.

So if you think about executive orders that targeted and sought to sanction law firms, we'll talk a lot about universities, they have been in Trump's sights the whole time, businesses across different sectors, celebrities, talk show hosts, scientists and scientific journals, broadcasters, museums, libraries, international students. This campaign is touching all of that and more, and it is being done through the executive order. That's sort of the campaign's initiator. And then the federal agencies who are without a doubt supportive and behind this campaign are now carrying that out, whether it's Homeland Security or the education department, various scientific agencies and the like, and of course, the FCC for broadcast stations. There's an executive order. There are directives to agencies to go out and eliminate so-called DEI, diversity, equity, & inclusion, from all government contracts, to bar law firms, and there are associates and partners from courthouses, because they represented clients that Trump doesn't like, doesn't think should have been represented.

And the government now in Trump 2.0 is sort of leveraging federal funding, in particular, other sanctions too. But there's an enormous focus on leveraging federal funding to punish, to suppress, to censor a speech, and it's working to some degree. Harvard has sued, for example, and some of the law firms sued, but a lot of people didn't. A lot of people in these regulatory realms have capitulated, decided it's not worth it. They've just gone ahead and stopped speaking the words that the Trump administration doesn't want them to say, or taking positions or advocating for things that the Trump administration disfavors. This is a much more on the ground use of executive power, impactful campaign. This isn't just the president sort of bloviating about these things, he's actually doing things that have serious impacts for free speech press and assembly.

Michelle Deutchman:

I appreciate that overview. I wrote down punish, censor, suppress. These are very strong and devastating words and impacts. I want to take a moment and ask you a question, and maybe it's implicit, but I think it'd still be helpful to hear you talk about, all of this to what end? Is the goal to remake government? Is the goal to remake issues and ideology based on what Trump and his followers think? What is really at the heart of this?

Timothy Zick:

Yeah. It could be both end, right? There is an effort to refashion government in the form of... what's often referred to as the unitary executive. Everything flowing from the office of the president, right? He's in charge. Stephen Miller was caught saying plenary authority. He can do what he wants. Executive orders, for example, typically apply in the executive branch, and they are typically executions of laws that Congress has passed. This is a very different model that he

is pursuing, the president. In some cases, he's simply bypassing or ignoring federal appropriation laws, protections for universities and others before their grants can be terminated. Just all of that seems to be of no consequence to this model of the presidency. So there's that. I do think there is a very strong ideological component, and that's obvious from the institutions and the people who are being targeted here. Think about elite law firms. What have they done? What is their sin? They've represented causes on the left. That's their primary infraction, so he's gone after them.

Universities, of course, he's gone after. And for the most part, elite universities, the Harvards and Columbias and Browns and Penns. And the project there, as May Mailman, who's sort of heading up this campaign, is to affect some sort of ideological turn to the right at universities. So they're not hiding that as a sort of campaign or purpose. When they go after Stephen Colbert or Jimmy Kimmel, or a broadcast station, there's always an ideological component to it. He goes after critics who have said bad things or, as he would say, nasty things about Trump himself or the administration. And the same is true, I think, of libraries, museums. Some of that I think marries the new form of presidency to the ideological component because what he seems to be trying to do, and the administration, in general, seems to be trying to do, is to undermine the legitimacy of any institution that can fact-check or otherwise check the Trump administration. That's why law firms, that's why the press, that's why scientists and so forth, and academics, of course.

Michelle Deutchman:

No, I appreciate that. I think one of the things I want to ask you, and this is something I struggle with as I go to facilitate workshops and trainings with members, especially of the higher education community, about is the First Amendment and its principles and how they apply on campuses. The reality is the First Amendment exists largely to prevent things that... like what's happening now. Right? It's supposed to protect people from the government engaging in viewpoint discrimination and all the things that we're talking about. And I'm wondering, what do you say to people in this moment as we see the First Amendment, and all of its kind of attenuated rights, be undermined and sort of really desecrated sort of at every turn?

