



# The End of Free Speech

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Ah, fall. Students heading off to campus protests, football players kneeling as the national anthem plays, the smell of burning flags.

It's the season of free speech madness.

Republicans, as is their habit of late, have positioned themselves as the defenders of First Amendment freedoms in a time of runaway political correctness. This plays well on television: Footage of college students shouting down speakers they don't like, staging sit-ins, and brandishing protest placards runs on an endless loop at Fox News while chyrons blare, "Free Speech Under Fire on Campus."

And when a demonstration in Charlottesville, Virginia, spiraled out of control, it was primarily right-leaning lawmakers and pundits who stood up for the right of white supremacists and Nazis to express their vile opinions about race and Confederate statuary. Meanwhile, signs demanding "No Free Speech for Fascists" cropped up in the hands of lefties at post-Charlottesville rallies around the country.

But as the weather cooled, the GOP revealed its true colors. Led by an increasingly vehement and erratic President Donald Trump, the same party that was poised to die on the hill of free speech when it was being threatened by angry progressives was suddenly ready to eliminate First Amendment rights on the football field, revoke citizenship for flag burning, pull broadcast licenses over bad comedy sketches, and expand libel laws to take down annoying members of the media. There are greater threats to speech, it turns out, than a bunch of angry co-eds.

In the face of calls for censorship from the left and the right, meanwhile, one of the most important traditional defenders of speech has begun a slow but undeniable retreat. Dealing with internal dissension in the wake of Charlottesville, the American Civil Liberties Union (ACLU) tiptoed away from its proud legacy of free speech absolutism. And poll after poll revealed that Americans of both parties are ready and willing to see speech rights abridged in the service of partisan goals.

Nothing that has happened so far in 2017 is yet irreversible. But as the ACLU is undermined from within and the right once again sheds the mantle of free speech in favor of a cape made of the American flag, the sharp edges of our First Amendment rights are eroding. In an era of bipartisan agreement that speech should be limited (paired, of course, with violent disagreement about *what* speech should be limited), it will be all too easy to forget where the outer boundaries of our freedom of expression once were. And once lost, they won't be easy to reconstruct.

**Back to School**

As the fall semester began, campus activists were primed for action. The previous academic year had begun with Yale students surrounding residential college master Nicholas Christakis and shouting about how his wife's opinions on Halloween costumery made them feel unsafe; it ended with Evergreen State College students surrounding professor Bret Weinstein and shouting about how his opinions on student activism made them feel unsafe. Berkeley's campus had been engulfed in angry protests, which culminated in the cancellation of speeches by right-wing provocateurs Ann Coulter and Milo Yiannopoulos.

Many students came back to campus looking to fight. They were not disappointed.

Before classes even began, Fordham's dean of students and deputy Title IX coordinator Christopher Rodgers was already under investigation for showing a video questioning popular statistics on campus rape in a resident adviser training session. Charles Murray, author of *The Bell Curve*, a book that makes controversial claims about the relationship between race and IQ, faced protests at the University of Michigan. (Unlike at Middlebury College the year before, where his attempt to speak ended in physical assault, Murray managed to finish his talk after the hecklers moved on. "We feel it is important to make an unequivocal statement that we believe universities should remain bastions of civil debate and tolerance," the students who invited him, under the auspices of the conservative American Enterprise Institute, told *The New York Times*.) At Brandeis, an award-winning playwright wrote a show about political correctness inspired by the profane comedian Lenny Bruce; the school cancelled it after students who hadn't read the script said they were offended. Northwestern returned to its favorite whipping girl, film studies professor Laura Kipnis. Having weathered one Title IX investigation last year in response to a critical essay she wrote about Title IX prosecutions in *The Chronicle of Higher Education*, Kipnis was accused of Title IX violations again this fall for her new book, *Unwanted Advances: Sexual Paranoia Comes to Campus*. In other words, as First Amendment lawyer Ken White observed, she was investigated for writing a book about being investigated for writing an essay about being investigated.

A common denominator in these stories is that many of the controversies were actually meta-controversies, triggered when someone spoke up in favor of free expression and against censorship. Not all of the victims of this year's cycle of panic over offensive speech were anywhere close to being Republicans. But once their stories got out, they were typically embraced by the conservative media as heroes while being vilified on the left.

Before the school year began, newly elected president of the College Republican National Committee Chandler Thornton was quoted in the *Chicago Maroon* declaring that the "Republican Party is the party of free speech, we're the party of tolerance, we're the party of inclusion, and we will fight for everybody's right to freedom of speech." On campuses across America, one might be forgiven for believing that what he said was true.

And then football season began.

