

Speech delivered by the Honorable Laurence Silberman, Senior Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit, on September 20, 2022, at Dartmouth University.

This is a Constitution Day talk. So I will address one of today's most contentious constitutional subjects—the First Amendment's protection of free speech. As I noted in a recent opinion, the First Amendment's guarantee of free speech is not just a legal doctrine. It represents the most fundamental value in American democracy. A national commitment to uninhibited political speech is a crucial aspect of our country's culture. It is the penumbra around the First Amendment, which, by itself, only prohibits government control of speech. Unless all American institutions are committed to free political speech, I fear the strain on the First Amendment's guarantees will become unbearable.

Those seeking to suppress free speech sometimes think that provocative, even extreme and obnoxious, political speech is dangerously divisive. It should be suppressed. I think that is profoundly wrong. I think it is the very opposite. Toleration of all versions of political speech is the crucial unifying factor in our country.

Some years ago, I was ambassador to Yugoslavia, a communist country where freedom of political speech did not exist. I had a small fund with which I could send promising young intellectuals to the United States in the summer. Yugoslavia, then a county of six separate ethnicities, was threatened by centrifugal ethnic forces (which ultimately resulted in six separate nationalities). The government sought to squelch talk that threatened Yugoslav unity.

One intellectual that I sent to the United States came back and expressed wonderment that our country—composed as it is of the descendants of an enormous number of nationalities—could nevertheless enjoy such a uniform commitment to shared values. I explained that we swore allegiance not to a sovereign nor a blood grouping, but rather to a legal document—the Constitution. And nothing in that legal document was more important than the First Amendment. Protection of the speech *of* fellow Americans, even the most provocative and unpleasant, reflects a fundamental tolerance *for* all Americans.

I was often obliged to explain the First Amendment to the Yugoslavs who demanded that I restrain the New York Times' criticism of their government. Their eyes would glaze over during my First Amendment lectures;

they didn't believe me until I pointed out that if our government could influence the New York Times a Republican administration would have every incentive to do so. That finally got across. Interestingly, even allied democratic governments that generally—but only generally—supported free speech were mystified by the strength of our First Amendment.

To be sure, I recently wrote an opinion seeking the overturning of *New York Times v. Sullivan*, a case that benefits the press. That case, by constitutionalizing American libel law, made

it nearly impossible to sue media for certain inaccurate personal attacks on public figures. Some have suggested my position reflects less than vigorous support for the First Amendment. On the contrary, I oppose *New York Times v. Sullivan* because it was wholly illegitimate policy making by the Supreme Court.

A guarantee of free press does not mean special immunization from accountability when the press libels a person. A free press is not necessarily an all-powerful press. The Supreme Court in *Sullivan* was concerned, legitimately, about problems created by excessive libel actions against newspapers supporting the struggle for civil rights, but that could have been handled with legislation. It was illegitimate for the Supreme Court to literally make up constitutional law to deal with the problem. Its decision was contrary to text and history, and it created new problems for society in the form of media that can spread false rumors and sling unfounded accusations directed at public figures without consequence.

The history of the First Amendment is fascinating. The phrase “freedom of speech” first appeared in the Anglo-American tradition in the English Bill of Rights written in 1689.

It only protected the expression of members of Parliament. This was so because, in the English tradition, Parliament, not the general population, was the source of sovereignty. Our Founders extended that right to all citizens, because here the People rule as sovereign.

As many of you know, the First Amendment was drafted by one of the most extraordinary of our original political leaders—James Madison. His primary focus was freedom of the press, which was included in the constitutions of virtually all the colonies; whereas the phrase ‘freedom of speech’ only existed in one of those. But if one thinks about it, which clearly Madison did, freedom of speech was a necessary corollary of freedom of the press. It followed apodictically, if you protect words that appear in the press, you couldn’t suppress those words uttered verbally.

There are virtually no cases in the first half of the 19<sup>th</sup> century involving the First Amendment’s freedom of speech. As you might know, the First Amendment did not apply to the states until after the Civil War, when the 14<sup>th</sup> amendment’s due process clause was seen to incorporate the First Amendment.

The first case that I could find considering the First Amendment’s free speech clause as applied to the states was *Patterson v. Colorado* in 1907. It included a dissent by one of our greatest justices, John Marshall Harlan. He was the man who dissented in *Plessy v. Ferguson* from the odious view that racial segregation, although separate could nevertheless be equal.

*Patterson* involved a state judge who held a litigant in contempt for criticizing the judge’s opinion.