Timothy Zick:

Yeah. This is a real stress test for First Amendment rights and, in fact, for courts, to the extent they are trying to uphold those rights. I suppose, I would say that, first and foremost, this is the most impactful period in American history for First Amendment purposes since the McCarthy era of the 1950s. And I don't think that's an overstatement at all. The number of different things that the Trump administration is trying to do and their impact on free speech and press is unprecedented. We've never had a president use executive power in this fashion, whole of government, whole of society. We have had presidents who wanted to do that, Richard Nixon comes to mind, and have been unable to effectuate those designs. But here, we have a president who has had some success, in part, getting people to capitulate even without applying the order to them, but to the extent... Here's the good news, the silver lining is to the extent that people have pushed back.

They have won First Amendment cases, not all of them, but this administration has an abysmal judicial record in terms of First Amendment cases. It has lost all of the law firm cases it has litigated. It has lost every bail hearing that involved an international student that the administration targeted for deportation. They just lost a huge case. Maybe we'll talk about the

Harvard University case with respect to Harvard's funding, and a case in front of Judge Young in the district court in Massachusetts involving the targeting of international students for arrest, detention, and deportation. And there've been lots of other areas where the administration has been successfully challenged when it's tried to, for example, force people who receive federal funds to disclaim DEI or to disclaim and cease advocating what it calls gender ideology, sort of non-binary gender idea. That's the good news. Now, a lot of those cases are preliminary. They're going to go up on appeal. We will see what appellate courts have to say, and maybe even the Supreme Court, in one or two of these areas. Who knows? But that's the record so far.

You have to be willing to challenge, and that's not a small thing. But if you do, in many of these cases, I don't think the First Amendment issues are very close. The law firms are a great example. Under what authority can you single out a law firm because of the clients that represented, and just bring the full weight to the federal government down on it? Courts have reacted to that as you'd expect they would. It's a clear violation of the First Amendment, of the Constitution. So the First Amendment is holding to some degree, but it's a lot to push back. And you can't do anything about institutions or individuals who just decide, "I'm going to capitulate. I'm going to comply in advance." The First Amendment cannot address that problem. So that's what I'd say I think about how the First Amendment has played out or how those issues have played out so far.

Michelle Deutchman:

You anticipated where I was going next, which is to start with what I would also consider the bright spot, which has been some of these court victories. And since the center really focuses on First Amendment in higher ed, I wanted to start with the Harvard Court victory and its challenge to the Trump administration's decision to end over 2.8 billion in federal grant funding. I was wondering if you could talk a little bit about the First Amendment implications of Judge Burroughs's decision, maybe just get in the weeds a little bit. And then, also, whether you think that these arguments are going to have... I know it's hard to tell because every district court and every... is different, but if you think that they're likely to have similar traction across the country.

Timothy Zick:

Yeah. The Harvard case started with a very lengthy list of demands to Harvard University, to change everything from how it admitted students to what was taught in its classrooms and by whom, sort of a broad side against academic freedom, institutional autonomy, and First Amendment rights. And Harvard, I think, quite rightly said, "No. We're already doing some of the things you want us to do, but we're not going to give up our institutional autonomy." The principle sort of wedge that the administration has tried to use against Harvard... not the only one. Because I think Harvard, at this point, I've lost track of how many different investigative proceedings... it's been subjected to 10 and maybe more than that at this point. But this particular one, the administration said, was about antisemitism. So it said, "The university takes federal funds and that means it's obligated to protect its students against antisemitic harassment, racial harassment," those sorts of things, "and the creation of a hostile environment on campus. You didn't do that, Harvard, and that's why we're canceling your cancer research funds, your educational funds, and every other fund that you would otherwise be entitled to."

There are lots of issues and problems with that approach. One is if you are going to accuse a university of that sort of offense, there has to be a hearing. There has to be some sort of process

under federal law before the grants are terminated. Well, the administration didn't bother with any of that. As I said before, it doesn't feel obligated to follow the rules that Congress has laid down, to execute the laws of Congress. You have those sorts of problems, and Harvard raised those issues. But on the constitutional front, on the First Amendment front, it made two arguments. One, it said the administration is targeting and pursuing Harvard in retaliation for its protected speech.

