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 caused 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. We are honored to be kicking off season five of the podcast with two nationally recognized higher education leaders, Howard Gillman, Chancellor of University of California at Irvine and Erwin Chemerinsky, Dean of the University of California at Berkeley Law School.

In addition to these august positions, they serve a special role here at the center as co-chairs of our National Advisory Board. They've been instrumental in the center's founding, growth, and development over these last eight years, for which I am incredibly grateful. Both are the authors of numerous law review articles, op-eds, and books. As a pair, they wrote THE book on "*Free Speech on Campus"* in 2017. They're joining us today to discuss their new book, "*Campus Speech and Academic Freedom, A Guide for Difficult Times*," which is available later this month.

But before we dive into today's conversation, let's turn to class notes, a look at what's making headlines. Texas A&M University seems to be the leader in news hits this month. On January 6th, the university's College of Arts and Sciences alerted an instructor in a contemporary moral issues course to remove two one-day units on race and gender ideology, including readings from Plato's symposium. In order to comply with a revised system-wide rule that says no system academic course will advocate race or gender ideology or topics related to sexual orientation or gender identity.

The university sent similar notices to other faculty members whose courses underwent syllabus reviews by administrators to comply with the revised rule. In an official statement, A&M attempted to placate outraged faculty and students by saying that Plato will continue to be taught widely, assuring them that the syllabi review only ensures that no core curriculum courses teach race or gender ideology. Just a week later, Texas A&M canceled a graduate ethics class during the ongoing course review after administrators said the professor did not specify when and how race, gender, and sexuality might be brought up in the course.

The revised policy allows non-core curriculum and graduate courses to request an exemption from the rule in limited circumstances upon demonstration of a necessary educational purpose. Administrators allege that they could not identify the specific information needed for an exemption request and therefore canceled the course because the professor declined to provide it.

The professor contested this by arguing that issues of race, gender, and sexuality are not peripheral, but integral to the class, and it was inappropriate for them to limit or censor discussions in the course.

These restrictions on teaching have drawn widespread criticism and are among the many examples of how academic freedom is being undermined and dismantled across the country. The Texas A&M examples fit the profile of education censorship that PEN America details in its newest report released last week, expanding the web of control, finds that more than half of United States college and university students now study in a state with at least one law or policy restricting what can be taught or how campuses can operate.

The report also notes that state legislatures set new records in 2025. For instance, 15 states passed 21 laws censoring higher education. We all have our work cut out for us this year. Collaboration and collective action will be vital. If I shared the full biographies of both of today's guests, there would just be no time for an episode, so I'll give you the Cliff Notes version. Chancellor Howard Gillman was appointed by the University of California Board of Regents as the sixth chancellor of the University of California Irvine on September 18th, 2014.

He is an award-winning scholar and teacher with expertise in the American Constitution and the Supreme Court. He holds faculty appointments in the School of Law and the Department of Political Science, which is within the School of Social Sciences. Dean Erwin Chemerinsky became the 13th Dean of Berkeley Law on July one, 2017, when he joined the faculty as the Jesse H. Choper distinguished professor of law. Prior to assuming this position from 2008 to 2017, he was the founding dean and distinguished professor of law and the Raymond Pryke Professor of First Amendment law at the University of California Irvine School of Law.

The dean and the chancellor were guests on Speech Matters in our first season, which kicked off in 2022, but that does feel like a lifetime ago. We're thrilled to welcome you both back to season five of Speech Matters.

Dean Erwin Chemerinsky:

It's a pleasure to be with you.

Chancellor Howard Gillman:

Michelle, you're always one of the people we want to talk to most, so we're really looking forward to the conversation.

Michelle Deutchman:

Me too. I hope you feel that way after the conversation. No, I'm just teasing. As I noted at the top, the two of you have been longtime partners, including co-authors of numerous op-eds, as well as your 2017 book, "*Free Speech on Campus*." 2017 was an auspicious free speech year with notable campus controversies taking place at UC Berkeley, including the visit of Milo Yiannopoulos at Middlebury College with the visit of Charles Murray and at University of Virginia the evening before the Unite the Right Rally.

Before we get into the substance of this latest book, I want to ask a bit about your decision to write the book and the writing process itself. Following campus expression issues in higher ed during the last five years in particular, could easily give anyone whiplash. After Biden's

inauguration in 2021, he immediately undid many of the executive orders that President Trump issued during his first term, only to have President Trump do the opposite upon his reelection.

Alongside the executive orders, there have been increased Dear Colleague letters and investigations by the Department of Education's Office of Civil Rights, as well as ever-increasing activity by state legislatures who are attempting to employ lawmaking as a way to control what can be taught in college and university classrooms. And then of course, there are the federal and district court judges who've been ruling on these issues, often creating circuit splits that create further inconsistency.

So, during all of this campus expression ping pong, when did the two of you decide it was time to write a book? Chancellor.

Chancellor Howard Gillman:

Yeah, ping pong is one metaphor to be used. So, it was really around 2022. We had been reflecting on all of the debates that occurred since we wrote the first book. The first book, as you remember very well, Michelle, was written at a time when even basic principles about whether the expression of ideas on campus could be regulated, how they could be regulated was a contested issue. And back in 2015, '16, a lot of university leaders didn't have the vocabulary, the arguments to understand how to defend speech that people found disagreeable.

And a lot of students had never really been taught the value of free speech principles. They had been taught the importance of toleration and the like, but not really why you should tolerate and embrace protections for speech that you might otherwise find offensive. So we thought we needed to write a book that dealt with the basics. After a number of years though, in the wake of that book, a lot happened. There were tremendously disruptive, even violent protests on campuses, ongoing disruption of campus activities.

Increased government intervention, new developments in the way in which the federal government, even under the Biden administration, was thinking about non-discrimination principles and the protections of Title VI in the university environment. And so, what we realized was, even if you accepted and understood and agreed with our basic point about the importance of free speech values, there were so many issues that nevertheless had to be addressed.

