

The Battle Over Free Speech on Campus

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[00:00:00.5] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We The People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan non-profit, chartered by Congress to increase awareness and understanding of the constitution among the American people. Over the past few weeks, protests on college campuses about the war in Gaza have sparked a debate about the scope and limits of free speech rights on campus. In this episode of We The People, I'm honored to be joined by two of America's leading free speech scholars, Keith Whittington of Princeton University and Geoffrey Stone of the University of Chicago, to discuss the campus protests and the First Amendment. Keith Whittington is William Nelson Cromwell professor of politics in the Department of Politics at Princeton University. He's currently the chair of the Academic Committee of the Academic Freedom Alliance and a Hoover Institution visiting fellow. Keith's new book, *You Can't Teach That!: The Battle Over University Classrooms*, will be available on May 20th. Keith, it is great to welcome you back to We The People.

[00:01:06.4] Keith Whittington: Thanks for having me.

[00:01:08.4] Jeffrey Rosen: And Geoffrey Stone is the Edward H. Levi Distinguished Service professor at the University of Chicago. He previously served as Dean of the Law School and Provost of the University. He's the author and editor of many books about the First Amendment and the Constitution, including *National Security, Leaks and Freedom of the Press, The Free Speech Century*, and *Perilous Times: Free Speech in Wartime*. He chaired the Committee on Free Expression at the University of Chicago. Geof, it's wonderful to welcome you back to We The People.

[00:01:35.7] Geoffrey Stone: Thank you. Delighted to be here.

[00:01:40.2] Jeffrey Rosen: Let's begin with the University of Chicago, a beacon of free expression. Recently the president of the university announced his policy about sending the Chicago police to remove the encampments. Geof Stone, tell us about why the university president did what he did and whether or not you think he was right.

[00:02:00.9] Geoffrey Stone: So, as you noted, the University of Chicago is unique in its commitment to freedom of speech and academic freedom from its very founding, this was a central element of the values of the university, and it has lived up to that over the years in many ways, and prides itself on its commitment to not taking positions itself on public issues and allowing faculty, students, and others to express their views without the university interfering based on the viewpoint that they're expressing. In this most recent situation, a number of students, as in other universities gathered together to engage in a protest against Israel and put up a number of tents in the main quadrangles. And in doing so clearly were acting inconsistently with the university's neutral rule about gathering in and blocking access to various facilities and the central quads.

[00:03:06.4] Geoffrey Stone: It would've been perfectly plausible for the president of the university to tell them from day one what you're doing is a violation of our norms and of our regulations and you have to stop. But he quite rightly decided that they were engaged in expressive activity. This was obviously a very important issue. They cared deeply about it, and although it was problematic in terms of the functioning of the central quadrangles it was not horrible, and therefore he said, I will give you some time to do this, but you have to understand that it's gonna be limited. And after a little over a week, he decided that that was enough time, and he said to them, time for you to disperse. Some of them did, some of them did not. He then used the university police, not the Chicago police, but the university police to remove the tents and to remove them. And it's remained clean ever since then. So so far it seems to have gone quite well.

[00:04:11.7] Jeffrey Rosen: Keith, in addressing the encampments, the president of the University of Chicago said that the university would only intervene if what might have been an exercise of free expression blocks the learning or expression of others, or substantially disrupts the function or safety of the university. He also drew a distinction between protests that disrupted activities and those that did not, and noted that an encampment with all the etymological connections of the word to military origins is a way of using force of a kind rather than reason to persuade others. You've drawn a crucial distinction between persuasion and force, do you think the president drew the right distinction and how would you address the question of encampments?

[00:04:57.1] Keith Whittington: Well, I do think the broad principle that he articulated is the right one that we ought to be thinking about what's disruptive to the operations of the university generally, certainly especially disruptive to the core educational functions of the university. But of course, there's lots of other things that go on on university campuses as well, and protests and encampments can interfere with those kinds of activities also, and the university has to take that into account. And so you can imagine protests that are obstructing the operations of administrative activities on campus, that obstruct simply the normal activities of other students

on campus. One thing about these encampments, of course, is they've taken up space in the common areas that students use for all kinds of purposes. And some also of students can't unilaterally monopolize that space and exclude others.

[00:05:45.1] Keith Whittington: And so I think the right principle for universities in general is to be thinking about how much of a disruption does this create for how the other people are trying to use the campus are able to use it. Of course there's also gonna be judgment calls about whether any particular protests or expressive activity is creating a disruption. And one of the challenges, I think, for universities is do you operate simply with that kind of broad standard and leave it up, for example, to the presidential judgment as to whether a particular protest is creating those kinds of obstructions, or do you have a set of detailed rules that we sort of thought through ahead of time and sort of said, "Well, we think these kinds of activities would in fact be disruptive. And so we're just gonna exclude those entirely from our campus." So you can't be in classroom buildings, for example, or you can't use megaphones or you can't have protest activities after a certain time of day, and the like because we just think as a general policy that those are going to be disruptive and it sends much clearer signals to both students and administrators about what to do under those situations.

[00:06:57.8] Keith Whittington: The encampments as a particular version of protest I think are an interesting new thing that we're increasingly seeing. And over the last 20 years, we've been seeing more and more protest activities include some kind of encampment feature to them. And I don't know if I'd go so far as the president of University of Chicago did in characterizing them as necessarily militaristic or having militaristic overtones. In part, they do serve a kind of symbolic function, or at least in some circumstances, they serve symbolic functions, I think in the context of these protests part of the symbolism of the encampments is to suggest the nature of the refugee status of people in a war zone. And so this kind of sheltering in place sort of calls the situation that people in a war zone might find themselves in, and likewise, we've seen tents and other kinds of shelters used in protest about homelessness and other kinds of situations where we might think that the encampment aspect is part of the symbolic message they want to convey. But it's also true that what we're seeing on university campuses right now is encampments serve not just a symbolic function but they also are designed to be at least somewhat disruptive to how the university operates.