Under the First Amendment, the government cannot retaliate against a speaker for engaging in protected conduct, in this case, speech. The second argument was... that Harvard was trying to use its leverage and power over federal funding to impose what is called an unconstitutional condition. You can condition funds on things that are relevant to the program you're trying to fund, but the Supreme Court has said you can't use that funding power to sort indirectly affect the First Amendment rights of, in this case, educational institutions. And you can't use that power to attempt to impose sort of viewpoint-based requirements on universities, the funding recipients. On both counts, the judge ruled in favor of the challenger, in favor of Harvard against the administration, finding that defending itself from the administration was clearly protected speech as was filing its lawsuit. It decided to fight the administration, and the judge determined that's why it was being retaliated against.

In addition to just the timing of all this, the judge went out of her way, I think, to reject in no uncertain terms the idea that this was all about antisemitic discrimination. The timing didn't support that argument. The breadth of the funding termination, as you said, \$2.8 billion, did not support that determination. And oh, by the way, the Trump administration, including Donald Trump himself, had made copious statements that suggested, "This had nothing to do with antisemitism. This was about bringing Harvard to heel. Because if I can bring Harvard to heel, guess what, I'll bet other universities will follow." Retaliation and an abuse of power with respect to the funding mechanism. Those were the two sort of First Amendment claims that the judge ruled on, again, both in favor of the challenger. How that plays out going forward? Is that going to be a model that maybe if other universities fight, they will also prevail?

I don't know. So far, in a lot of different areas, the retaliation claims have been successful. Part of the reason for that is that this administration, including the chief executive, are so transparent about wanting to retaliate against whoever the target happens to be, it's difficult to take any argument to the contrary very seriously. One of the complicating things in the Harvard case, and I think in some of the other cases involving funding, is sort of a highly technical one of whether a district court can entertain these claims at all. There's something called the Tucker Act, and there's a court that hears contract claims that has jurisdiction over federal grants and contracts. The administration keeps arguing with that, "That's the court, the only court, that can entertain these claims." The Supreme Court has been ambiguous about that, I guess I'll put it that way, and lower court judges have tried to figure out whether what they're doing is right or wrong, but that could be a potential obstacle to bringing these First Amendment claims in future cases. We'll see.

Michelle Deutchman:

As I listened to you talk about it, it becomes more clear to me why the newest step is this alleged compact because it's just the threat allegedly of losing the funds, which, of course, is another question, which is... this goes back to the unconstitutional conditions. And I imagine that's what's going to be at issue with the compact, which is coercive action and conditions. As you mentioned earlier, about the First Amendment, the First Amendment really can't help when people

capitulate or engage in anticipatory compliance. But another way that First Amendment and the law, I think, can't catch up is to the chilling effect that's happening. So even though Harvard had what everyone considered this wonderful legal victory, the chilling effect both at Harvard and across the United States is still occurring. I don't know what the answer is, but I'm curious if you have any suggestions of what folks in higher education can do to mitigate the effects of the fear and the impact of self-censorship?

Timothy Zick:

Yeah, that's really hard. Part of the reason it's difficult is that the doctrine of the First Amendment recognizes chill as a particular type of harm and seeks to protect against it. But when push comes to shove and you try to bring a legal claim on that basis, a lot of courts will say, "Well, you can't prove that chill has occurred. It's speculative." Almost as if they want some empirical evidence for something that... The people chilled is quite obvious, and maybe to others. There's no question that the administration is strategically relying on a sort of broader net being cast, than its executive orders might otherwise have, if you can sort of scare people into submission. If I'm a company and I support a diverse workforce, and I advertise that on my website, am I still going to do that? If the Department of Labor is going to read my website and maybe send me a letter and then open an investigation, et cetera? The same for universities. The threat of the termination of funding is a real cudgel that this administration has used against institutions of higher education.

