# Free Speech and Academic Politics

**Restoring Free Speech and Liberty on Campus.** By Donald Alexander Downs. New York: Cambridge University Press, 2005. 318p. $28.99 cloth, $19.99 paper.

## Review Editor's Introduction

*Jeffrey C. Isaac*

Donald Downs's *Restoring Free Speech and Liberty on Campus* is an important book. Like his earlier books, it integrates political theory, jurisprudence, and policy analysis to address a matter of contemporary concern. In this case, the matter at hand is directly relevant to all scholars and teachers who work in the contemporary American university. Since this includes most political scientists, it seemed like a good idea to open the pages of the *Perspectives* Book Reviews to a range of perspectives on the book. I have thus sought out a "balanced" cast of distinguished commentators, in the hope that the juxtaposition of different reviews will help to promote serious discussion of academic freedom issues of concern to all of us. Some of these issues are juridical, and regard the ways in which universities, academic departments, and perhaps even professional associations are called upon to codify "diversity" considerations and balance these with other considerations, including "academic excellence" but also civil liberty and robust debate. Some of them are principally ethical, and regard the habits of mind most conducive to intellectual inquiry and liberal education. These issues are complicated and controversial. In featuring the Downs volume and the three reviews that follow, I sought to stimulate intelligent discussion about them within the political science profession. It is my intention to organize similar discussions of other important books in future issues.

## Nancy J. Hirschmann,

***The University of Pennsylvania***

The stated themes of Donald Downs's book are ones with which most readers of this journal will be sympathetic: Intellectual freedom is the most important commodity academics have; it is under siege on a variety of fronts; some of these fronts might appear innocent but are often only the thin edge of the wedge; and faculty must recognize these threats and organize themselves to resist. This is a timely reminder, for there are many threats to academic freedom facing us today: Campus Watch, which has posted online the dossiers of professors who supposedly sympathize with Islamic terrorists and encourages students to "inform" on their professors for alleged anti-American sentiments; David Horowitz's so-called academic bill of rights, which targets professors who supposedly display that favorite shibboleth of the right wing, "liberal bias"; the Patriot Act; and government surveillance and wiretapping. Moreover, the strength of these efforts to suppress speech is frightening: Well funded, but not very thoughtful, they often hijack the truth in vitriolic hatred of academics.

Unfortunately, the bulk of this book takes us in a direction opposite the one his urgent title suggests. Although Downs acknowledges some of the aforementioned dangers in his eloquently written preface, the book focuses on events that happened in the 1980s through the mid-1990s, in response to race- and sex-harassment codes on various university campuses. His focus is not on dangers to the academy from the outside but on dangers from within, and he cites "political correctness" as the prime enemy. He claims that the lessons we can learn from the events surrounding the defeat of these codes will help us figure out how to deal with the new assaults on intellectual freedom. But that conclusion is harder to grasp, because he excludes from his analysis a consideration of the role of political power.

One could argue that the reason for this lack is that the book is really a memoir; Downs teaches, after all, at the University of Wisconsin, the subject of the majority of the chapters in the book, and he is writing primarily about his own efforts to defeat that university's speech code. His book is more a narrative of events than an intellectual



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analysis of the concepts and ideals at work. And as a narrative, it is obviously rather one-sided, reflecting the author's own experiences and perspectives.

A memoir is not really the kind of book that *Perspectives on Politics* would be reviewing, much less featuring in a symposium, however. And in his preface and conclusion, Downs tries to link his own experience to a broader social phenomenon, to go beyond memoir to quasi-academic study. Hence, there is a chapter on my own institution, the University of Pennsylvania, one on Berkeley, and one on Columbia. This is where things become more problematic. The Penn chapter, for instance, is filled with a narrative of events that is skewed by ideology. Downs relies on Penn law professor Alan Kors as his primary source (with some references to various campus publications and the *Chronicle of Higher Education*), complaining that my colleague Sheldon Hackney, Penn's president at the time, and others at Penn would not consent to be interviewed. Yet Hackney has written a book about the incident himself, and fairness would suggest reliance on it as well. Downs cites it only a few times in a rather patronizing tone, preferring to rely on Kors, who is more sympathetic to the story Downs wishes to tell.

This is the sort of thing that makes me, as a scholar, suspicious of the rest of the book. The advocates of university procedures to serve victims of sexual assault, sexual harassment, or racism are uniformly presented by Downs as extremists, devious radical ideologues, and Machiavellian "master strategists" (p. 252), while those interested in maintaining the status quo are described as heroic defenders of basic human liberties. In the Columbia chapter, rape victims are reduced to "accusers," advocates are "activists," and a lawyer who is more concerned with the accused than the victim is described as "brilliant" (p. 75) without any evidence to back up that assessment. Downs mocks a Wisconsin colleague's accounts of victimization by racist epithets, claiming that his "dramatic" style during a faculty senate debate over a harassment code, rather than the validity of his argument, "assured our defeat" (p. 208).