Whether it came to protests on campuses, or whether it was about what faculty said in professional environments or how you deal with social media or what to do about, especially in the latter part of the Trump administration, efforts on the part of both the federal and a number of state governments to regulate higher ed. All of those issues were really not addressed. They were beyond the scope of the first book, which is about first principles.

So we thought we needed to do a book that dealt with, even if you agree with the basics, there are many, many issues that still need to be addressed. And by around 2022, we started to map out the book.

Michelle Deutchman:

One of the things that I thought was interesting about the book, and I'm curious to know if you had planned this, is you ended up bringing in so many of your personal experiences that you had in your roles. And I'm wondering if that just seemed natural or that was something that you had to really kind of grapple with.

Dean Erwin Chemerinsky:

No. When we were thinking of the book, we didn't imagine that so much of it would need to be in the first person. We were very much focused on the national events that were occurring. And Howard mentioned several of these, the disruption of speakers, including at some law schools, the adoption of anti-critical race theory laws, the Stop WOKE Act and states across the country. And we go on with the many incidents of particular faculty members facing discipline for their speech in and out of the classroom.

And we realized, as Howard said, that the book we wrote 2017, "*Free Speech on Campus*," just hadn't dealt with these. And it didn't make sense to us to try to do a second edition. We're really talking about a brand new book. And our hope was when we signed the contract with Yale Press, that is a book that would be due ... the manuscript turned in, in the summer of 2023 for a publication in 2024. For many reasons, we didn't have the manuscript done at that point.

And so much happened during the following year, including, of course, things on the Irvine campus, things at the Berkeley campus, the encampments across the country, so much so that our terrific editor at Yale Press, Bill Frucht said he was never so glad that a manuscript was not turned in on time and we were able to write the book and we recognized that the book is inevitably a snapshot. It's at that moment in time. And so we picked, I think, an important moment in time and turned in the manuscript in the fall of 2024 to be able to talk about just the monumental events that occurred, including ones that we experienced over that year.

Michelle Deutchman:

I can only imagine that there must have been many moments in the writing process when you thought the manuscript was complete, only to wake up the next morning to headlines that necessitated edits or editions. And I imagine that it was hard to decide when to quote-unquote call it. And I think it is a snapshot. It's a little bit like ... for people who do this work every day, a little bit of a like, "This is your life episode."

All the kind of greatest hits, so to speak, but I think there's already so many more issues for the next book. So let's dig in. Your book focuses and discusses the phenomenon of campus protests and encampments following the events of October 7th, 2023. One of the reasons it's good that you didn't turn the manuscript in before then. It notes that in the spring of 2024, college students set up roughly 121 protest encampments at 117 universities.

In chapter one, you go to lengths to answer the question, "Is nonviolence enough to comply with university policies?" Throughout that spring, there was much confusion about the difference between a peaceful protest and one that violates university regulations. And I would appreciate it if you could talk a little bit about this important distinction. Dean?

Dean Erwin Chemerinsky:

I want to start a step back from your question, and that's that the premise of both free speech on campus and the premise of this book is that a campus has to be a place where all ideas and views can be expressed, that it's integral to what we think a university has to be about. But of course, there can be time, place, manner restrictions as to the when and how speech can occur. Even there's a right to use government property for speech, it doesn't mean that there's the right to use every piece of property at every time.

I'm teaching constitutional law. No one has the right to come into my class and use that classroom for a forum for other things because the time, the place, the manner are all specified. What's in this context that I think when we focus on protests, it's important to draw a distinction between peaceful protests that are accord with the rules of the campus and the law, protests that violate campus rules that still remain peaceful and protests that violate the law, and that would include violent protests.

And the First Amendment doesn't provide a right to ever engage in violence. And generally, the First Amendment doesn't provide a right to violate campus rules. Now, the punishment, the sanctions may be different, depending whether you're talking about campus rules or violating the law, but ultimately, the First Amendment has to be about a right for peaceful protest, not violence.

Chancellor Howard Gillman:

And Michelle, thank you for asking that question because even before the extremely tumultuous year that occurred in the wake of October 7th, it was a very basic, straightforward principle of any conception of free speech that you have a right to express yourself, but not any time, anywhere in any way you want, so these time, place, and manner restrictions. And they apply not only with respect to encampments, but with respect to whether you should disrupt an activity on the campus and the like.

So we wanted to make sure that people understood that it's a straightforward principle, even of the most hardened free speech advocates, that there are legitimate regulations. There's rules about the regulations. It can't be so onerous that you really effectively don't have an ability to reach your audience, right? They have to be reasonably related to a legitimate interest of the campus.

But before the encampments of that year, no one would have said that under ordinary circumstances, any group that wants to come in and commandeer a space on the campus for its own purposes and disrupt campus activities has a free speech right to do. So there was a lot of emotion with respect to that year. A lot of people were in sympathy with the students who were out there, engaged in that activity, but sometimes you just have to get back to first principles.

So we did want to make sure that, sure, if there wasn't active violence, that might be one observation about what some of the encampments were like. But the idea that there's a right, if you believe in free speech, to commandeer as your own, a space on the campus in violation of university principles and act in that way, that is something that most people under ordinary circumstances would understand is not a right.

We don't have any doubt, for example, that if people from a different political vantage point, let's say anti-immigrant activists decided to go onto the campus, put together an encampment with signs that were considered very hostile to students on the campus who had immigrant status that people wouldn't say, "Well, that's simply a right and you can't interfere." And just because they're not engaged in violent activities, we should allow them to be accommodated.

So one of the aspects of free speech is that there has to be viewpoint neutrality. The rules that you apply to some protestors, have to be the same rules you apply in other circumstances. And so in that chapter in the new book where we talk about protest activity on the campus, we do want to make it not just about what happened with the encampments, but every campus activity,

disruptions of campus events, all the same, very important to apply it regardless of who the protesters are and what their viewpoints are and just lay that out as a basic principle.