And it's difficult for me to sort of sit here and advise them as to how they should manage this. The instinct is to say, "Well, you should stand up to this. You shouldn't give in. You should be aware of what the law actually requires and certainly do that." But going beyond that just to appease an administration that might be vindictive if you don't do what it wants, I think, is a sort of dereliction of duty. It's harming your community. It's infringing on the rights of your faculty if you're sort of going to them and suggesting, "Hey, maybe you shouldn't teach this or maybe you shouldn't say that in the classroom." I think they have to stand firm, educational institutions, even though they're facing pressure, not just from the administration, but, as you know, from donors and from alumni and from the public at large. This has really put universities in a very difficult spot. But the one thing I think they cannot do is to sort of give away their institutional autonomy in order not to be targeted by a retaliatory executive.

Michelle Deutchman:

No, thank you. I think maybe we'll get to this later, but it sort of leads to the question, something I think a lot about, which is while universities are in a very unenviable position, there is a potential opportunity for collective action that we haven't seen. And I think it's a challenge. I could keep talking all about freezing funding, but I want to move us on because I want to make sure we also get to protest and hopefully to campus speech. Listen, particularly in the wake of Charlie Kirk's assassination, I want to talk about campus protests and assembly. Earlier this year, long before Kirk's death, you published a law review piece entitled New Threats To Campus Protest, which will also be in the episode notes. In that article, you highlighted some of the steps that were taken by colleges and universities in light of the Israel-Hamas War, which gravely limited student activism.

These included canceling already permitted demonstrations, masking bans, limits on who's allowed to organize and participate in demonstrations, and regulations addressing whether and

where signage displays and sound amplification can be used. If all of that was already taking place before Kirk's death, what do you foresee in the coming months for expression and assembly rights, and in particular, with regard to safety and security? One of my concerns is that... While safety and security, of course, is a serious and real issue, I worry that it can also be used as a pretext for stifling speech.

Timothy Zick:

Yeah, that is a major concern. I would say all of the things that I talk about in the article, plus a whole lot more, are pressing on universities to act in ways that are going to be detrimental to campus assembly and protests. What I mean by that is... what I discussed in the article was things that the administrations had themselves done. What did presidents do and what did campus administrators do in light of what happened with the Gaza-related protests. What I didn't discuss in there was what the Trump administration has been doing or what federal legislators or state executives and state legislatures have been up to. And they too have been very focused, hyper-focused on campus protests. You've got the Trump administration taking a very important and vocal component of campus protests out of play by snatching off the street people who organized protests, who happen to be studying on a visa or some other legal means. Are they going to, to the extent they're here, protest on campus?

I would suspect not given the threat to them, like being detained and deported. The administration has pressed universities to be even stricter with regard to enforcing protest policies, so, "Change your disciplinary rules to make it easier to discipline students who break the rules, enhance your punishments." And some of the universities that have sort of accepted a so-called deal from the administration have agreed to do that. They've agreed to masking bans, and maybe to apply a definition of antisemitic speech that's going to be broader than the First Amendment should allow. There are countless pressure points with respect to campus protests. Now comes the killing of Charlie Kirk. Undoubtedly, that is going to cast a pall over public events at universities and could be, as you say, used as a pretext for denying permits or just not allowing campus protests to occur.

There are First Amendment standards here. There are First Amendment limits to what universities, I'm thinking of public universities, can do with respect to the rules of protest on campus. But it's going to place more pressure on public gatherings, and there are serious safety concerns there. I don't mean to downplay them, nor would I downplay the antisemitism that was apparent on some campuses, but the question is the proportionality of the response. For me, that's a real concern. I'm writing an article now, sort of a follow-up article, that I was entitling Killing Campus Protests before Charlie Kirk was murdered. I think that title probably isn't appropriate.