Downs's justification for these selective narratives is, as in the Penn chapter, that relevant people refused to be interviewed. But are we not, as social scientists, supposed to write the book to which the evidence leads us? If we are faced with difficulties in gathering reliable data, are we not obliged to reconfigure our thesis?

Perhaps even more troubling than the unreliability of the narrative is the book's inadequate analysis of the concept of free speech, of power, of the dynamics of academic and intellectual communities, and of the ambiguity in which the principle of *in loco parentis* places colleges and universities. These ideas are mentioned in passing at various points, but never seriously discussed.

For the record, I do not really trust harassment codes, for the reasons that Downs illustrates: They do not accomplish what they are supposed to, for they are enforced through processes that are too often secret and potentially corrupt by administrators who are not really qualified to oversee them. But that is a matter of incompetent administration, not ideological bias. Any procedure can be perverted, including due process.

The *idea behind* these codes is something else. And that is to level the playing field of power. In an intellectual community that depends on the free expression of ideas, the power dynamics that systematically silence certain people by virtue of who they are is self-defeating, if not self-contradictory. Women and minorities are still less likely to speak in class, less likely to be called on by professors, less likely to assume campus leadership positions. Certainly, Downs does not expect us to believe that this is because the marketplace of ideas really works, that the deck is not stacked, or that more speech would somehow fix this. As vital as the First Amendment is, we must acknowledge that it is more often used to shore up the power of those who already have it. The liberal *ideal* is that free speech allows the minority, the person with the unpopular view, to be empowered to speak up. But that is not generally what happens. The First Amendment is more often used to protect pornographers who want to beat up and rape women for fun and profit or it is used to protect Nazis and Klansmen (as Downs showed in his first and much better book, *Nazis in Skokie,* 1985).

One could argue that free speech is what enabled the civil rights and feminist movements, but did it? Free speech did not prevent Martin Luther King, Jr., from getting killed, or black freedom marchers from being beaten, burned, and arrested; it does not keep women from getting harassed or passed over for tenure and promotion. At best, speech is one of a *group* of ideals, such as equality, democracy, recognition, and diversity, that animate the claims of disadvantaged groups. All of these ideals, not just free speech, are needed if the academy is to be truly inclusive and accessible to all.

The Millian notion of equal liberty is at the heart of Downs's book, though it is unacknowledged. The liberal saying that my right to swing my fist ends where the other guy's nose begins means that the more people there are in a given space, all swinging their arms, the less freely they can swing them. White, professional, heterosexual males, who have been used to swinging their fists wherever they wish, are now constrained by the fact that they have less room because women, racial minorities, and sexual minorities are seeking to share their space. This is a classic principle of liberalism that Downs seems to misunderstand: For everyone to have equally free speech, each of us must exert more self-control and limit ourselves from the freedom that we used to have at others' expense. Understandably, those in power do not want to do that.

Power also defines the *terms* of the debate, a point that Downs also misses. For instance, he relabels harassment codes as "speech codes," which then enables him to shift



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the reader's perspective of events in a misleading manner. For example, he discusses an incident of a colleague at Wisconsin saying "Seig heil, comrades!" to graduate students who were being rude to him. Is that needed? Because one student was "part Gypsy, and the other's wife was Jewish," they brought a charge of racial harassment against the professor, and Downs complains that it should have been seen as an issue of "uncolleagiality," rather than as harassment (p. 28). Supposedly, the professor was unaware of the students' racial ties, but does that really make a difference? This is not talk radio, after all; it is the university, where faculty wield considerable power over students and where such antagonistic expression is bound to silence students dependent on these faculty for approval of their examinations, dissertations, letters of recommendation, and ultimately jobs. Courtesy and respect must go both ways.

The Penn case illustrates these points as well. As Downs describes it, some African American sorority sisters were engaging in very loud celebrating outside a dormitory late at night, and several male residents of the dorm shouted insults at them, including "Black bitches," "Black asses," and the most infamous insult: "Shut up, you water buffalo, if you want a party there's a zoo a mile from here." The women entered the dorm, demanded to know who shouted the insults, and were referred to the Jewish freshman who shouted the water buffalo insult. A charge of racial harassment was brought before the university judicial administrator and the student was faced with the possibility of expulsion (pp. 169 ff).