And we think in the wake of that year, people have a slightly better understanding of it, but it was very painful that year to think about how divided the campuses were under those circumstances. But as we say in the book, the way that you manage through incredibly contentious moments is that you have an understanding of what the first principle should be and what the basic principles are.

And part of the reason of the book is to reassert these basic principles even when people are divided politically on particular activities.

Michelle Deutchman:

Well, one of the reasons I picked up on it is because I definitely noticed when I would go and speak to not just students, but faculty and administrators, there was a misperception that as long as it was peaceful, it was okay. And that also, if you were committing civil disobedience, there was a chasm between breaking rules and then being ready to accept consequences. And so, there was a lot of discussion about that.

And I don't know if either of you wants to talk a little bit about the role of administrators thinking both about consequences and proportionality, but at the same time thinking about the role of the university as an educator and how you sort of balance those things, especially when passions are so high.

Chancellor Howard Gillman:

In fact, one of the most important decisions that administrators had to make during that year when really these encampments have been quite unprecedented as political activities, many university leaders had faced particularly that form of protest was. Well, if it violates university rules, what does it mean about how you should respond? And so just to give you a sense, and we discussed this in the book of the complications, right?

You can imagine that, well, it's a violation of a university rule, but not necessarily a broader criminal law. So under those circumstances, do you use police to enforce university regulations or not? And under normal circumstances, we don't use sworn officers to enforce university rules that don't implicate larger aspects of criminal law. And so one decision is, do you use the administrative processes, for example, of student conduct proceedings to address those issues, or do you involve other people?

If you believe that those administrative processes might not be sufficient to deal with the issue, under those circumstances, can you call in police? Does it depend on whether local police jurisdictions are available to you to assist if the activity is more than can be handled by the police at a particular university? The layers of complications are extraordinary. And every university leader that we talked to was working through those issues in an unprecedented way in real time.

And one of the things we want to convey in the book is, sure, let's say you believe that those kinds of activities should not be permissible. It still raises lots and lots of questions about what the actual implementation strategy should be, how far you should go. And then as you say, what the proper response should be, is the response always going to be a response that is a criminal justice response?

Is some of that going to be within student conduct? If so, are issues of proportionality and the like, relevant? All of those have to be worked through. And too often, especially when these issues get pulled into the culture wars, people just say, "Stop it no matter what, use any force necessary, or you're being too accommodating." But the decisions that actually have to be made by administrators in real time are much more common.

Dean Erwin Chemerinsky:

One of the things we wanted in this book, like on Free Speech and Campus, is to give guidance to campus administrators. We didn't want to just offer platitudes, but to be quite specific in terms of how we could be useful. And one of the things that we realized is the campuses had the legal authority to stop the encampments. It wouldn't violate the First Amendment to enforce those time-place manner restrictions, but it was much more pragmatic about what they should do.

And so in accord to what we were trying to do in the book, we list some criteria here. How much is the activity disrupting the campus education and research mission? How great is the risk of violence and destruction of property? How much harassment is happening? What have been past practices and what are implications for the future? What actions would be necessary and what are the likely consequences of taking them?

These don't always point in the same direction, but we think they are such important considerations when campus administrators are facing things, like the encampment situation of the spring of 2024.

Michelle Deutchman:

Well, that's one of the things I like about both of the books. And I'm a very pragmatic person, so obviously I love the law, but I think that people ultimately, even when you give them basic principles, this book is all about nuance and that's what this whole experience has been about. So I want to pick up on something that the chancellor said, and maybe you can speak to it a little bit, which is that so many people analogized the spring of 2024 with the Vietnam War protests.

And you point out in the book that a key characteristic of the Vietnam protests was that students were largely unified against the war and you contrast that with the current divisiveness of the student body and faculty on the issue of Israel-Palestine. And maybe dean, you can speak to this and add in any of your own thoughts about how did this affect things on campus? And do you think that the larger national divisive political climate, the polarization is contributing to this?

And I'm not going to ask you how to solve it, but we'll just talk about your general thoughts.

Dean Erwin Chemerinsky:

I'm old enough that I was in college during the Vietnam War and participated in anti-war protests. And at least where I went to college at Northwestern, the student body was overwhelmingly anti-war, quite different from the spring of 2024 on our campuses where there was intense division between those who were supporting Palestinian actions and those who were supporting Israel. There wasn't much common ground often between those.

There was a group that believed that Israel should not exist as a country. They took literally the phrase from the river to the sea, and those believed that the existence of Israel was essential. In one way in which it was similar to the anti-Vietnam war protest is that people felt very

personally affected. I know that when I was in college, one of those frequent topics for conversation is, what were you going to do if you got a low draft number?

And for those who cared deeply about what was going on in the Middle East, was often tied to their religion, to their identity. My answer to your question is that in the end, it has to be a process conclusion, that it has to be that the campus is a place where everyone is made to feel welcome, everyone is included, everyone can express their own views and ideas, that the campus has to be this forum where all ideas and views can be expressed.

And I think that was true in the 1970s, and it's true with the deep divisions that occurred in spring of 2024 and they remain on our campuses.

Chancellor Howard Gillman:

And when I talked to my colleagues around the country who were university leaders under these circumstances, every single one of them said that the most challenging issue they've had to face as a leader if they had been in the job for a while, wasn't COVID shutting down the entire university, fundamentally transforming education on the campuses and the like. It was this issue. And it was this issue because the amount of pain that was directed within the university community and other members of the university community divided the campus in a way that seemed impossible to try to overcome.

We're so used to at a university when people disagree, falling back on what we think are the basic scholarly norms. Well, our job is to deepen the conversation rather than reproduce all of the problems of social media and political culture. Let's get people to talk, let's focus on facts, let's do teachings and the like. And one of the things as Erwin and I were talking to each other during those early months, we realized, was that there are certain moments when people are not in a position to talk.