Or maybe it's more appropriate, but maybe a requiem for campus protest because I'm not sure we're going to see campus protest as we know it, as Americans, in our history, ever again. And by that, I do mean sort of the 1950s, '60s, '70s, into the '80s, those sorts of campus protests, which were very impactful in terms of everything, from desegregation to ending the Vietnam War. I don't know that you can sustain those in an environment where students, in particular, feel like the heavy hand can be brought to bear if they step over, now, an increasing number of, lines that are being drawn on campuses.

Michelle Deutchman:

I appreciate your candor, but it certainly is a very somber prediction. I'm going to keep going on this topic because one of my pet issues and one that I feel like was largely overlooked and the rush to interpret the meaning of Kirk's death through our polarized politics is the profound interplay between the First and Second Amendments. You were one of a handful of legal commentators to highlight this when you posted a piece on your Substack called When the Second Amendment Threatens the First, and you wrote, "Charlie Kirk was not killed by words. Like far too many others in the United States, he was murdered with a high caliber firearm. Easy access to firearms is an existential threat to peaceful discourse." I was just hoping you could maybe outline some of the ways that First Amendment expressive rights are chilled by the Second Amendment, and especially in open carry states and public venues. Yeah. I can also ask what do we do about that, but I'm not sure what there is to do post-Bruen and with the current Supreme Court. But you're welcome to discuss any or all of those questions.

Timothy Zick:

Sure, yeah. No, I've written about all of that. I don't know that any of my proposed solutions would be effectual, but I did have some ideas about that. But as you said, they have to be consistent with the Second Amendment. So one way that exercising Second Amendment rights, at least accessing firearms and then using them for illicit purposes, can chill speech is exactly the Charlie Kirk situation. Right? One person with a high caliber rifle who murdered another person who was on campus to speak at an event could cause immeasurable damage to other people's First Amendment rights. You may not be able to protest because there's a danger now that somebody who lawfully possesses a gun may misuse it. That's one example. I've written quite a bit about carrying firearms to public protests, which when I talk about that to people, they say, "Well, that's just crazy."

Certainly, a gun doesn't belong in that environment. There's common sense to that, and there's data supporting that common sense. There's studies that show that people who think that there will be guns at a protest are less likely to attend, less likely to speak if they attend, less likely to bring their families. It's an intimidating environment. And in that context, it could very well chill even peaceful protests or result in a peaceful protest becoming a place where mayhem occurs, like physical harm and death. There's a question of spatiality there, "Where do guns belong? Should they be on campuses? Should they be at protests?" Well, when you carry them to those places where there are obvious First Amendment events going on and First Amendment rights in play, you potentially threaten those rights. One of the big question is, "Well, what can you do about that?"

So many states have very liberal public carry laws, and a lot of states you don't even need a license to get a gun and then to carry it. You can carry openly in some states or conceal, or both. There are things... I won't go too far into the Second Amendment area, there's a concept called sensitive places. There's certain places where guns historically have been banned because of these types of concerns. That could be schools and universities. It could be government buildings the court is recognized. It can be public protests. So in a lot of places where people frequently protest, government buildings come to mind or public parks, there's historical support for banning public carry in a number of those places. Is it enough historical support for the court? We'll find out, presumably, at some point. There's that, and there are lots of other different legal interventions that one could make to try and make public protests safer in the event that people are going to try and carry firearms into those spaces.

But it's a real problem, right? The First Amendment's theory is we effectuate policy change through peaceful discourse. What is the Second Amendment's theory of peaceful change? Does it have one? How do you reconcile the right to publicly carry a lethal weapon and the right to peacefully assemble and engage in dissent? It's a really difficult problem, and it's become more difficult as more people have decided to try and normalize carrying weapons in public and not concealed. I'm talking about long guns and things that are sort of inherently intimidating to a lot of people. So that's a really important intersection. It's something we should be paying more attention to.

And in the Charlie Kirk example, all of the focus it seemed to me was on speech, what was said, what did he say and what did the killer say. On that very same day, there was yet another school shooting, not far apart in terms of minutes from the Charlie Kirk shooting. We should be able to talk about both of those things. One of the frustrating things for me, in a way, about public discourse is, from the right, it's always too soon to talk about firearms regulation. But with respect to casting blame for the murder of Charlie Kirk, it was not too soon to talk about words and rhetoric. So there we are.