The majority upheld the contempt finding. Harlan disagreed. He said: “I cannot assent to that view if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare

cannot override constitutional privileges.” He concluded that “the privileges of free speech and of a free press—belonging to every citizen of the United States—constitute essential parts of every man’s liberty.”

Not surprisingly, the constitutional protection of free speech from government action has been most strained when we faced national security threats. First were the notorious Alien and Sedition acts growing out of the three-corner tension between the United States, Great Britain, and France.

But the statutes were abandoned before the Supreme Court had an opportunity to rule on them.

Perhaps most astonishing is the degree of Lincoln’s tolerance of free speech even during the bloody Civil War. He did strain the First Amendment on occasion but, given the threat to the nation, it is amazing how tolerant Lincoln was of fierce criticism. For instance, he announced that the arrest of Vallandigham, a southern sympathizer, was wrong if that arrest was based purely on Vallandigham’s criticism of Lincoln. In instructions to his General in dealing with Northern civilians aiding Confederate guerrillas, Lincoln explicitly directed General Ewing to only arrest individuals or suppress assemblies or newspapers if they were working “palpable injury to the Military” and that “in no other case will you interfere with the expression of opinion in any form.”

Then, we have the 20<sup>th</sup> century’s war time pressures on the First Amendment.

Some of the most celebrated First Amendment opinions, *Abrams*, *Gitlow*, *Whitney* were the result of challenges to laws passed to suppress wartime protests. Perhaps the most problematic was the McCarthy era, which my class of 1957 experienced at the time we entered Dartmouth. The notorious senator from Wisconsin was able to intimidate politicians, academics, and Hollywood writers in his wide ranging and, in many cases, wholly unjustified pursuit of alleged communist sympathizers.

Turning to the present, I am convinced we are faced today with a worse threat to free speech than during that earlier time.

Indeed, now some political speech is attacked as if it were blasphemy drawn from the colonial period when witches were burned at the stake. Threats against political speakers are not simply levied by unscrupulous politicians, they come also from young people influenced by academics—ironically the prime targets of the McCarthy era. Certain controversial subjects are placed out of bounds.

I am shocked at the recent challenges to free speech in our academic institutions—particularly the Ivy League. For example, recently at Yale Law School, students attempted to stop, then drown out, a public dialogue between a conservative and a liberal lawyer. They were both supporting untrammelled political speech. The administration’s response was to vaguely gesture at the importance of free speech but also to celebrate “respect and inclusion”—whatever that means.

The Dean sent a letter calling the behavior “unacceptable”, but she did not so much as issue a slap on the wrist to the students who were hostile to free speech.

And at Princeton, Professor Joshua Katz was stripped of his tenure and fired after challenging the University’s orthodox view on race. He was terminated ostensibly based on the disputed details of a consensual relationship he had with a student fifteen years ago—for which he had already been disciplined. This was only after he criticized a Princeton faculty letter that demanded preferential treatment both for minority faculty and a black student organization. Does anyone believe that Katz would have been fired if instead he gave a speech in support of a black student organization?

Similarly, at Harvard, Professor Roland Fryer, one of the most gifted economists in the country—who happens to be black—has been suspended for two years for allegations that he made inappropriate comments. His supposed crime was telling raunchy jokes. But Fryer’s real crime was his work empirically demonstrating that police do not kill blacks at a higher rate than other races, and that black students excel when faced with high expectations—challenges to the current shibboleths on race.

Amy Wax, professor at Penn Law School, was recently punished because she unwisely—indeed somewhat cruelly—described her experience over many years regarding black student performance in her class. She therefore touched on the mismatch theory popularized by Richard Sander and Stuart Taylor. They wrote a book by that name and have filed an amicus brief in the Harvard case before the Supreme Court. They contend that in an effort to achieve soft quotas, elite schools artificially admit less qualified minorities thereby injuring the very students supposedly benefitted. In other words, in a less competitive school those students might do much better. I emphasize that, as a Judge, I take no position on the mismatch theory. But I predict you will see reference to it in the forthcoming Supreme Court opinion.

To be sure, it is unseemly for any serving professor to suggest that minority students are less qualified. (That proposition is more readily expressed openly by emeritus professors no longer teaching, like Alan Dershowitz at Harvard Law School and Stanley Goldfarb at Penn Medical School.) In furtherance of Amy Wax’s tendency to offend minority groups, she recently attacked Asian-Americans in the most unflattering terms.

I gagged when I read her remarks, but free speech is free speech.