### **Flag Football**

As the National Football League (NFL) opened for business, more players joined an ongoing protest by quarterback Colin Kaepernick in which they stay in the locker room, sit, or kneel during the national anthem as a sign of their concern about police violence against black Americans.

Never one to stay out of a fray, Trump quickly chimed in with his thoughts on the controversy. "I know we have freedoms. And we have freedom of choice and many, many different freedoms. But you know what? It's totally disrespectful," he said at a rally in Alabama. "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say, 'Get that son of a bitch off the field right now. Out! He's fired. He's fired!'"

Impulsive and intemperate as the president's comments were, they didn't *completely* miss the mark. Trump acknowledged that First Amendment rights exist. He didn't threaten to take action himself or ask his congressional compatriots to do so. Instead, he urged team owners—private individuals not bound by constitutional limits on government action—to reconsider their terms of employment. The most powerful politician in the country suggesting that someone be fired from his job for expressing a political opinion is not an actual violation of the First Amendment. But it runs perfectly counter to the spirit of the law.

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Other high-ranking administration officials couldn't even manage Trumpian levels of subtlety, however. Treasury Secretary Steven Mnuchin told ABC News' Martha Raddatz that players "can do free speech on their own time." Employees of the NFL, he said, "have the right to have the First Amendment off the field." Later, during a press gaggle, Trump would attempt to clarify his remarks in Alabama. "This is a great, great country and we have a great flag, and they should respect our flag," he said. "They're making a lot of money. I'm not grudging anything. I'm just saying they have to respect our flag, and have to respect our country."

His invocation of the importance of respecting the flag understandably reminded many observers of something Trump had posted to Twitter shortly after his election—a statement that came much closer to threatening an actual constitutional violation: "Nobody should be allowed to burn the American flag—if they do, there must be consequences—perhaps loss of citizenship or year in jail!"

Astoundingly, Trump's spokesman at the time, Jason Miller, doubled down on his boss's tweet. "I think most Americans would agree with me that flag burning should be illegal," he said on CNN's *New Day*. "It's completely despicable."

He's wrong about that: Somewhere around 37 percent of Americans support a law to prohibit burning the flag, according to Gallup. What's more, such a move has already been tried—and was soundly rejected by the courts.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable," Supreme Court Justice William Brennan wrote in his majority opinion in *Texas v. Johnson* in 1989. "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."

The Court reaffirmed that sentiment the following year in *United States v. Eichman*, declaring that "punishing desecration of the flag dilutes the very freedom that makes this emblem so revered, and worth revering."

If the president actually moved to impose harsh penalties for flag burning, he almost certainly would be thwarted at every turn. But the flaws in his understanding of the limits on his power to censor also inform his actions in areas where presidents have historically been granted more latitude.

## **The Press**

Before the election, Donald Trump promised that he would "never kill" journalists, a statement that should be reassuring but somehow isn't.

Trump's relationship with the press has never been easy, but this year the complaints about "fake news" and media bias that peppered his campaign rhetoric have been elevated into something more forceful, though thankfully still well short of assassination. The press, he has said repeatedly, is the "enemy of the people."

In response to an unflattering depiction of himself on *Saturday Night Live*, Trump tweeted that "it is a totally one-sided, biased show—nothing funny at all. Equal time for us?" In October, he returned to the same well: "Late Night host are dealing with the Democrats for their very 'unfunny' & repetitive material, always anti-Trump! Should we get Equal Time?" And then: "More and more people are suggesting that Republicans (and me) should be given Equal Time on T.V."

Trump's capitalization of "Equal Time" suggests that he might have been referring to the Equal Time Rule, a rather narrow law requiring broadcasters to offer equivalent airtime to all candidates for a public office. But unless Alec Baldwin declares for president in 2020, it's not clear how this rule is relevant to snippy comedy shows.

He may instead have been thinking of the Fairness Doctrine, a related rule in effect from 1949 to 1987, which required broadcasters to "afford reasonable opportunity for discussion of conflicting views on matters of public importance." The Federal Communications Commission (FCC) eventually killed the regulation after concluding that it violated the First Amendment. To demand balanced coverage from *SNL*, the president would probably have to reinstate that doctrine—and given that enforcement ended in semi-authoritarian confusion the last time it was tried, it's unlikely to go better this time around.

As a historical side note: After Barack Obama was elected, there were rumors that he would restore the Fairness Doctrine in an effort to kill right-wing TV and radio. There's no evidence that he actually planned to pursue this, though there has long been a cadre of progressives keen on revival. Nevertheless, a few Republicans introduced a bill to prevent him from doing so. Among them, one Mike Pence.

But Trump has made more concrete threats as well.