[00:08:22.2] Keith Whittington: They may be relatively small disruptions. So for example, students might confine themselves to a lawn, not extend off into sidewalks and other kinds of things. But we've seen lots of movement on a lot of campuses in which students who are doing the protesting have also tried to prevent other students from entering into those areas where the encampments are taking place. We've seen students try to harden their encampments to make them harder to remove. And I do worry that this increasing tendency of protest to want to include this kind of encampment element has also baked into the protest an unwillingness to move, a

greater willingness to assert a kind of property, right over the space in which the protestors are occupying that makes it much more difficult for others to use that kind of common space, and I think fundamentally becomes much less tolerable to a university when these things are not just symbolic, but instead they're being pitched as this is a liberation zone that only us protestors are allowed to come into. I think as a university sort of thinking about that, it's one thing if you have a symbolic shelter, it's another thing if you're just marking off a part of campus and saying, no one's allowed to come here.

[00:09:37.9] Jeffrey Rosen: Thank you for that distinction. Geof, the president of The University of Chicago, said, we will only intervene when what might've been an exercise of free expression blocks the learning or expression of others, or that meaningfully disrupts the function or safety of the university. And he distinguished between a protest on the quad with a large flag saying, honor the martyrs, which was permissible, and the occupation of Rosenwald Hall, which was not. Keith said that there's been a rise in the past 20 years of encampment features to protests that block movements. Do you see that change in the recent protests too? And how does the University of Chicago distinguish between disruptive protests and non-disruptive ones?

[00:10:26.8] Geoffrey Stone: I think the thing to understand about protests and particularly civil disobedience is that an important realistic way to get attention is to be engaging in provocative activity. Students, faculty, and so on are perfectly free to hand out leaflets, to give speeches, to hold events, to talk about issues in all sorts of ways that are conventional for the university environment. And that's something that is completely protected even if other people are concerned or upset about the points of view that are being expressed. But the reality is, doing those things will not get you stories in the New York Times or the Washington Post. And as a consequence, people who want to make their views well-known will inevitably engage in activities that will get them attention. And that means engaging in activities that will be perceived as disruptive. And that will lead, whether it's universities or other organizations to attempt to regulate or silence what they're doing.

[00:11:30.6] Geoffrey Stone: It's not because of the message they're communicating, it's because of the way in which they're doing it. And as I said, it's completely understandable that one wants to do that. That's why we're having this conversation, frankly. And had the students at universities or colleges across the country been using conventional appropriate means of communication, it would be interesting on the substantive issues, but we wouldn't be talking about this. So students are clearly understanding that the way to get the attention they want, and I understand why they do want it, is by violating the norms of the institutions so as to force the institutions to react in a way that will become a matter for publicity. And so if you didn't act on day one, they will be more aggressive and you'll have to act on day two, 'cause that's the whole point.

[00:12:24.0] Geoffrey Stone: So I do think that what the University of Chicago president did was the correct thing. He basically, as I said, he allowed them to violate the ordinary content neutral rules about when students can take over public parts of the institution because it was expressive, but also recognize that there is a point at which you don't want to let them do that forever, because if they do that, then other organizations with other issues will do it as well. And so you have to, at some point, step in and stop it. And also, students understood that the way they would get attention, as I said, is by being more and more disruptive. So it's a complicated game that we're playing in this context, but it's important to understand that the protestors know exactly what they're doing, and they want to get the attention that they get by being silenced. That's the whole point.

[00:13:16.6] Jeffrey Rosen: Keith, in your important book, *Speak Freely: Why Universities Must Defend Free Speech*, you have a chapter on forms of protest and you distinguish between staged and actual disruptions, which you say should be treated differently. You talk about the problem of the heckler's veto, and you say that universities may choose to negotiate with protesters who are engaging in civil disobedience but only if they think that the cause is sufficiently important, and it's a prudential question. How can universities reconcile their commitment to neutrality, which you endorse, with making judgments about whether a particular form of a civil disobedience is appropriate enough to be indulged, and tell us more about this distinction between actual and staged disruptions?

[00:14:11.2] Keith Whittington: I think it's not an easy question, and part of the challenge is being able to communicate with students and understand what they're actually doing. And so a lot of universities, I think, have become quite sophisticated in anticipating that these kinds of protests are going to occur and other kinds of expressive activities on campus are gonna occur. They try to engage in dialogues with students to understand what the students are trying to accomplish, how far they're really willing to go, what are their plans exactly. Try to communicate clearly to the students as well, what the rules are, so students go into this process understanding what's gonna be allowed, what's not gonna be allowed, what are the consequences for violating them? So keeping open those lines of communication and having conversations before the protest begins, I think is often important and helpful in trying to anticipate then is this going to get out of hand? How far is this gonna go? How serious is the administration really about enforcing their rules? For example, and can prevent some of these things from being a temporary momentary disruption that calls attention to the cause, for example, but really doesn't create serious difficulties for the university and allows everybody to move forward in a relatively reasonable way.

[00:15:27.5] Keith Whittington: But that's not what students always want, and I think part of what we're seeing now with the encampments with this round of protest is there is a somewhat greater radicalism here in on a lot of campuses where students don't simply want a momentary

protest that's going to get attention, but they really do wanna heighten the conflict in order to create more and more attention, in order to extend the controversy to greater lengths. We've seen this on a lot of campuses and how this has played out, but we've seen a version of it here at Princeton as well where students began wanting to create an encampment like elsewhere. Our university told them tents and shelters were not allowed, those were specifically against the rules, but did allow them to bend the rules relative to occupying some space on campus for an extended period of time. Students ultimately were not happy that that was not getting enough attention so they occupied a building for a period of time.