Even if they've agreed to be part of a university community, even if they understand that in that community, their job is to listen more deeply than they would in other circumstances. Sometimes the moment presents itself in a way where you can't overcome that divide, and that was part of what was so painful. All of the normal tools we had to try to manage the situation didn't become available because of the pain, the personal experience, even in many respects, the deep age.

So the other thing that's different about the Vietnam circumstance is that on both sides, there was an argument that when you let the other side express their view, the other side of that view felt that the expression of that view made them feel less safe on the campuses, right? There are very few people who, as a result of their identity or protected class during the Vietnam War said, "Well, if some people are opposed to war, that makes me feel as though I'm being discriminated against on the campus."

They just knew that that was a political argument, but on both sides of this issue, people thought that if you express a particular view, if you said, for example, chanted from the river to the sea, as a Jewish student, you would say, "That is making me as a student feel as though I cannot have an equal educational experience on this campus." But the same thing was true for pro Palestinian students who would hear pro Israel statements.

And part of the complication of this debate that we wanted to address in this book is that federal anti-discrimination law, the Title VI framework where everyone has a right to be on a campus and to experience campus activity in a way that is non-discriminatory so that they have the same ability to get an education in others, all of that almost immediately got pulled in to these debates.

So it wasn't just how painful it was to try to bridge the gap. We knew we couldn't bridge the gap, but hovering over all of this activity were actually under the Biden administration, letters from the Office of Civil Rights to campuses that were ... from our point of view, were not especially clear about how if we didn't do something with something not being that well expressed, we may be in violation of Title VI.

If, for example, we allowed pro-Palestinian demonstrators to say certain things that Jewish students felt created a hostile environment, the campus may be violating federal law. And Erwin and I at that time wrote op-ed or two, saying, "This puts campuses in a very difficult position because what we think people are saying, what pro-Palestinian protestors are saying may be very distressing to pro-Israel students on the campus." But from our point of view, they were clearly constitutionally protected speech activities.

And so what is a campus to do when we think the First Amendment requires the campus to protect that speech, but you're getting signals from the federal government that if you don't do something about the fact that some people are expressing themselves that way, you may be in violation of federal law. And one of the things we think is really important about how the book addresses these issues is that it layers in this additional layer of complexity about how campus leaders are trying to figure out how to manage free speech issues with these new claims of non-discrimination and of the obligations of federal law.

Michelle Deutchman:

Well, you just covered a lot there. I'm going to pick up on a couple of things. I think during that period of 2023 and 2024, I did think that one of the sad ironies was that the common ground often was the amount of pain that people experienced. And then of course, Title VI, you have the director of the Office of Civil Rights saying there's no rub between Title VI and the First Amendment, and yet you've Just articulated all of the pressures that are being brought to bear on administrators.

Dean Erwin Chemerinsky:

Yeah. Maybe we should, for those listening, explain a little bit about what Title VI is and its relationship to this, because I think in our comments, we've assumed that people are familiar with it. Title VI and the 1964 Civil Rights Act says that recipients of federal funds can't discriminate under the basis of race. The Supreme Court has expanded this to include ethnicity. So discriminating against people for being Jewish, being Muslim, being Israeli or Palestinian would violate Title VI.

And the standard under Title VI is that a university receives federal funds and all do, can't be deliberately indifferent to a hostile environment on the basis of race or ethnicity. And it's just as Howard said that the presence of say pro-Palestinian speech could make Jewish students feel uncomfortable and say it's a hostile environment or speech that was defending what Israel was doing in Gaza could make pro-Palestinian students feel it was a hostile environment.

And the question is, well, what happens? It can't be that the university, at least when you're talking about a public university governed by the First Amendment, could punish the speech, Title VI, a federal statute, can't override the First Amendment in the Constitution. And it was in this context that Catherine Lhamon, who was the Assistant Secretary of Education for Civil Rights, the head of the Office of Civil Rights, made a number of statements that said that

campuses have a duty under Title VI to not be deliberately indifferent, but that doesn't mean that they can prohibit and punish the speech.

So what is it that the university must do to avoid being deliberately indifferent? It's here that the Office of Civil Rights didn't give much guidance, and there's still not much guidance in that regard. And for university administrators, that's the key question. What is it that they have to do to be able to avoid liability under Title VI?

Chancellor Howard Gillman:

And what's so important about that is that that precedent where you didn't have to suppress the speech, but you had to do something. And if you didn't do enough to demonstrate that you were not deliberately indifferent, you could be in violation of federal law. That created a deep concern among universities, not knowing how much is enough, right? That same ambiguity, if it's left ambiguous, can then be used by any administration to create a fear at universities that, well, this speech happened, you didn't suppress it and you didn't have to suppress it, but you should have done something.

And if we think you didn't do enough, then we're going to put you in a situation where your entire federal funding can be put at risk because in our judgment, you should have done more. And the lack of clarity about what constitutes enough to avoid deliberate indifference is still central to what universities are facing, especially as the Trump administration has decided to use this rubric as a way of telling universities that unless they change certain practices and do more from the vantage point of the Trump administration, they could risk the loss of federal funding.

Now, Erwin has been part of litigation where it was very clear in the Title IX situation that universities were simply shrugging off the responsibility and not trying to do anything to protect, for example, women who felt that they were in a objectively hostile environment. So we kind of know what it looks like to not care at all and do nothing, and therefore in a legitimate way, risk vulnerability for a violation of federal law.

But this area of law right now is so ambiguous that it really puts at risk any understanding of what is permissible and not permissible, when universities should protect the free expression of ideas and when they should do something different. And so we think it's going to be a little bit uncertain for a while longer, but one of the things we want to emphasize in the book is that this is a larger issue that university leaders have to address.

Not just respect to the Trump administration, but structurally embedded in how the Office of Civil Rights under the Department of Education has been talking to universities over many years about what their obligations are under Title VI.

Dean Erwin Chemerinsky:

And I should simply add what Howard said, the Trump administration has used Title VI in saying it's cutting off funds to certain universities because they didn't create a sufficiently conducive learning environment for Jewish students, those hostile environment, but what the Trump administration didn't do was follow any of the procedures that are prescribed in federal law. Federal law says that before university's funds can be cut off on Title VI, they have to have notice, there has to be a hearing.