"With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!" the president tweeted in October. "Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!"

The FCC doesn't actually license NBC, the corporation that produces the network news—only individual broadcast stations. But the allocation and regulation of broadcast permits has long been an underrated source of press-chilling power. An NBC executive should not be thinking

twice about the tone of a segment because the president directly threatened his company's primary distribution method. That is the very definition of the chilling effect on free speech.

Some Republicans and high-ranking officials have pushed back. "Mr. President: Words spoken by the President of the United States matter," tweeted Sen. Ben Sasse (R–Neb.). "Are you tonight recanting of the oath you took on January 20th to preserve, protect, and defend the First Amendment?" Federal Communications Commissioner Jessica Rosenworcel was more concise, simply tweeting: "Not how it works."

Threatening licenses is a maneuver that has tempted many presidents: Richard Nixon tried it during the Watergate era in an attempt to punish *The Washington Post* (which also held licenses for television stations at the time), and Franklin Delano Roosevelt successfully reined in hostile media by shortening the period for broadcast license renewals from three years to six months.

Trump has also said he wants to "open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money." In March, he re-upped that idea on Twitter: "The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?"

Speaking from the Oval Office in October, he added menacingly, "It's frankly disgusting the way the press is able to write whatever they want to write, and people should look into it."

Will the president find inspiration abroad? In September, he told the emir of Kuwait, Sheikh Sabah Ahmed al-Sabah, that he was "very, very honored and happy to know that you have problems with the media also." Kuwait ranks 104th in Reporters Without Borders' World Press Freedom Index.

### **ACLU, But Not for You**

OK, so maybe the press is under attack. Thank goodness we have powerful, longstanding institutions dedicated to protecting all speech, regardless of content.

Oops. Bad news on that front, too.

This summer, local ACLU lawyers sued after a group called Unite the Right was denied a permit for a gathering in Charlottesville. It looked like business as usual—a routine defense of controversial speech on the part of the organization that famously defended neo-Nazis who wanted to march through Skokie, a predominantly Jewish suburb of Chicago, in 1978.

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Everything changed after a driver murdered counter-protester Heather Heyer by plunging his car into a crowd of people in the Virginia college town. When the rally tipped from a locally polarizing event to a national tragedy, longstanding internal tensions at the civil liberties nonprofit came into sharp relief.

Waldo Jaquith, a member of the board of the ACLU of Virginia, resigned his position, characterizing the group's support for the right to gather as "a fig leaf for the Nazis." Shortly afterward, national head Anthony Romero announced that the ACLU would no longer stick up for the speech rights of people who are holding firearms—an odd response to a protest where the

violence was committed via automobile, not semi-automatic. "If a protest group insists, 'No, we want to be able to carry loaded firearms,'" Romero told *The Wall Street Journal*, "well, we don't have to represent them. They can find someone else."

It is, of course, the ACLU's perfect right to spend its donors' money defending whomever it pleases. The move was likely a conciliatory gesture offered in response to backlash from some local chapters. But begging off of certain classes of protesters weakens the group's position in the fight to protect all speech.

Finally, in the first week of October, about 200 ACLU staffers—out of 1,300—signed an open letter arguing in *favor* of restrictions on hate speech, a proposed departure from the group's long, laudable history. "Our broader mission—which includes advancing the racial justice guarantees in the Constitution and elsewhere, not just the First Amendment—continues to be undermined by our rigid stance," the letter reads.

The group has long been torn between its liberal roots and its civil libertarian mission. Of late, the ACLU is flush with anti-Trump cash. Donations poured in after its fast, strong opposition to early moves by the new president to restrict immigration drew national attention. But those donors and even some newly hired employees may be less committed to the group's historical mission and thus were shocked when the ACLU did what it has always done: vigorously defend unpopular speech. Whether these more progressive supporters will shape the organization's mission in the long run remains to be seen, but there have certainly been concessions in the short run.

None of which appears to have successfully staunched the reputational bleeding. In October, students affiliated with the Black Lives Matter movement crashed an event at the College of William & Mary featuring the American Civil Liberties Union's own Claire Gastañaga, an alum of the school. She was scheduled to speak on the subject "Students and the First Amendment" but was bullied to silence with cries of "ACLU, you protect Hitler, too," "the revolution will not uphold the Constitution," and "liberalism is white supremacy."

## **The People**

The last bulwark of our liberties is the people. Surely they will rise up to defend their own freedoms?

After Charlottesville, seemingly every pollster in America sprang into action to do a quick temperature check of the nation's views on free speech. The results were not encouraging.

