

# Dershowitz's Lesson in Cultivating Respect for Free Speech

COMMENTARY

By [Peter Berkowitz](#) - RCP Contributor  
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Respect for free speech must be cultivated because it does not come easily to human beings. We have a strong propensity to prefer our opinions to other people's opinions and our ways to other people's ways. We suppose that the world would improve if others would hold their tongues, recognize their errors, fall into line, and think as we think and say as we say and do as we do. To be sure, the powerful human impulse to censor other people's opinions is contrary to the interests of free and democratic citizens. But that doesn't mean the inclination to dismiss alternative points of view, silence dissent, and shame and purge those who dispute the popular and the fashionable isn't real, widespread, an affront to the dignity of the individual, and a menace to constitutional government.

Like all fundamental rights in a democracy, free speech tends to be of most urgent concern to minorities. That's because the majority generally looks out for itself and possesses the political clout and influence over public opinion to curb the speech it finds inconvenient, unsettling, or disagreeable. This dynamic does not change when the majority consists of a coalition of individuals in which many identify as members of a minority.

In the past, journalists and professors — though often members of the majority — have by and large robustly defended free speech. This reflects professional interest: To do their jobs, at least as those jobs have long been understood in free societies, journalists and professors must have the right to pursue the argument where it leads, consult widely, weigh the evidence, test their ideas by voicing their opinions and listening to others voice theirs, and reach reasoned judgments — and all this without fear of losing their jobs, suffering imprisonment, or some other state-sanctioned penalty.

Among the most alarming aspects of the contemporary attack on free speech is the dearth of journalists and professors willing to take free speech's side. It was bad enough that dozens of predominantly younger New York Times journalists last summer rose up in protest against the paper's publication of an [op-ed](#) by Arkansas Republican Sen. Tom Cotton, who argued that in the face of violence sweeping American cities, it would be lawful and proper for the president to send in the military to restore order. Worse, the Times' newsroom and management failed to defend the op-ed page editor, who was eventually fired for the offense of running the piece. Similarly, it is troubling that university students believe that they have a right to be shielded from ideas that make them uncomfortable. It has been a dereliction of professional duty on a massive scale, however, for professors to have done much to encourage and little to correct students' profound misunderstanding of liberal education.

Honorable exceptions among journalists — including Matt Taibbi, Glenn Greenwald, Bari Weiss, and Abigail Shrier — have taken strong public stands in defense of free speech. A number of professors have distinguished themselves, too, including Bret Weinstein and Heather Heying, both formerly of Evergreen State College; [Heterodox Academy](#) founders Jonathan Haidt and Nicholas Quinn Rosenkranz; and Princeton professors Keith Whittington, Lara Buchak, Robert George, and Alejandro Rodriguez, who recently established the [Academic Freedom Alliance](#) (I am a member). And then there is the outspoken and inimitable Alan Dershowitz.

A Harvard Law School professor emeritus, Dershowitz has distinguished himself over the past half-century as an author of many best-selling books, an adviser to presidents and prime ministers, a lawyer to parties in numerous high-profile legal cases, a proud member of the liberal left, and a consistently impassioned and effective advocate for civil liberties. But Dershowitz was vilified and ostracized for the principled stand on free speech that he took during Donald Trump’s presidency. Lost on those who anathematized Dershowitz for assisting Trump was the essential distinction between defending a person’s policies and actions and defending his rights.

In “[The Case Against the New Censorship: Protecting Free Speech from Big Tech, Progressives, and Universities](#),” Dershowitz writes, “Freedom of speech in America is facing the greatest threats since the Alien and Sedition acts of 1798, which unconstitutionally punished ‘false, scandalous or malicious writing’ against the United States.” The reason, he explains in his short and bracing book, is that the new censors are in the main “so-called progressives, who are far more influential and credible than the reactionaries who promoted and implemented McCarthyism.” Moreover, the new censors seek to curtail freedom of expression on issues that many Americans already favor, such as the rejection of racism, sexism, discrimination on the basis of sexual orientation, and various forms of disinformation. Further magnifying the danger is that the new censorship is not prohibited by the First Amendment since “it is promulgated and enforced by private parties who have their own First Amendment rights, rather than by government agents who are bound by the Constitution to ‘make no law ... abridging the freedom of speech.’”

Dershowitz, who represented the former president in both impeachment trials, believes that Trump’s Jan. 6, 2021, speech to supporters was “ill-advised and justly condemnable.” Yet Dershowitz has little doubt that if the issue had reached its chambers, the Supreme Court would have properly held that the speech was “fully protected under the *Brandenburg* principle, which distinguishes between advocacy and incitement to violence.”

Dershowitz rejects the common view that Trump was “a uniquely dangerous and evil president, whose actions justified extraordinary measures, even measures that compromised constitutional rights and values.” Not the least example of this way of thinking, argues Dershowitz, was the [letter](#) signed by 144 constitutional scholars in early February in the run-up to the second impeachment trial. The professors claimed that “any First Amendment defense raised by President Trump’s attorneys would be legally frivolous.” As Dershowitz observes, it is one thing to say that it would have been mistaken. But by declaring such a defense “legally frivolous” — the Code of Professional Responsibility prohibits lawyers from advancing such arguments and subjects those who do so to the possibility of disciplinary sanctions — the professors, Dershowitz maintains, themselves sought to chill speech by means of specious reasoning.

“The Trump presidency,” Dershowitz emphasizes, “accelerated a repressive trend that had begun years earlier.” It would be more accurate to say decades earlier. Undergraduates whose parents were not yet born in 1965 when Herbert Marcuse published “[Repressive Tolerance](#)” today believe, as the Frankfurt School theorist taught the ’60s generation, that tolerating conservative opinions is unjust because they are false and perpetuate oppression. The new forms of censorship — speech codes, trigger warnings, microaggressions, free-speech zones, selective application of hate speech and disinformation and misinformation standards, and now mandatory teacher training that [affirms](#) that “colorblindness” is an expression of “white supremacy” — did not arise out of nowhere. They are the progeny of the view promulgated by Marcuse’s heirs in the humanities, social sciences, and law schools — professors who regard themselves as activists and advocates whose principal job is not to understand the world in its many-sidedness but to change it in accordance with an ideology they exempt from scrutiny.

The new censors cannot be defeated by counter-censorship, which would only intensify the problem. Instead, fathers and mothers must take their parental and civic responsibilities seriously by participating in the reform of K-12 education to ensure that students are taught early on and regularly that we learn to formulate responsible opinions by mastering the facts and listening attentively to a variety of points of view. Consumers must exercise greater selectivity in the social media platforms they patronize to impel companies to apply their rules about posting impartially and to treat like cases alike. Professors who know better, but who have sat on the sidelines, must rise to the defense of free speech. Philanthropists and foundations must continue to build alternative educational institutions that prize free speech as indispensable to the pursuit of truth. And political leaders must step forward to straightforwardly explain at every opportunity that free speech is not a luxury in a free society but essential to its health and prosperity.

Free speech in the United States is a constitutional birthright. It has always been true that to enjoy speech that is free not only from government coercion but also from the tyranny of public opinion — and to ensure that coming generations will enjoy it, too — we must cultivate respect for it. Now more than ever.

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