There have to be findings of that, there has to be 30 days notice given to vote the House and the Senate before any cutoff of funds under Title VI. Funds can be cut off to only the part of the

program that itself was deemed to violate Title VI, and none of these have been followed over the course of the last year.

Michelle Deutchman:

I mean, I think the key here is the words you used, uncertainty, and ambiguity, and the fact that universities are really between kind of a rock and a hard place. And I know that I think a lot about how fear of losing federal funds is terrifying and could easily lead to over compliance. And I guess I'm seeing that less on the side of the First Amendment, but also these cases are very fact specific.

I mean, I don't know if you would agree, but when you look at, for instance, there was one case, a Title VI issue that was brought by Harvard and one by MIT, and they came out different ways. And it really involved a very fine and granular reading of the facts, which again, I don't think helps to pull out larger principles that councils and administrators can follow. And I don't know how long it's going to take until we have enough decisions.

And then, I think there's also the question of the way that OCR interprets terms like deliberate indifference and how courts interpret terms like deliberate indifference. And I know I'm getting a little in the weeds, but I think it's important.

Chancellor Howard Gillman:

And Michelle, we would agree that what you want is very careful deliberation of what is really happening in a fact specific way. This is what happens in the law all the time, right? And usually, it's in a forum where you have a chance to make your case and there's a record that's being developed in the life. One of the challenges is if a lot of activity or conversations or negotiations are happening before you ever get to court, then you don't have that normal process where you can work through the specifics.

It probably ... I mean, when Erwin has been involved in some of this litigation, it was very important to understand very clearly what were the threats to women at this particular college, right? And what did the university specifically do or not do? Every university, I think, would be happy with a process by which you had a chance to make a record and clearly indicate how you responded to different circumstances.

The problem that we've seen really over the last year or so is that so far there hasn't been an opportunity to get into those kinds of things.

Michelle Deutchman:

Okay. So we could continue down this rabbit hole, but I'm going to move us to a different rabbit hole. It's something that, Chancellor, you mentioned at the top, which has to do with firing of faculty and lecturers. And another big issue, which is extramural speech, and I'd like to kind of talk a little bit about that. I believe that extramural speech of faculty members is one of the most misunderstood and contentious issues playing out right now.

And I thought that maybe, Chancellor, you could start by refreshing our listeners' recollections about the difference between free speech and academic freedom, and then, we can move into some more specific questions about what's been happening and discuss the rash of faculty firings based on comments that people are making on their personal social media and other places.

Chancellor Howard Gillman:

Yeah. Thank you, Michelle. One of the things we think is most important about the new book, which by the way, is called "*Campus Speech and Academic Freedom,"* is that free speech and academic freedom are both related in the sense that they have to do with protections of people to express themselves in certain ways, but the dynamics are very, very different. And one, free speech applies to everyone, and it has to do with the ability of everyone to express a viewpoint without getting in trouble merely for expressing a point of view.

And the other academic freedom is very specific to the privileges and obligations of faculty members when they are doing their jobs at the university. So to give you an example, and Michelle, you and I, when we were teaching a course on free speech and academic freedom, used this example in that course. So if you're a person off the street and you believe the moon is made of green cheese, you can go to city hall and get a sign and say, "The moon is made of green cheese" outside the mayor's office.

And no one is going to censor you or punish you for expressing a viewpoint that a lot of people think may be wrong because you're just some person who has a point of view about the moon being made of green cheese." But you're a faculty member in an astronomy department at a university trying to get tenure and your tenure file is rooted in your off-the-cuff belief that, by the way, everybody should think the moon is made of green cheese.

That is subjected to normal peer review, whether or not you have the competence to be a professional faculty member with that area of expertise. And if people think that point of view is not a legitimate or competent point of view, you could be denied your position, right? You could be denied tenure, you could be not hired, lots of things could happen. And so, the difference between academic freedom and free speech is that free speech is the right that everybody has to express a point of view without getting in trouble merely for expressing that point of view.

That we think is central to any free society. Academic freedom has to do with the rights and obligations of professional scholars. What do you expect of professional scholars when they are doing their job in the classroom, in the lab, or otherwise speaking to a broader community as an expert? And the obligation of academic freedom is that as well-trained professionals, they have a right to express themselves in their teaching of advanced knowledge.

In the research they want to do, and in the way that they are expressing their expertise to a broader audience, as long as that expression reveals their fundamental competency as experts in that field and is ethical in relationship to their professional responsibilities. Think of it as the same kind of protection we think of physicians having, that is to say a physician needs some discretion as an expert as to how to imagine what standard of care is for a patient.

And the main obligation they have is to do their best as a professional to take good care of their patients. The clinical environment in a hospital is not their free speech area where they can say or do whatever they want, right? If they say things that demonstrate that they're simply not competent as physicians, that could get them in trouble. But what should be evaluated is whether they have competency as assessed by other experts in the field.

So the reason how this applies to external speech of faculty members is that when a faculty member is expressing themselves about topics that have nothing to do with their expertise, some faculty member in, I don't know, physics has a blog on restaurants in Irvine, California. Maybe you disagree with every single one of their recommendations. Nobody cares. Having a wrong

point of view about a restaurant in Irvine doesn't necessarily mean you can't be a decent physics professor at Irvine.

But if a faculty member in those rare circumstances expresses themselves externally to a broader audience, in a way, that is supposed to reflect their scholarly competence, but in that speech demonstrates a lack of scholarly competence, then that can be taken into account the way any kind of evidence of scholarly competence can be taken into account. So a history professor, a European 20th century history professor who has an opinion about restaurants in Irvine should never get in trouble because they expressed an opinion on their blog about restaurants in Irvine.