Michelle Deutchman:

I appreciate you're discussing this with me, and I'm glad you mentioned the other shooting. I was going to say it's not just the normalization of weapons and open carry, but the normalization of the amount of violence we have come to anticipate and expect in our society. And it also makes me think about Unite the Right in 2017 before the center had even been founded. That was one of the issues that came up, and I'm sure we all recall that the ACLU took a lot of flack. And there was a moment there with Heather Heyer's death where there was this discussion about those two things. And then, I'm sure, people have still been studying it, but it's definitely been more in the background. Okay. My third big bucket that I wanted to cover today is classroom speech. Obviously, I'm going to do a quick refresher for our listeners that what professors teach in the classroom and how they teach it are key components of academic freedom. They're delineated in the AAUP's 1940 declaration, are protected so long as the professor's instruction aligns with disciplinary competence and professional standards.

We've seen a movement, in the last number of years, by state legislatures to pass laws that interfere with professor's autonomy to plan and teach course material, including attempts to ban books, subject areas like critical race theory, or particular perspectives on topics like the history of slavery in America. President Trump has used executive orders to attempt the same in spite of the fact, as you point out in your SubStack, the president has no direct authority to dictate what is or isn't taught in university classrooms. Despite this, we have seen firings at Texas A&M and the resignation of the college president as a result of the discussion that addressed conceptions of gender in a children's literature class. Now, Texas Tech has become, what I believe, the first public university to provide written guidance requiring compliance, not only with current state and federal law, but also with Trump's executive order that recognizes only two human sexes, male and female. This requirement allegedly applies to the instruction of students. In your post, you described this as hogwash, and I want you to tell us why.

Timothy Zick:

Yeah, let me add something first. At public universities, of course, you have First Amendment rights if you're a public employee. So you're right about the academic freedom part, and it is

supported by and related to First Amendment rights to engage in discourse in the classroom. With all of that, as you say, you still see efforts to dictate or shut down, not just subject matters, but particular viewpoints being addressed in the classroom. And what I was referring to as hogwash is the notion that the president of the United States had somehow directed universities across the United States to forbid any discussion of non-binary gender in the classroom. That is hogwash. The president executes the laws of Congress. There is no law of Congress that authorizes the president to make that directive. And even if there were, it would be an unconstitutional law, it would violate the First Amendment.

To our earlier discussion of how do you broaden the effect of these executive orders, which seem to apply only to sort of contracting or some narrow area, well, you convince people that the edict applies across the entirety of society. In the Texas A&M case, you had a student who interrupted a classroom discussion, videotaped and audiotaped the interaction with her professor and told the professor, "What you're doing is illegal because Trump said so." That is hogwash. That is dangerous to classroom teaching and to free inquiry in the classroom. It pits students against their instructors. It pits the university against the administration, I suppose. The indirect way that the administration's position could affect the university is because of the threat of termination of funding, "Well, you receive federal funds and, therefore, I can dictate what goes on in your classroom." The one does not follow from the other, but the universities are running scared. Or in the case of Texas A&M, maybe not running scared, maybe they support this.

There was a lot of pressure from the state legislator who saw this video, amplified it. Three people on the faculty lost their jobs over this. And then as you said, the president resigned, the president of the university. As to the guidance, even if you were going to take the position that you can't talk about gender ideology, that's what the executive order says, how are you going to effectuate that? What does that look like in a classroom? They put up guidance and then they quickly took it down. So I noticed, they put it up and then I was going to look at it and like, "Oh, it's gone." Part of the reason for that is probably it's impossible, nearly impossible anyway, to describe in any detail what you are asking faculty not to talk about. It's everything from, "Can I have a rainbow flag in my classroom? Can I wear a rainbow lapel? Can I say my office is a safe space for discussion of gender issues or other sexual orientation, and so forth?"