[00:16:25.8] Keith Whittington: Now they're engaged in a kind of hunger strike in order to attract additional attention to the cause. And so one kind of challenge relative to the University of Chicago, for example, if you give 'em a week, will the students decide, "Well, that's not enough attention. You're not giving us enough, and now we have to do even more in order to get more attention and become more and more disruptive and force a stronger and stronger reaction potentially from the administration," which becomes challenging and difficult.

[00:16:51.4] Keith Whittington: I do think it's fundamentally prudential judgment is what's going to work. We've seen lots of different kinds of approaches different university presidents have taken to try and deal with the protest. Some more effective than others. And in some places, I think the exact same kinds of efforts have worked much better in some places than others. So Chicago, for example, they made clear to the students what was happening, they gave them a week, they sort of said, "Okay, now we're clearing out," and the students cleared out. In other universities, there's been those kinds of warnings, those kinds of efforts, and then the students didn't clear out, and then the question is, "Okay, now what do you do? At that point." And part of that calculation is how are the students going to react and what are they gonna force you to do under these circumstances? But frankly, I think part of the challenge for university presidents in this environment and also is thinking about what are the faculty going to do? How are they going to react relative to the students? What are crucial stakeholders like the mayor of the city of Chicago and the police department going to do relative to this? How are politicians outside the university environment? Are you in an urban environment in which there are lots of outside people who can easily come to campus? Which is the problem Columbia faced, for example, unlike some other universities that might be more isolated.

[00:18:01.4] Keith Whittington: And so you're really just dealing with students, which I think creates a different kind of challenge. So I think as a consequence, presidents are in a very difficult situation. I don't think there's a one-size-fits-all as to how you try to manage these situations. And I think it's easy to play Monday morning quarterback on some of these things and say, "Well, they should have done it differently." But when you're in the midst of it trying to make those decisions, I think it's not always obvious what's going to work and what's not going to work, and what in fact is going to make the situation worse, just in terms of the functioning of

the university and being able to move on. One last thing, I would just note briefly that both comes out of The University of Chicago example, and the question you just asked, which is about how do you maintain the neutral time, place, and manner regulations, the neutral principles across different protests over time? And one thing Chicago is now confronting, and we're hearing lots of rhetoric about it here at Princeton and elsewhere, I think they're getting similar kinds of arguments being made, is have you now get a one-week encampment rule at the University of Chicago, and so does the next protest that comes along where they want to occupy the quad, and then the university president says, "Well, you're violating the rules. You need to clear out." And they say, "Well, last semester you gave the Gaza protestors a week."

[00:19:17.3] Keith Whittington: "Shouldn't we get at least a week before we have to clear out." And I think universities can get themselves in a real bind about that. You wanna be somewhat tolerant of students, you wanna give them some grace period and wiggle room in these situations, and you need the prudential maneuvering room to deal with different kinds of circumstances. But if you're not careful, you're gonna find yourself in a situation in which it looks like you're playing favorites. And you look like, well, we said we had some rules but we're actually not gonna enforce those rules against everybody. And students, I think quite rightfully will find themselves starting to complain that the rules seem to be very selectively enforced depending on how much support the students have and how sympathetic their cause seems to be.

[00:20:03.4] Jeffrey Rosen: Thank you for that. Geof, the question of selective enforcement and institutional neutrality that Keith raises is so important. Institutional neutrality is at the core of the Chicago principles, and it's what has allowed Chicago to flourish as a free speech beacon. And yet around the country, universities are being accused of being selective in their devotion to free speech. At the celebrated hearing of the university presidents of Penn, Chicago, and MIT, the claim was that speech was being protected for some causes and not others. And Keith also raises this question of, when you accommodate some groups with one week grace period, do you have to do that across the board? How are universities dealing with this question of selectivity when it comes to institutional neutrality, and having departed so far from institutional neutrality, how can universities other than Chicago recover it?

[00:21:00.9] Geoffrey Stone: Well, I think Keith is exactly right that this is a real challenge. The reality is with respect to all regulations, governments and universities and colleges exercise a degree of judgment and discretion as to when and how to enforce. No rules are enforced automatically the same way in all circumstances. One has to weigh the cost and benefits of enforcing different regulations and rules in any given situation. And that's just inevitable. So I think to that extent, all institutions are going to have to decide on a case by case basis how to respond to particular situations, that I think happens with respect to all sorts of things, a student comes to you and says, "Can I have an extra week to turn my paper in?" That's not gonna be the same answer for every student.

[00:21:52.8] Geoffrey Stone: It depends on the circumstances and the reasons. The key factor, I think, with respect to things like protests is that universities should not and cannot act based on the viewpoints being expressed by the protestors. They can treat different protests differently based upon how disruptive they are but they cannot treat them differently based on the message that's being communicated. And that's something that I think is essential for universities. And they have to take that extremely seriously. But reality is, just like the government exercises judgment in deciding whom to prosecute, when to prosecute, and so on. And as I said, just like faculty members make judgements about whether to give the student extra time to turn in a paper, universities have to exercise a degree of judgment in deciding how to respond to particular controversies and problems. So I think that's inevitable and that's gonna happen always. But the key factor is universities have to be viewpoint neutral about it.

[00:22:53.1] Jeffrey Rosen: Keith is Geof's endorsement of viewpoint neutrality for universities consistent with your suggestion, and speak freely that you say the question to be asked about any given disruptive protest is whether the disruption to social order is justified from the general perspective of a liberal democratic society not whether the protest falls within the ambit of free speech that's essential to the mission of the university. Do you think universities should make judgements caused by cause about whether the disruption is justified, or is that a violation of viewpoint neutrality?