But if they express an opinion, for example, that the Nazi Holocaust never occurred, that can be taken into account the way any other evidence of their scholarly competence can be taken into account. And so it's very important when we think about what faculty say to understand that there's different rules depending on whether they're simply like every other person expressing themselves on a variety of topics or whether they are acting as professional scholars.

And if you start with that premises, it really helps figure out and orient, I think, both administrators and the general public to when saying something that might be considered outrageous is not a problem and should be protected because everyone has a right to say certain outrageous things. And when saying something really calls into question their ability to be a competent professional in their fields.

Dean Erwin Chemerinsky:

I think Howard puts it very well. I wanted to get back to where we started this conversation. When we were working on this book, we realized that one of the gaps in free speech on campus as opposed to 2017, is it didn't focus on academic freedom. There's a great deal of emphasis on student speech and what campus could do, but so many things that happened from 2017 wrote this book of faculty members who had faced discipline, even firing for their speech.

And it required us to think through the relationship between academic freedom and freedom of speech and increasingly have come to realize there's a great misunderstanding about this. Academic freedom is about the ability of an instructor in the choices made in teaching a course, in scholarship, in disseminating ideas to the public within, as Howard says, the standards of the profession.

Freedom of speech, of course, extends far beyond that, the ability people to express themselves, even if it has nothing to do with what they're teaching in their class or their scholarship or dissemination ideas. And so I think of it as, in event diagram sense, overlapping circles. There are some things that are protected by free speech, but not academic freedom. Howard's example of somebody who says the moon is made of green cheese. My example would be, imagine that a professor, say of computer science, goes to a rally over the weekend, having nothing to do with that.

But it's a rally that is very offensive to people. Academic freedom wouldn't be involved there. This wasn't about his teaching, his scholarship, his dissemination of scholarly ideas, but free speech, at least at a public university, would prevent that person from being disciplined. On the other hand, there are things that are protected by academic freedom that we wouldn't think of as protected by free speech.

At private universities, the First Amendment doesn't apply, but private universities are still committed to academic freedom. And there are many things that are protected by both free

speech and academic freedom. And I hope that one of the things that the book contributes is greater clarity with regard to academic freedom and free speech and the relationship between the two.

Chancellor Howard Gillman:

And Michelle, two other points about this. So one point is one of the differences therefore when it comes to extramural speech, which is what you talked about, is that when faculty members engage in extramural speech, mostly they're exercising their free speech rights. But every once in a while, rarely, they could be saying something that calls into question their competence as an expert in their field of study.

And then, there should be a mechanism by which through a normal process of peer review, that could be taken into account, but that should be a rare thing. That doesn't apply to students though, right? Students who say knuckleheaded things in social media, they're not obligated by a sense of professional competence. So one of the things we emphasize in the book is that every once in a while, faculty members might raise issues with respect to their professional competence when they say something externally, but not when they say something internally.

On the other hand, the other thing that we think is a big source of confusion is that many faculty members think they have free speech, for example, in the workplace environment when they teach classes, right? They think of their classroom as their ability to just express themselves. That is a very important misunderstanding that we hope to correct in the book. In the classroom setting, they are obligated to act as ethical and competent professionals.

And that classroom is not their private play thing. The way they're expressing themselves maybe at an unrelated protest can be a place where they can say whatever they want and academic freedom does impose certain obligations on faculty members when they're actually supposed to be doing their job.

Michelle Deutchman:

Thank you. First, I just want to add in that the green cheese example, I have used it everywhere and there's something about that example, probably because it's so silly that people all of a sudden the light bulb goes on and they're like, "Oh, I get it. Of course you couldn't teach that." But on a more serious note, one of the things, I think there's so much misunderstanding both about intramural and extramural speech.

And I think one of the things that's contributing to the confusion is what we're seeing happening. And let's take, for example, one of the examples that you weren't able to touch on in the book, which was what happened following the assassination of Charlie Kirk. We saw people posting a lot of things that were very positive and very negative about Kirk and about Turning Point and a lot of the people that posted negative things having nothing to do with their area of academic expertise.

Found themselves on the other side of sanctions, which seemed wrong, but I think does contribute to the confusion about what is allowed. And I was wondering if you could sort of speak to that and why we're seeing that happening. Yeah.

Dean Erwin Chemerinsky:

I'll make a more general point. I think there's often a strong impulse to try to stop and punish the speech that we don't like. And so when people said things that were found offensive after the death of Charlie Kirk, the natural response of some was to try to silence, to punish those who said it. But to go back to the distinction that Howard and I were just articulating, I think that faculty members have sort of public university, a First Amendment right to express their views.

Whether it's do we like or dislike, one that's palatable or outrageous? And to fire a professor at a university for expressing views on the death of Charlie Kirk, I think raises very grave First Amendment issues, probably not academic freedom, because we're again not talking in the realm of teaching course material, scholarly dissemination of ideas, research, and the like.

Chancellor Howard Gillman:

And Michelle, we think that while we didn't get a chance to talk about that specific example, we did include examples of faculty members who expressed themselves in social media in ways that were considered kind of outrageous, especially in the wake of the death of somebody. So we have a woman faculty member who upon the death of Queen Elizabeth, said some extremely harsh negative things. There's a lot of general sympathy in the culture and people wanted to talk about her tremendous legacy.

This one woman faculty member really celebrated her death on grounds that she had facilitated deathly imperial activities in her home country and the like. And there was a lot of pressure to sanction this faculty member, to fire this faculty member. One of the arguments we make in the book is that, that faculty member's position there was fully protected by free speech. The fact that there was outrage about what they said is completely irrelevant.

And one of the things we're seeing even in the Charlie Kirk example is that we're already seeing a number of faculty members who said some things that certain politicians did not like and demanded that certain action be taken. This is a situation that university leaders unfortunately have to face all the time. Those leaders broke under that pressure and we're already beginning to see litigation and lawsuits and resolutions of those issues to the favor of the people who were caught into that hysteria.