And I kept thinking about my own teaching. I teach constitutional law and I teach a unit on the equal protection clause, and that includes gender equality. As you know, gender is not today what it was when the Supreme Court addressed it in 1970. We have very different conceptions of it, we have a very robust debate about what gender is, and I preface my class with that discussion. Have I run afoul of the president's executive order? Is my university going to terminate my employment or suspend me from the classroom? I sure hope not. This is dangerous stuff. It's not clear what the executive order requires anyone to do. And it's not clear that the university system in Texas, the systems that have tried to sort of comply, as they call it with the executive order, know what they're doing. There's a vagueness component to this, but that also leads to overcompliance.

It all comes back to the same sort of principles that, "Even if there's not a law on point, if I think I might be running afoul of it, I will trim my sails. I will no longer give my class that preface with regard to gender. I will teach it as binary." Even though there are cases in the book now about transgender individuals and their equal protection rights, how do you do this? You can't. All of that's a long way of saying, as an academic myself, I have a personal stake, I suppose, in how this all shakes out. But I have a strong conviction, and I think the law is on my side, that the

government can't dictate what I teach about gender as long as it's germane, it relates to what I'm supposed to be teaching in the classroom. But the Texas A&M example is a good one. Even though the law is clearly on the side of the instructor and others, they've been terminated. So they will have to sue, assuming they're not welcomed back, in order to get their jobs back.

Michelle Deutchman:

It's a very difficult cycle. I often say, in the workshops I do, that the law is a blunt instrument. And I think that this is where we sort of see that, where we know that the law might be on our side. But that doesn't help a professor who has to decide what the rules mean and are likely to err on the side of excessive caution, and/or chilling and/or removing material from the classroom. So it's really a challenge-

Timothy Zick:

Yeah. It's not a brand new issue. There have been sort of language issues in classrooms, as you know, by following this conflict. Some of them come from the left and students and their sensibilities. You face that in the classroom and you should endeavor to be current with respect to what the debate is all about, and so forth. And hopefully, you get a measure of grace from students when you make a mistake. This is quite different. This is the government trying to tell me, in effect, what I can and cannot discuss in the classroom. As I said, we're in a dangerous place with respect to higher education.

Michelle Deutchman:

And I think similar. They're different legal applications, but extramural speech for faculty too, I think that's sort of maybe... We have time for one more question, which is, "How many faculty were sanctioned and even students for not just their own posts, but forwarding on other people's posts that made comments about Kirk's death, that may or may not have been appropriate according to the government?", which again really runs afoul of all the things that we're talking about. I don't know if you have any thoughts about that.

Timothy Zick:

I do, as a matter of fact. As someone who engages in extramural speech, including this, this interview itself potentially could be used against me in some fashion. I work at a public university. I have the right to comment, as a citizen, on matters of public concern. That's what the First Amendment says, unless and until whatever I say has some sort of significant disruptive effect inside the building. That's the sort of First Amendment standard for government employees. And then, of course, there's academic freedom that applies to private university employees. And look, it's interesting, and some people have called this now the woke right, the sort of embrace of canceling people that the right railed against for many, many years and all that. It's wrong no matter who's doing it. The distinction that I always like to sort of tease out though is that it's one thing for social opprobrium to be brought to bear on somebody for say using the N-word or saying something offensive.

It is quite another for the government, whether it's federal, state, or local, to intervene to punish someone for what they've said. And if you're a public employee at a public institution, that's really what's happening. It's being done, I think, to show that you are attentive to the concerns of a retaliatory administration. It's another form, in my view, of capitulation. There are things I

wouldn't say in the wake of what happened to Charlie Kirk, but a lot of what I've seen is that people are being punished for sort of publicizing what his views were, which isn't the same as celebrating murder. Those are two very different things. I will say in my own Substack, when I wrote about Charlie Kirk, when I just mentioned his name, I had four times as many views as anything else I've written. I don't know who's reading it, but I have a sense of who might be reading it because there are people now devoted to weeding out academics who say the wrong thing.