[00:23:27.9] Keith Whittington: Yeah, I don't think universities can be making judgments about the, does the university president for example, agree that the cause of the Palestinians is so important or so just that we need to give special rules in this case, but some other protest that comes along the university president is going to be less sympathetic with, disagrees with the goals and as a consequence is going to be much less tolerant of what the protest looks like. As Geoff suggested, I think these are gonna be very context specific judgements about what kind of grace you offer relative to particular rule violations. So you can imagine, for example, that there are different places in the university where you might wanna try to set up an encampment. And if the students were to say, "Well, last semester you allowed an encampment," sometimes the answer is, "Yeah, but that encampment was not in a place in campus that disrupted classrooms," for example, or was right outside a dorm and prevented people from sleeping in their dorms at night, for example, or the timing of the protest is different in terms of how much of a problem it's gonna create for the operation of the university and the like.

[00:24:38.2] Keith Whittington: And so one of the challenges though that the university presidents are gonna have to face is how do you explain the differences between how you're treating different protests where hopefully the reference point is always going to be one of saying, "Well, look, the conduct here and the kind of disruption it was creating is different, and that justifies treating them somewhat differently, but what we're not gonna do," which we've seen

some rhetoric around right now, we're not gonna create a Palestinian exception either in the sense of we're not gonna crack down on pro-Palestinian speech, which is certainly what some of the protesters are arguing, that there's kind of a Palestinian exception where our speech is less protected than other people's speech. And likewise, you're not gonna have a pro-Palestinian exception that says we're gonna be more tolerant of your speech than somebody else's speech. And that's a very hard standard to maintain, right? People's natural sympathies will lead them to want to say, "Well, in this case, the protestors really seem to have a good cause and their heart is in the right place, and so can't we show them some additional tolerance here? But those other protestors we really don't like."

[00:25:46.2] Keith Whittington: And one of the hard challenges of administrators trying to enforce neutral rules is to say, "We can't make those kind of judgements. We have to stick to the core principle we're really trying to protect here, which is universities are places for everybody to make use of, with lots of different perspectives, and we're trying to create a set of conduct rules that will allow everybody to do that in a reasonable way over time."

[00:26:10.5] Jeffrey Rosen: Thank you for that, and thank you for both helping us understand the importance of neutrality and the difficulty of making these judgements case by case. Geof, we jumped right into this crucial topic, and I wanna pull back for a sec. You've seen protests through the course of your towering career defending free speech on campus. How are these protests different if they are different in any ways from the Vietnam era? You've both talked about the different roles of faculty and mayors and outside stakeholders, their social media. Are these different in kind or degree or are they like the Vietnam protests, and what are the new challenges of confronting protests in this particular age?

[00:27:02.7] Geoffrey Stone: My sense is that the anti-Vietnam protests were in many ways similar to this, people weren't using tents and weren't taking over parts of their community. In the public space, but they were taking over, for example, president's offices in universities, they were engaging in all sorts of, what might be regarded as disruptive activity in order to get publicity for their views. So I don't think it's unusual for protestors, so think about Civil Rights protestors as well, back in the '60s. The point is, again, getting publicity, getting visibility. In these protests, you're not simply trying to get the university to change its policies. There are lots of situations where that's the issue, but not these types of situations. In these types of situations, the issues are far beyond anything about the university. You're trying to get national attention, if possible, for your positions. And therefore, again, you wanna create controversy. So during the Vietnam Era, and during the Civil Rights Era, there were protests that were not identical to these but nonetheless were meant to be disruptive and were disruptive in various ways, and universities responded, again, in complicated ways. I think in general, they tended to be reasonably patient, but not completely patient, and shut things down and punished students for engaging in those protests.

[00:28:33.8] Geoffrey Stone: I remember when I was a college student at the University of Pennsylvania and participated in an anti-war protest, it got a little bit crazy, and the students began climbing on fences and broke some of them and so on. And so I think that's inevitable in so far as you're trying to get attention. But I don't think universities are acting necessarily any differently now than they have in the past.

[00:28:58.7] Jeffrey Rosen: Keith, do you see any differences in the conduct of universities when it comes to Vietnam and today? And I'll just raise the question of faculty participation. Paul Berman wrote an interesting piece in The New York Times recently. He was a leader of the '60s protests at Columbia, and he said then the faculty were neutral or tried to deal with the question in the context of the classroom and now they're at the barricades. Is that a difference and what are the consequences?

[00:29:25.7] Keith Whittington: So I think Geof's right to point to the Vietnam Civil Rights protest is probably the thing that's most comparable to the current protest, in part because the audience that the students are really looking for is a national audience and not simply about campus issues, in some ways campus is just the convenient target, but the campus policies are not really central to these protests. So I think it does sort of put them in a different light, requires different kinda response, the students are gonna be engaged in different kinds of activities as a consequence of trying to aim for that. And they are somewhat disruptive, like those protests earlier on, they seem much smaller now than what we saw with a lot of the Vietnam protests in particular, which became extremely large.

[00:30:11.8] Keith Whittington: I think right now at least these protests occupy a much smaller set of the students than those protests did. But it's also true, I think that this protest does attract more support from a lot of faculty administrators than was true in the Vietnam era. I really am hopeful that actually somebody's doing good survey research on faculty attitudes about these protests. There was some really nice survey work done of faculty attitudes about Vietnam Era protests. They found some real divisions among the faculty at the time. There's a real generational split among the faculty at the time with the younger faculty being more supportive of student protestors in the Vietnam Era than the older faculty. But it was a pretty small set of faculty at the time who were very supportive of the protestors. I suspect it's a larger percentage of the faculty who are sympathetic to protestors in this kind of protest activity now than was the case then. But it's an empirical question and it'd be nice to have more actual data on that.

[00:31:20.7] Jeffrey Rosen: Geof, what's your sense of the role of faculty in these protests? CNN recently reported at least 50 professors arrested at campus protests across the country. Some say they attended to show support for their students. Is that different than in the Vietnam

Era? And what are the rights of faculty in expressing views on political issues outside of their classroom duties?