Even Dartmouth, to my distress, has engaged in smothering provocative speech. In January, the college cancelled an event with Andy Ngo, a controversial conservative journalist. His speech was forced online based on unspecified information from the Hanover Police Department. Apparently, Dartmouth has been evasive about the “credible threats” it received. It has provided shifting rationales for its decision.

The College Republicans have also been charged \$3,600 for an event which did not actually take place. Indeed, I think it is inappropriate for the College to ever charge organizations for the

protection their speech requires. That policy simply accentuates the power of those who would discourage free speech.

If the Dartmouth administration had the backbone to discipline students who shouted down speakers or to arrest non-students for disrupting events, the deterrent effect would obviate the need for imposing security expenses.

Regardless of the situation, the College aligned itself with those who wish to silence speech by cancelling the event. It should be recalled that, in *Terminiello*, the Supreme Court squarely rejected the so-called heckler's veto rationale for suppressing speech. The Court held that speech cannot be punished merely because it could cause unrest amongst potential listeners.

A common thread of these incidents at Yale, Princeton, Harvard, U Penn, and Dartmouth is that university authorities, in discouraging unfashionable speech, do not do so explicitly. Rather, they perform an "Ivy League Two Step."

First, they pay lip-service towards the value of free speech. Then they use alternative reasons as a pretext to shut down "objectionable" speech. That, in some ways, is more dangerous than a frontal attack.

Even assuming that there are some circumstances in which speech can be legitimately restrained, we have seen that schools have been inclined to dissemble in their justifications for suppressing speech.

It is for that reason, when universities take action to limit free speech, they have a solemn responsibility to be absolutely honest and transparent in why they are doing so—they must, as Oliver Wendell Holmes said, "turn square corners" when demanding such accommodations. So far, our Ivy League schools have demonstrated a pattern of suppression that should upset all friends of freedom of speech.

I hope that Dartmouth's new President, Sian Leah Beilock, will have the steel in her spine that is needed to take this responsibility seriously and stand up for free speech when it becomes difficult. Her recent statements are encouraging. But when the chips are down, many university presidents have folded.

Admittedly, one of the most serious questions the country faces is how to achieve racial equality. Does it mean equal opportunity or equal results? Is progress for African-Americans, for instance, held back because of residual racism or because of other aspects of the black experience? Views about achieving racial equality that are uttered in good faith are repressed—even shut down as "racist"—if they vary from certain orthodoxies.

As a result, the charge of "racism," not unlike McCarthy's frequent cry of "communism," has been drained of much of its meaning. Similarly, debates over issues relating to sex education and sexual identity—issues about which many hold sharply divergent views, sometimes based on religious differences—are ruled unacceptable.

Those repressive forces come from the left side of our political spectrum, but I can think of examples coming from the opposite political pole. For instance, although it is certainly reasonable for parents to argue about the curriculum of public schools, it is intolerant to seek to ban library books on Critical Race Theory, at least at the high school level.

By the same token, efforts to prevent persons such as Linda Sarsour from speaking on college campuses in support of BDS (Boycott, Divestment and Sanctions) directed against Israel are equally intolerant. As a one-time special envoy in the Middle East I regard BDS and Sarsour's views as particularly obnoxious, but I deplore the effort of Jewish groups to prevent her from speaking at universities.

My class at Dartmouth entered in the fall of 1953. The previous spring Dwight D. Eisenhower spoke at commencement. He implicitly attacked Joe McCarthy and McCarthyism, admonishing students: "Don't join the book burners."

Consider the context of Eisenhower's speech: we were in the midst of a Cold War with the Soviet Union, over 50,000 American men had been killed in Korea, and there were indeed prominent pro-communist traitors in our own government, as well as in allied governments. Nevertheless, speaking extemporaneously, Eisenhower courageously said, "how do we defeat communism unless we know what it is and what it teaches and why does it have such an appeal to men, why are so many people swearing allegiance to it . . . . And we have got to fight it with something better. Not try to conceal the thinking of our own people."

And this is the part I love... "they are part of America. And even if they think ideas that are contrary to ours, their right to say them, their right to record them, and their right to have them at places where they are accessible to others is unquestioned, or it isn't America."

Because McCarthy was a Republican, it was important that Republicans—most notably Senator Margaret Chase Smith and then Eisenhower himself—were the ones to speak out and put an end to his reign of intolerance. I hope you Dartmouth students—on both sides of the political spectrum—will stand up for freedom of expression. It is not a partisan issue. It is as I have tried to explain fundamental to American democracy.

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To be sure, you may have to draw upon "the granite of New Hampshire, in your muscles and your brains" to withstand the immense pressure to bow to conformity. But, I expect nothing less.