And fortunately, for me, I suppose, I did not get contacted by either the internet trolls or my university for anything I wrote. But that is the danger. I did a different interview, a couple of weeks ago. They were having a hard time getting guests to come on because the guests were afraid to say anything negative about anything the Trump administration was doing. I don't feel like I have that luxury, and I wouldn't do that anyway. I feel like people should speak out, and I'm not going to capitulate. But the chill part of this, which we talked about earlier, is very, very widespread. And it shows up in places like that every day.

Michelle Deutchman:

I want to follow up with two comments. One is that not everybody is as courageous as you, and I admire that. I hope that it will inspire some of our listeners to act similarly. And second, I want to reiterate how important one of the things you said is, which is that there are consequences for expression. Just because speech is, quote, unquote "free" doesn't mean there aren't consequences. The First Amendment is about not having consequences from the government. And I think that people really do not understand that, right? It doesn't mean that there won't be responses from people that you work with, people that you know. The whole idea is that the government is expecting a public employee doesn't have a role in responding, retaliating, coercing, suppressing your ideas. And I just think that not enough people, I mean, this is my experience, even understand that the First Amendment is about the government.

Timothy Zick:

Right.

Michelle Deutchman:

I'm hopeful that this episode among other things will help people to understand more specifically, not just generally of like, "Oh, the administration is doing these bad things," but specifically why they are so destructive to what underpins our democracy and all of its democratic institutions, including higher education.

Timothy Zick:

Yeah.

Michelle Deutchman:

With that, we always end by asking our guests if they have some kind of action that folks can make towards the conversations we've been having. In this case, I think it could be something to think about, something to read, something to do vis-a-vis expression or assembly in higher ed. And I welcome any thoughts that you have.

Timothy Zick:

Yeah. Well, I'm just a law professor, so take what I have to say with a grain of salt. But I think with respect to higher education, if you're fortunate enough to be a donor, you have influence over what higher education does. If you are an alum of a university, you can also make your voice heard and so they have that information, "What are people who went to this university and prized their experience thinking about what's going on?" You have to stay aware of events as they're happening with respect to higher ed and with respect to other things. And I think it's probably going to sound trite, but vote. We don't actually talk about these things as if they're on the ballot, but this agenda that Congress has allowed to happen is very much on the ballot in 2026 in the midterms. One of the reasons Trump's been able to do what he's been able to do is there's zero pushback from Congressional Republicans with respect to funding or the Justice Department, what he's doing with the Justice Department, or anything else.

So just like we talk about reproductive rights and other rights, we should be more frequently talking about First Amendment rights when we talk about politics and elections. The last thing I'll say is with respect to reading, I myself have been doing a deep dive into campus protest books. There's some really good ones out there. I can share the titles with you when we're finished, but I've already learned a lot. I knew something about campus protests, but I've been reading books about what was going on at historically Black colleges, for example, that hasn't gotten as much historical attention. The reason for that is a lot of people think of campus protests as silly or ineffectual, or incipient riots, or a bunch of entitled students who are just breaking the rules to break them. No. I think a lot of students are principled and they have something to say. This is a generation we should be listening to rather than trying always to punish, calling out law enforcement to arrest them and taking all these other measures. So I think in terms of reading materials, that's sort of where I am and what I'm finding useful.

Michelle Deutchman:

Thank you so much. You've been incredibly thoughtful and generous with your time. Is there anything else you want to add before we close?

Timothy Zick:

I don't think so. I think we covered an enormous amount, actually. As you said, there isn't enough time to cover everything that's going on, but we touched on a lot of the major themes. And I appreciate your questions and the exchange. Thank you.

Michelle Deutchman:

Okay. Thank you so much.

Well, that's a wrap. Thanks again to Professor Zick for giving us his time and expertise, this month. If you haven't already done so, please be sure to register for the final two installments of the center's Fellows in the Field series to learn more about our fellows research. Talk to you next time.