A survey by the Brookings Institution found that 19 percent of undergraduate respondents agree it is acceptable for a student group to use violence to prevent a "controversial" campus speaker from "making offensive and hurtful statements." Similar numbers showed up in polls by McLaughlin & Associates, *The Economist*, and the Foundation for Individual Rights in Education (FIRE) taken around the same period, suggesting that the finding of one in five college students condoning violence against speech was not an outlier.

In September, to celebrate the 230th anniversary of the signing of the Constitution, the Annenberg Public Policy Center conducted a survey of its own. Asked what rights the First Amendment protects, fewer than half of American adults were able to dig up "freedom of

speech" and only 14 percent managed "freedom of the press." A full 37 percent couldn't name any First Amendment rights at all.

When broken down by party, pollsters found a more complicated but similarly worrying story.

A poll conducted by the Cato Institute's Emily Ekins (formerly of Reason Foundation, the nonprofit that publishes this magazine) in conjunction with YouGov found that 72 percent of Republicans say colleges and universities are not doing enough "to teach young Americans about the value of free speech" and 90 percent think political correctness is "a big problem this country has." Around seven in 10 agree with the statement that "people should be allowed to express unpopular opinions in public, even those that are deeply offensive to other people," compared to less than five in 10 Democrats.

But further queries reveal deeply confused views about those same topics: 72 percent of Republicans would support making it illegal for an American to burn or desecrate the flag, and 53 percent favor Trump's idea of stripping flag burners of their U.S. citizenship. Nearly two-thirds say they would like to see NFL players fired for failing to stand during the anthem.

A full 63 percent of Republicans agree with the president that the press is "an enemy of the people," and half say journalists have too much freedom. Only about a third of overall respondents agreed with those sentiments, putting Republicans solidly in the camp *more* disposed to censorship. Two in five respondents say government should prevent hate speech, although 82 percent agree it would be "hard to ban hate speech because people can't agree what speech is hateful."

Americans, it seems, aren't too sure they want free expression after all—at least not for the people espousing views they don't like.

### **Not Silenced, But Muted**

Conservatives are right to worry about progressive incursions on speech. But this autumn, the more dire threat was not from the left.

Even on the college speech issue, the right's record is mixed. Going into the school year, 22 states were considering laws to protect free speech on campus. But while some of that legislation establishes reasonable protections for student speech, including a few bills modeled on a template developed by FIRE, others looked more like punitive measures aimed at Black Lives Matter and likeminded groups.

The University of Wisconsin Board of Regents voted in October to suspend or expel students found guilty of "disorderly conduct" that disrupts others' ability to communicate. In other words, the very student activists agitating for limits on outside speech may be the ones who soon find themselves censored.

The people wielding those "No Free Speech for Fascists" placards don't really know what they're asking for. If the justification for restrictions on the speech of one man is violence committed by another, there can be no end to the litany of people who may be gagged in the name of order.

Extremism is generally frowned upon in American politics, and rightly so. But defense of speech rights is one place where absolutism is not only healthy but necessary. A bipartisan world in which everyone gives in a little on the edges—in which we sneak some limits on hate speech

into our laws and keep folks who carry guns from yelling too loud—is a world slipping its way down a dangerous slope, where neither the trusty ACLU nor even very many principled citizens can be relied upon to fight for unpopular expression.

Even now, our rights to say what we please are not completely sacrosanct. There are limits on speech in the workplace, on the airwaves, and in crowded tinderbox theaters. But this fall's softening of strong views on speech from the left and the right further collapses the window of acceptable views for the rest of us.

If the fascists and racists and unfunny comedians are to lose their free speech rights, someone must take them. And if you believe, as many of the Charlottesville counter-protesters do, that white nationalists and their brethren are emboldened by the presence of a man in the White House who sees them as part of his coalition, then why on God's good green Earth would you want to hand that man the right to censor those *he* believes are unworthy? To decide what constitutes a fair balance or equal time for controversial opinions? To expand the definition of libel? To take away people's passports for burning a flag?

Needless to say, the list of folks Trump and the restive-but-still-Republican Congress would like to mute won't look at all like the list progressive campus agitators have in mind.

To chip away at the First Amendment now is to hand a unified Republican government the power to regulate speech. And if that happens, the vision of the activist left—one where hateful words are banned and no one is made to feel uncomfortable by dissenting opinions—will not be the reality that greets us. Instead, what we'll get will look an awful lot like the beginning of the end for free speech.

In the first week of November, a mistake at Twitter HQ deactivated the president's account on the platform for 11 minutes. The internet joked and conspiracy-mongered over the short outage, but even the brief loss of his preferred method of communication must have left the president feeling lost, bewildered, and disempowered. He should consider how the rest of us will feel if he does the same to us.