[00:31:48.3] Geoffrey Stone: I think faculty members have every right to express their views about whatever issues they wish insofar as they're acting outside their classroom duties, and that's an important thing for universities to protect. Faculty members are free to engage in their own free speech, and certainly they're free to take political positions outside their own narrow educational functions. So I don't think there's any particular problem with that. And during Vietnam, I don't remember, frankly how often faculty members took positions about the war. There are faculty members now who are taking these positions, I don't have any objection to that, I think that's perfectly fine. They're free to say what they want, to think what they want, and to participate as long as they do it in an appropriate manner. I think if they violate university rules in doing so, then they can be, in theory, disciplined in the same way that students can. But hopefully they will be more cautious about that. But they can be disciplined if they violate university rules just as they can if they violate other university rules. So I don't think there's any problem with faculty members though engaging in public political protests to the extent they think that those issues are to them personally important.

[00:33:14.5] Jeffrey Rosen: Keith, your important new book discusses the question of the rights of faculty, of both public universities and private universities, and in chapter five, you sum up the existing First Amendment precedent about faculty speech and conclude that faculty speech should reach its highest constitutional protections when the speech is germane to the pedagogical or content goals of a course and the speech is professionally competent. How would you apply that framework which you set out so well in the book to faculty speech involving Gaza?

[00:33:54.4] Keith Whittington: Yeah, so certainly I think one thing we need to distinguish is between speech that occurs in a classroom context and speech that occurs outside of classroom context, whereas faculty are speaking out, as the American Association of University professors would characterize it, speaking as citizens. So if professors are participating in protest activities, for example, and giving a speech on the quad, then we wanna give them, of course, a tremendous amount of latitude. The same latitude we'd wanna give students as long as their conduct is consistent with the rules of the university, the content of the speech, I think, it should have extreme levels of protection, even if the content of the speech might be quite extreme, might be quite controversial, might be speech that others find quite repellent or are disturbing or are offensive in various ways.

[00:34:45.6] Keith Whittington: The classroom is different. In the classroom context, professors have specific responsibilities that they're supposed to be engaged in. And as a consequence they have specific protections. But those protections have real boundaries under traditional academic freedom protections, and I think properly understood sort of First

Amendment set of protection should be viewed similarly for faculty as well. So if I'm a Chemistry professor teaching a Chemistry class, presumably there's no space in that class to be talking about Gaza and what's happening in the Middle East. And so if you're occupying class time using this captive audience to pontificate on your political views about something you think is terribly important but has nothing to do with Chemistry then that's inappropriate. And universities can quite rightly crack down on faculty and discipline faculty for engaging in that kind of behavior because students have a proper expectation that when they're in Chemistry class they're going to be getting Chemistry not political discussions to suit the professor's political interest.

[00:35:51.8] Keith Whittington: Likewise, even in a class in which it's relevant to be talking about the Middle East or Israel or Gaza or foreign policy or various other kinds of things related to these current events such that you satisfy that kind of your maintenance requirements, not Chemistry class, it's some kind of Middle Eastern politics class or history class or political science class, for example, there's still a requirement that you be professional in how you engage in it, both in the sense you're not trying to indoctrinate and politicize the students in particular ways, but also in the sense that you should be conveying professionally competent knowledge to the students. So you may have very strong feelings about a particular situation, and yet you have a responsibility in a classroom, I think, to inform students as to what the range of opinions are, what the range of scholarship looks like on this, not to mislead students about what the history of the conflict might look like, for example.

[00:36:45.2] Keith Whittington: And so again the, your speech is more limited and more constrained in a classroom context than it would be if you're writing op-eds or participating in campus speeches. There are though, I think, a range of professional conduct rules that are not very well elaborated in academic norms that surround these things as well, and there's some real judgment calls about how those ought to play out. So one thing we've seen in some of these campus protests for examples is faculty taking their classes to the encampment and teaching classes in the encampment, which I think is seriously professionally unethical. I think violates the proper professional responsibilities of faculty to force their students to engage in a kind of protest by sitting in a protest zone in order to participate in their classes, for example. So I think there's some requirements that go along with not only do what you say in the classroom but also how you conduct your class in these kinds of contexts. And then, like I said, even if you're speaking as a citizen, there's gonna be conduct rules that apply to faculty just like everybody else, just because you're a faculty member doesn't get you a get out jail free card if you decide to occupy a building or lead a disruptive protest or the like.

[00:38:01.0] Keith Whittington: And there were some situations in the Vietnam Era where faculty did exactly that and got themselves fired as a consequence of leading a disruptive protest, being among the occupiers of a building, for example, and universities quite appropriately

thought, we don't have to tolerate faculty disrupting the activities of the university, although we should tolerate faculty with a wide range of political views who express those wide range of political views.

[00:38:26.6] Jeffrey Rosen: Geof, Keith has drawn a distinction between faculty speech on the quad and outside the classroom and inside the classroom, do you think that distinction holds and are we seeing examples of faculty taking politics into the classroom, making solidarity statements in class, as well as professional associations associating themselves with the protests? The American Anthropological Association voted to endorse a resolution to boycott Israeli academic institutions, and there is increasing pressure on faculty to align themselves with one side or the other. Tell us about how this is playing out and whether you think this classroom, outside the classroom distinction can hold.

[00:39:14.4] Geoffrey Stone: Well, I agree completely that there is a fundamental, in the classroom, outside the classroom distinction. In the classroom, the professor is performing a function, that is in general defined by the institution. And that is you're teaching a Chemistry class or a history class or whatever, and it's not appropriate to then move completely to a different topic or subject because you're politically interested in, or believe strongly in the political views of that subject. I agree with Keith, that would be completely inappropriate. Even in a situation in which you're teaching a course in which the issue may be relevant, so if you're teaching, for example, as I do a First Amendment course, I think it is certainly appropriate to talk about and get the students to think about what should be the boundaries of protests like this in a public institution, should the university be able to regulate things in a certain way?