We really want to make sure, especially given how explosive social media activity can be in these circumstances, we really want it in the book to make it very clear that every university leader, when they have thousands, if not tens of thousands of faculty and students, are going to face a situation where some of those people, maybe just one of those people is going to say something that's going to drive everyone else completely crazy.

You have to have your bearings under those circumstances way in advance on when you should take steps against those people and on what grounds and when you just have to say. They have a right to say that. And part of the price you pay for having a commitment, a principal commitment to the First Amendment, which is Erwin and I, and Michelle, you understand it's not the kind of commitment that everybody has, right?

If you have a principled commitment to the right of people to express themselves without getting in trouble from the government, then you have a right to say things and under those circumstances, even if there's tremendous political pressure, university leaders have to make it clear they are going to defend the right of people to express themselves. And so we think that the book lays out the argument that would have helped some university leaders at least make a more

informed decision about whether to resist political pressure or not in the wake of the Charlie Kirk tragic and terrible assassination.

Michelle Deutchman:

Absolutely. And I'm going to kind of just move us along because I do want to talk about chapter four in the book, which is government control over campus speech, which is really something that wasn't nearly as prevalent when you wrote your first book at all. And in chapter four, you described two very different practices of public higher education. The first is what universities were like in the 19th century, which when we taught our class chancellor, you really educated me about.

Which was that the ideas that were acceptable to teach or debate, this is what you write in your book, at colleges and universities have been controlled by politicians, boards, and administrators. If religious leaders or politicians didn't want Darwin to be taught, then faculty members acquiesced to this command or risked being fired. If the antebellum South considered abolitionism threatening to the public order, that idea could not be fairly discussed, closed quote.

The model the universities adopted at the beginning of the 20th century included academic freedom and tenure and embraced a dramatic model of intellectual freedom because it allowed for the best creation of new knowledge and improved educational results for college students. So your book discusses how we are currently at a crossroads with many legislators and advocacy groups interested in returning to the 19th century model of political control of faculty.

And you argue, and I would agree, that this is an existential threat to American higher education, which is, at least until recently, the envy of the world. So maybe dean, do you want to talk about this existential moment and what universities can be doing to persuade politicians and voters, what is at stake?

Dean Erwin Chemerinsky:

I think it is an existential moment. If you were to ask me what's been the greatest threat to speech on campuses and academic freedom, it's what some state legislatures, some governors and what President Trump had done. We focus in the book on the anti-critical race theory laws. We talk about the Stop Woke Act. And so when you think of the kind of things that Governor Ron DeSantis has done or that are now happening with the University of Texas system, it's based on such a different model of higher education than the one that the United States for over a century has followed.

When I think of President Trump cutting off federal grants simply because he thought them they were pursuing diversity in research. This is at odds with what a university is supposed to be about. And so my answer to your question is that I think it's so important that we educate people on what universities are supposed to be about, that why universities have to be places where all ideas and views can be expressed,

Why the Ron DeSantis and Donald Trump view of universities is really antithetical to the advancement of knowledge and this is the detriment of all. And I think it's so important that we find a way after we educate people about this, to have them get involved and speak out because the future of higher education really is at risk at this moment in time.

Michelle Deutchman:

Well, I was just going to say, do you think people really understand what it is that universities contribute to communities and-

Dean Erwin Chemerinsky:

I'll just answer in one sentence and turn it to Howard. I think that higher education over time has done a poor job of explaining what it's about. And so at this moment, public confidence in all institutions is down, including in higher education. And I think that all of us who have been leaders in higher education deserve some of the blame for this. Now the question is, how do we do a much better job of explaining to people why higher education and this vision of higher education is so important for our society?

Chancellor Howard Gillman:

Yeah, I think that's right. One of the things we tried to do in our earlier book, but underscore, especially in this book, is that the modern American university, as you said, Michelle, maybe up till recently the envy of the world, was predicated on one very simple principle that expertly trained scholars in fields of advanced knowledge would have the freedom based on their competency and ethical behavior to make decisions about how to convey that knowledge and what kind of research would be most important in order to advance knowledge.

Free minds, expertly trained, held accountable by their peers for their activity, if allowed to work as they see fit, will work miracles. And the 20th century was a century, a lot of complication, but miracles when it came to the advance of knowledge, precisely because it wasn't politicians telling them what they should study or how they should teach, and it wasn't religious leaders telling them what was true and what was not true.

So that is fundamental to the modern American university. Now, what we've seen though is that over the last few years, even before the Trump administration, in one red state legislature after another, there was a tremendous frustration at continuing to allow a free faculty to have discretion on how to teach and what to research. And their belief was that there was a culture of intolerance, on campuses.

That there was an unwillingness to take seriously certain points of view that they politically disagreed with. And as a result of that, over the years, there was a growing frustration on the right about whether you could trust a free, well-educated, well-trained faculty to make those decisions in a way that was consistent with what they claim to be their own values of free inquiry and the luck.

And what we saw is the minute that social contract between tenure and academic freedom on the one hand and deference to faculty decision making, the minute that starts to become frayed, the whole system starts to fall apart. So when Ron DeSantis in Florida as kind of a first mover before Texas started to take over, when he said, "We have to stop woke at universities," the argument that is developing in the litigation about whether Florida can tell university professors what to teach and not teach.

The argument that they have is that there is no academic freedom, that they are public employees, that they are public universities professors, that as public employees, they have to say what the government wants them to say. That is a position that you can take. It's not that they say, "We believe in academic freedom, but it's not covered by academic freedom." They don't believe in academic freedom.

And the reason why we're at a crossroads is that in the 19th century, the country had one model. In the 20th century, we have another model, and now, we are seeing almost half of every single state legislature revert back to a model of political control of what university professors should be allowed to teach and research. So for example, most recently at the University of Texas A&M, a philosophy professor and an introductory philosophy course wants to teach Plato, and has been instructed by their administration based on Texas law that the particular readings in Plato say things about gender identity, that the state does not want philosophy professors or any professor to teach.