[00:40:07.5] Geoffrey Stone: But I also think that it's inappropriate for the faculty member to be stating explicitly this is the right answer to this question because of my political views about a situation. So I agree with Keith completely. Now, there are obviously gonna be gray areas there that are gonna be tricky, but I do think that the basic principles are clear that when a faculty member is acting not in his official capacity as a faculty member, she is free to engage in public speech in any way that she sees fit, but in the classroom, I think there is a clear responsibility to act in a professional way in light of the responsibility you have of teaching a particular subject in an appropriate manner. In terms of faculty members themselves taking political positions outside the classroom, my own view is that that's something that one should be a bit cautious about, because you don't want to be seen as being overly political as a professor, so your students think of you in that way, but on the other hand, it's your freedom to do that. And so I do think faculty should be a bit careful about not going over the edge in terms of saying they have particular strong views, especially with their relevance to their teaching subjects because that will distort what students think they expect of them in the classroom.

[00:41:24.1] Geoffrey Stone: But that's a matter of discretion, I think, not a matter of of rules.

[00:41:33.5] Jeffrey Rosen: Keith, your new book, *You Can't Teach That!: The Battle Over University Classrooms*, includes, an important chapter about the new, so-called Anti-Woke Laws and the legal framework in which they should be evaluated, and in the final chapters you talk about teaching in the government school and compelling students to believe. Tell us about the current legal framework for evaluating Anti-Woke laws and why you believe that they violate the First Amendment or, and are ill advised.

[00:42:04.4] Keith Whittington: Yeah, it's a challenge to think about who ultimately controls the content of what's taught in university classrooms. In private universities, this was an extended fight in the early 20th century to try to push the trustees out of that process of deciding what's in the classrooms and what the curriculum looks like. And the trustees often were acting through the arm of the university president, and so there are real pitch battles about things like who gets to choose which books get assigned to students in a particular class, can the university president countermand an individual faculty member and say you're not allowed to assign that book to students because it's, the university president disagrees with it, or trustees disagree with it, or alumni, or even the students disagree with it, and mostly the faculty were successful in carving out principles of academic freedom that said, "No, no, the faculty get to control those kind of decisions and the trustees should back out of it."

[00:42:58.2] Keith Whittington: And that was true in the public universities as well, they went along with those same sets of professional norms. What we're seeing now, though, is a real challenge of legislatures to, and in some cases, trustees in public universities as well, but especially legislatures, to begin to reevaluate that and say, look, these are public institutions, we can't simply delegate all these questions to the faculty, and certainly if we think the faculty are making mistakes on some of these things, they're teaching the wrong kinds of ideas, or the wrong kinds of doctrines, we need to intervene as a state legislature and make sure our state institutions are teaching the things to students that we think are most appropriate to teach in. And that ultimately then is a question of, okay, what kind of legal authority does a legislature have in that regard?

[00:43:47.1] Keith Whittington: And is there some kind of First Amendment backstop that would reinforce the kind of professional norms that we've been seeing over the course of the 20th century that provide real limits on what they can do. The Supreme Court, partially in the aftermath of the McCarthy Era, and the battle over loyalty oaths, and the like in the 1950s and 1960s, said that there was an academic freedom component to the First Amendment and academic freedom values that were important to the First Amendment, but gave very little guidance as to what that meant in practice and it's really left it, since then, to the lower courts to try to work out what the doctrine actually looks like and what kind of tests ought to apply in these situations. And one of the challenges is for thinking through how does academic freedom

play from a First Amendment perspective in public universities is subsequent to that, the court has also said, well, we have government employee speech that can be regulated in various ways, and the court is increasingly sympathetic to the idea that workplace managers ought to be able to regulate to a very strong degree what happens in a workplace, in a government workplace in general.

[00:44:57.2] Keith Whittington: And if that's true of government workplaces in general, if you apply that logic to a university classroom, then academic freedom largely disappears in public universities. And so one real challenge I think that the courts are gonna have to confront now because of the work of these legislatures is how do we reconcile this kind of doctrine that's emphasized the degree to which government managers can control their employees and what speech they engage in in the workplace with this claim that there's a real academic freedom component to the first amendment. And the book in part is concerned with trying to work out that reconciliation in a way that maintains those academic freedom principles, but in a way that is still coherent with some of the goals of government employee speech doctrine, which means you need to be able to manage the workplace. And some of what we've already talked about, about the particular professional responsibilities of professors in the classroom, I think is part of that.

[00:45:54.9] Keith Whittington: And so if you have a legislature coming through and saying, "These ideas are politically unacceptable, you can't teach that," that's different than saying, "You can't teach incompetent Chemistry. You can't teach politics in your Chemistry class," and the like, that that's appropriate interventions in how you manage the functioning of the university, whereas if you say, "We don't like Critical Race Theory, as a set of doctrines, and as a consequence, you're not allowed to teach that here," that looks much more like the traditional political censorship that the First Amendment is centrally concerned with trying to prevent legislators and other government officials from engaging in.

[00:46:30.9] Jeffrey Rosen: Geof, do you agree with Keith's argument in his new book that legislature should not be in the business of telling universities what to teach? Or are you sympathetic to the argument that as universities deviate from their principles of institutional neutrality, it's appropriate for legislatures to impose those rules?

[00:47:01.9] Geoffrey Stone: So, first of all, to be clear, I think the government cannot constitutionally dictate what private universities or professors in private universities can and cannot teach or write or say. That clearly would violate First Amendment. The more complicated question, as Keith notes, is in public universities, because they are part of the government. And in general, the government is allowed to regulate its own employees insofar as they are performing their professional responsibilities in ways that it cannot necessarily regulate private individuals, particularly with respect to free speech. So the question there is to what extent the

government does have authority to regulate the expression of its public employees both on the job and outside the job. Outside the job, I think the answer is very little, I think that basically government cannot regulate what government employees can say when they're acting outside their official capacities, including obviously professors and scholars and so on.

[00:47:52.3] Geoffrey Stone: But when they're acting within their professional responsibilities, it's much trickier. And you can obviously tell a Chemistry professor that you cannot teach your class about History, that's not appropriate. The more complicated question is, can you dictate or prohibit certain viewpoints from being expressed by the professors particularly in the context of the educational process. And there's not yet, I think, a perfectly clear answer in the law. The Supreme Court has been cautious about allowing the government to do that, to engage in particularly viewpoint-based restrictions, in a number of cases, it has held unconstitutional laws of public universities that specifically distinguish between different points of view in terms of what's permitted or not. For example, in one case, the court held that a public university cannot constitutionally fund student organizations other than religious organizations.

[00:48:53.4] Geoffrey Stone: And presumably it would be unconstitutional for a public university to fund pro-Israeli or anti-Israeli organizations not the opposite. I think that too would be regarded as a violation of the First Amendment. And similarly, I think in terms of the dictating what ideas can be taught, I think the court would be highly skeptical of the constitutionality of the government making those decisions, just as, for example, it has held that a public school cannot remove books from the library because of disagreement with the viewpoints expressed in those books. So I think these are complicated issues, 'cause here we're talking about government employees, and government employees are in their professional duties like private employees subject to the regulations of their employer, but the First Amendment does have a role to play here, and my guess is that the court should, and hopefully will play an important role in limiting the extent to which government can dictate what positions professors and institutions can use to educate their students in an important responsible manner.

[00:50:08.5] Jeffrey Rosen: Keith, any other thoughts about the distinction between public and private universities, how the court might respond? And then talk about the central distinction that's core to your book about the difference between the currency of persuasion and the currency of coercion, you root your defense of broad First Amendment protections in the idea of protecting persuasion rather than coercing ideas, and your final chapter involves trying to course student thought. Tell us about that distinction and how you think it plays out.

[00:50:40.3] Keith Whittington: Well, as Geof says, I think these are very challenging issues, and the court has not yet resolved these, and have not really provided a lot of guidance, and I think the court's gonna be confronted soon with having to get greater clarity on how some of these problems should be dealt with. And it's gonna be a hard challenge for how did you

reconcile some of these doctrinal commitments, and how do you make sense of trying to, if the court's inclined to do this, tie the hands of legislatures while still allowing reasonable management of workplace speech by a faculty. But I think if you're going to have meaningful First Amendment protection for academic freedom, you have to think that faculty as they're operating in their research and in the classroom are simply different than a lot of other government employees and need a lot more freedom to engage in speech about ideas that their managers might not like that is more expansive and extensive than would be true for other government employees.

[00:52:06.9] Keith Whittington: One of the further challenges is also tied up in some of these legislative efforts and how we think about what happens in classrooms is this problem of, what constitutes compelled speech and efforts to compel student belief in ideas, what sometimes gets characterized as indoctrination of students in the classroom. This has long been a controversy among academic freedom experts in discussions, all across the 20th century, at the very foundation of the American Association of University Professors there was an emphasis on the idea that faculty do not have the right or freedom to try to indoctrinate their students. But figuring out what that actually means in practice has been extraordinarily difficult all across this time. And legislatures are now I think starting to really press on this question that we've tried to duck for a century of what counts as indoctrination in the classroom.

[00:52:50.3] Keith Whittington: So some of the legislation emerging out of state legislatures are doing things like saying, you can't advocate certain ideas in the classroom, but, and or promote certain ideas in the classroom, but others are framed more in terms of, you can't compel students to believe certain ideas, in the classroom. And that becomes a much trickier, kind of thing to distinguish between, okay, it's one thing for professors to lecture about certain ideas, or even say, "I think this is the right answer, and let me explain to you why I think that's the right answer." And then there's another question about, okay, when have you crossed that line to say, now we're gonna compel the students to try to believe that. The legislatures are not giving us any guidance on this front as we're trying to work it through and so we're gonna really be forced both in university administrators and I think for courts to try to distinguish between, okay, when have professors potentially gone too far in trying to compel their students to believe certain ideas. And it's not going to be easy, I think, to tease those things apart.

[00:53:54.0] Keith Whittington: Some of it's about very specific kind of behavior professors might engage in the classroom. So, for example, if you instruct your students such that they only get one perspective on a set of ideas, and they think that's the mainstream view, and it turns out this is a highly contested issue and scholars are all over the place on this, and maybe this idea being expressed by the faculty is in fact not a mainstream view, and students walk out of the classroom with misconception about the nature of the problem that was discussed in the classroom, maybe that's problematic under some of these statutes and certainly may not be very

good conduct on the part of the professors, but is it illegal under some of these statutes? Do you have a first amendment right, for example, to engage in that kind of conduct in the classroom? One of the things that's really hard is thinking about grading, for example, so a lot of the focus on indoctrination through these discussions over time is really focused on what do classroom discussions look like? Are students allowed to criticize the professor and criticize the ideas advocated by the professor?

[00:54:52.6] Keith Whittington: But one of the real concerns that has risen both in public conversation and among students, and I think among legislators as well these days, is this question of, "Well, yeah, we can have whatever discussion we want in the classroom, and I can say whatever I want in the classroom, but when it comes time to give an answer on a test or write an essay or a paper, I know what answer is gonna get me a good grade, and what answer is gonna get me a bad grade on a test," and is that somehow compelling student belief in those kinds of contexts?