Now, is that imaginable that that could be a position in the United States? It's certainly imaginable. That is the position in way too many states. And one of the things we discuss in this book are the consequences for the United States. If some states insist that the curriculum and research agendas of well-trained faculty will be directed by majorities in the state legislature, rather than by the judgment of those faculty members.

That could create in the United States in this crossroads analogy, two very systems ... different systems of higher ed. One which reflects the 20th century sensibilities, which have transformed the world and were the envy of the world, and another which reverts back to the 19th century. We hope that that doesn't continue to develop along those lines, but it is certainly a realistic possibility that it could.

One way that we could try to pull things back is if everyone, including faculty, do take seriously the original bargain that was made when tenure and academic freedom were first acknowledged, which is that they should act as competent professionals. They should be willing to express and listen to lots of different viewpoints. We wouldn't have the UC National Center on Free Speech and Civic Engagement, and Erwin and I would not have written these books.

We didn't think that there is something to the argument that at too many universities, there is not sufficient willingness to embrace all reasonable ideas within a field of study. And until that faith, that confidence in higher ed, that we are true to our values is more systematically reestablished, we are going to have these debates and these conflicts, and in theory, might end up with two very different systems of public universities in the United States.

Michelle Deutchman:

I mean, I certainly hope not. I mean, right now it feels like there are two very different sort of countries depending on where you live right now. I think this is really a perfect kind of lead up to the last theme. We're running short on time, which is unfortunate. I had a couple more legal equal questions for you, but I'll ask you another time. But really talking about how higher education, as you've just been talking about, has become a political tool.

Really in some ways being used as sort of a bludgeon. And we normally close all of our speech matters episodes by asking our guests to share something that listeners can do towards engaging themselves in the issues we discuss. And in terms of the things we've discussed today, are there ... I know Chancellor, you just mentioned something faculty can do, but are there other things that members of the university and college communities can take to help bend ... As Martin Luther King said, not just bend the arc towards justice, but bend the arc towards the 20th century model of universities.

So if each of you wants to share a couple of things, that would be helpful.

Dean Erwin Chemerinsky:

I think it's important to put this in context. Our society is more deeply divided than it's been at any time since reconstruction. There are so many measures of that. As I alluded to a moment ago, all of the major institutions in our society have the lowest approval rating that they've had in memory. The Supreme Court has its lowest approval rating as long as these have been taken. The last poll that I saw, so Congress having an approval rating of 16, and that might be 16 people, not 16%.

And it's not surprising that higher education has also suffered in public esteem. But as I said earlier, I think leaders in higher education have made a mistake in not explaining to people why higher education matters and the model of higher education that is essential for it to thrive. So I think that it's really important that leaders in higher education take steps to educate people, to encourage people to be involved, and to also encourage people to speak out.

There needs to be a response to Ron DeSantis. There needs a response to Donald Trump that explains what universities are about and why their approach to universities will ultimately very harmful for our society.

Chancellor Howard Gillman:

That's right. And the other thing is that there's a reason why there's not one Republican legislature in a red state ... legislator in a red state who's going to lose votes by going after their universities. There is among the public, the general sense, as there is with respect to lots of institutions that universities have lost touch, they don't reflect my values, they don't care about my issues, I feel as though I'm being condescended to.

What we're learning is that these social compacts are more fragile than we expected. I mean, you would think that given the success of universities in the 20th century, that you could simply rely on everybody sees the success. Everybody is trying to get into these universities. My university had more than 150,000 applications for students trying to get in. So whatever people think that maybe Berkeley maybe is doing okay as well. And so, whatever people think, on the one hand, they see the value.

But they also do see that in some corners of the campus, there's something that it would be useful for us to acknowledge. And my hope is that if you have some frustrations about universities, then you make the case that let's work on those issues without doing anything that might fundamentally destroy what has made American universities so central to the wellbeing of the world.

I mean, I really do believe that there's no greater institution in human imagination that has done more to advance human freedom, social progress, enlightenment than the modern ... especially public research university, which at scale brings people in from all sorts of different backgrounds who never in history would have had an opportunity to get higher education and allows them to make tremendous contributions to the world.

So if we need to talk about some things that we think could be useful correctives, let's talk about those things without at the same time destroying the fundamental reality about universities that has been so important to the country. And I have some confidence that when you go beyond some of the culture war and you just look at the political system more generally, I don't think the Congress of the United States, for example, wants to destroy America's research.

So there is a middle there that if you can get beyond the daily craziness of an executive order or a particular social media post of a faculty member or student, there is, I think, a basic understanding, but we do always have to renegotiate and reaffirm these social contracts. And that imposes, I think, an amount of patience and willingness to dialogue among the general public, but also it does impose a certain responsibility on higher ed to face up to the criticisms and the concerns.

And to address them in ways that restore confidence in what is, I think, the greatest system of our education that has ever been devised on the world.

Michelle Deutchman:

We're going to end on that note, and I'm going to thank both of you tremendously. I know we have gone over and still so many questions, but I want to thank you both, not just for joining us, but obviously, for all of the support that you've given to me and to the center so that it can grow and develop and have the impact that it's had, I think both that you see and across the country. And we're kicking off this new season, this new year.

And we're going to hope for better days and that we'll just keep fighting the good fight. And I want to make sure that all of our listeners know that the book, again, is "*Campus Speech and Academic Freedom, A Guide for Difficult Times*" from Yale University Press, and I believe it will be out on January 27th. So thank you both again.

Dean Erwin Chemerinsky:

Thank you so much.

Chancellor Howard Gillman:

Michelle, it's always a pleasure.

Michelle Deutchman:

That's a wrap for this episode of Speech Matters. Thanks again to our guest, Dean Chemerinsky and Chancellor Gillman for joining us for the conversation and for sharing their insights about their upcoming book. The book is "*Campus Speech and Academic Freedom, A Guide for Difficult Times"* from Yale University Press, and it will be available on January 27th. We are excited for the coming year of conversations about these interesting, challenging, and nuanced topics, and we look forward to continuing with season five. Talk to you next time.