[00:55:20.0] Keith Whittington: And we've also seen some kind of examples where professors seem to go even further. So we've seen examples of professors telling students, for example, I will only write you a letter of recommendation for graduate school, for example, or for outside jobs if you say that you agree to certain preceptors or principles. So we've seen some science professors, for example, say, "Well, I know you got really good grades in my class, so you're totally capable of understanding the material and saying it on the exam, but I'm not gonna write you a letter of recommendation to medical school unless you tell me you believe in human evolution." For example. And if you're withholding letters of recommendation on that basis, it's hard to see that you're not trying to compel belief on the part of the students in ways that are going to be troublesome, from that perspective. So there's a lot of very difficult conceptual issues and highly contextual issues in trying to distinguish between what counts as improper compulsion in the classroom of student speech. And I think courts, because of the legislation that's now emerging, are going to have a really difficult time trying to, both understand those distinctions, and explain those distinctions to faculty and universities.

[00:56:42.5] Jeffrey Rosen: Well, it's time for closing thoughts in this important discussion, so much of which has focused on the urgent importance of institutional neutrality. And both of you have suggested that there is a question on campus today about the fundamental academic mission as David French put it recently, does the university believe it should be neutral toward campus activism, or does it incorporate activism as part of the educational process itself, including by coordinating with the protestors and encouraging their activism? Geof Stone as one of America's leading champions of institutional neutrality, why is it so urgently important as an expression of the core function of the university as a neutral forum for the free expression of ideas?

[00:57:37.0] Geoffrey Stone: Well, I think that the universities exist for the purpose of exploring and learning new knowledge, and if you go back through a world in which, as existed in the 19th century, colleges and universities were seen simply as teachers of accepted wisdom and knowledge. Then a lot of questions never got asked, and a lot of insights never were made. And it is important for universities in order to fulfill their function to be able to explore things that a prior generation would've thought of as unimaginable and as unrealistic, and yet, which we later learn is correct, that in fact the earlier generations were wrong. So I think it's essential for universities to do that, that's who we are, that's why we exist, it's to create knowledge. And the way you create knowledge is by allowing free and open discussion and research and disagreement and that, to me, is the absolute core reason why we have colleges and universities. Now, it's true, they also exist to teach, and to teach the accepted wisdom. And that's a major part of what we do, but it's also essential that we are there to create knowledge, and the only way you do that is by challenging the accepted wisdom and by exploring new questions, and that's how we learn as a society, as a nation.

[00:59:04.7] Jeffrey Rosen: Keith, last word in this great discussion is to you and speak freely why universities must defend free speech, you eloquently defend the urgent importance of institutional neutrality as the core mission of a university, tell us why that is so and why neutrality is so important.

[00:59:22.5] Keith Whittington: Yeah, I would just endorse everything that Geof's just said, I think it's crucial to what the core mission of the university is, is that the university not try to limit the scope of debate, and so universities are about exploring new ideas, questioning conventional wisdom, and some of that conventional wisdom is sometimes the conventional wisdom that holds on the university campus itself. And so we need to hold ourselves open to the possibility that we're wrong about things, and allow a lot of freedom for a wide range of ideas to be expressed, and for real challenges to take place on university campuses. But in addition to that internal purpose of the university itself, I think it's worth saying something about an external concern about universities. Universities built themselves up in the United States, especially over the course of the late 19th and early 20th century, by emphasizing to the outside world and to important stakeholders that we will develop reliable expert knowledge about important questions that matter to society, ranging from very practical questions relating to science and technology, to more esoteric questions relating to morality and sociology and political life.

[01:00:43.2] Keith Whittington: And especially as we were creating public universities, there's a real concern of being able to establish that these new public universities we were gonna create were not gonna be captured by a single political party or a political faction and were simply going to then propagate a certain kind of narrow ideology. But these universities were going to be genuinely neutral. They were going to be open to everybody. And they were going to welcome a wide range of views and ideas, and as a consequence, the kind of knowledge that was

produced by those universities could be trusted by the larger public and by people from a wide range of perspectives. One concern about universities abandoning their position of institutional neutrality is that they can sacrifice that kind of trust. That they will tell the outside world, "We're not simply open to a wide range of views and letting and following the evidence wherever it might lead, instead we are recommitting ourselves to a set of particular partisan commitments, and everything we do should be read through that kind of lens." That's not going to be a happy place, I think for universities to be in the long run. It's not gonna be a happy place for scholars to be in the long run.

[01:01:49.4] Keith Whittington: If universities are gonna be successful, and they're going to be valuable to society, they have to be places that are willing to accommodate a wide range of views and really willing to put their money where their mouth is, in terms of convincing people, that, "No, we're places where we take ideas very seriously, and we're open to hearing a wide range of views and perspectives."

[01:02:17.2] Jeffrey Rosen: We need to hold ourselves open to the possibility that we're wrong about things, and universities have to be willing to accommodate a wide range of views if they are to be trusted as transcending partisan commitments. Eloquent words from Keith Whittington and Geof Stone on this urgently important question of the future of free speech on campus. Keith and Geof, it's just an honor to convene both of you, you're both such beacons of light and you help us think through these challenges by holding high the beacon of reason. Thank you so much, Geof Stone and Keith Whittington for a wonderful discussion.

[01:02:53.1] Keith Whittington: Thank you very much.

[01:02:55.4] Geoffrey Stone: Thank you, Jeff, so much, really appreciate it.

[01:02:58.6] Jeffrey Rosen: Today's episode was produced by Lana Ulrich, Samson Mostashari, and Bill Pollock. It was engineered by Bill Pollock. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh.

[01:03:13.7] Jeffrey Rosen: Dear friends, on February 13th, my new book came out, *The Pursuit of Happiness*, thank you so much for the wonderful emails and notes. If you would like a book plate, a signed book plate, I would be honored to send one to you, please email me at jrosen@constitutioncenter.org, if you'd like one.

[01:03:33.7] Jeffrey Rosen: Please recommend the show to friends, colleagues, or anyone anywhere whose eager for a weekly dose of constitutional illumination and debate. Sign up for the newsletter@constitutioncenter.org/connect. And always remember whether you wake or sleep that the National Constitution Center is a private nonprofit, we rely on the generosity, the

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