The question of how this got out of hand is certainly puzzling and dismaying. As Downs quotes my colleague Will Harris, the student's insult did not even violate Penn's code (p. 175). But Downs ignores the larger issue of how the terms of "speech," "racism," and "harassment" got defined in this case in favor of focusing on how the university seemed to run roughshod over an 18-year-old kid who ended up being the scapegoat for pent-up hurt and anger on a campus where racism and sexism were too commonly encountered. He says that it was "widely understood" that the slur was not racist (pp. 17, 170–71). But among which audience: the white administrators who prosecuted the case or the white faculty who defended the white male student? Certainly not among the African American female students. Indeed, the ease with which undergraduate white men shouted "black bitches" out their dormitory windows—instead of, say, "Hey, keep it down, we're trying to study/sleep," or even (imagine this!) walking downstairs to ask the women to be quiet—suggests the disturbing normalization of racist and sexist attitudes among these students and the freedom and power that they felt to express those attitudes at will. Furthermore, that particular insult invokes a long racist "tradition" of considering African Americans as animals rather than people. So it was not unreasonable for the women to interpret such comments as racist, whether the white students admitted to such intentions or not.

Whether this amounts to full-scale racial harassment is extremely dubious, and the fact that the student offered to apologize should have ended it, as Downs suggests, perhaps with some campuswide race awareness discussions. At the same time, however, escalating this incident into a "free speech" issue, and a case of "progressive censorship," is at least as problematic. Labeling insults as "free speech," though perhaps in keeping with the law, nevertheless trivializes the importance of speech and makes speech the universal stand-in for bad behavior. In the academy, in particular, the importance of speech has to do with the vitality of intellectual diversity, the Millian insight that unpopular ideas might have some truth in them. Hence, when Downs claims that "the single most important point in this book" is that "a problem arises when philosophical and political differences are dealt with not by discussion and debate but by the recourse or reference to coercive, punitive measures and powers that in effect 'criminalize' disagreement" (p. 215), he expresses a philosophy with which all readers of this journal undoubtedly agree. But exactly how is calling someone a water buffalo a "philosophical or political difference?" Did the student put forth an argument defending this choice of insult on political or philosophical grounds? Did Downs's colleague do so when he called his students "feminazis" (p. 30)? Not as far as Downs's narrative reveals. As a result, his elevation of these acts to "philosophical disagreement" or "political difference"—both of which would be defensible under a free speech rubric—seems rather disingenuous. But it illustrates the ways in which power operates in this issue: Who gets to say what constitutes free speech, who gets to define harassment, are usually not the victims but the people with power to protect.

Harassment codes no doubt have drawbacks. But the solution is not simply to get rid of the codes because that just leaves racism and sexism in place. Rather, we need to establish different ways of challenging the power of race and gender privilege in the academy, to create more space for women and minorities to enter the marketplace of ideas, to be listened to and heard. It is too bad that Downs did not write about that, because that would be an appropriate focus for the organized faculty efforts that he says should be marshaled against censorship. Instead, it looks as if in his view, free speech is not for everybody—just for those who already have it. I have confidence that this is not what he intended. But given his constricted approach, skeptical readers can hardly be blamed for wondering.



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The title reflects the background premise of this recent work: restoring free speech and liberty on campus. Free speech has been threatened on campus but it can be restored. That is the message that Donald Downs wants to convey. He is a professor of political science and law at the University of Wisconsin (Madison) and an unabashed champion of free speech. He cites John Stuart Mill with respect, and he is something that has become less common on American campuses, an old-fashioned liberal. Nearly a quarter of the book, in fact, is a personal memoir of Downs' success, at Wisconsin, in persuading the faculty senate to repeal its overly restrictive speech code.

One of the book's central points is that threats to free speech on campus have come from unexpected quarters in recent years. Where in the past, academics worried about threats from state legislatures, Downs notes, "attacks on free thought" since "the later 1980s . . . have arisen from leftist sources inside the ivory tower." It is hard to believe that this claim can still be "provocative" (as a blurb on the back cover calls the book). Surely, this is old news. Nor does it seem quite right to call this book "inspiring" (as another dust jacket blurb has it). The challenges to "free thought" are not easily redressed by the kind of counteroffensive the author celebrates at Wisconsin.

The nub of Downs's argument is that constraints on speech interfere, as Mill argued, with the search for truth. Therefore universities, of all places, must be open to all arguments. Probably the great majority of professors sympathize with this claim, at some level of abstraction. It does not follow, however, that removing official speech codes or abusive disciplinary codes will assure "free thought" or do much to promote any kind of "thought."

The grounds for skepticism start with the fact that, as Downs himself acknowledges, free speech is already quite well protected outside the academy, at least in the formal sense of freedom from government controls. As courts have interpreted the First Amendment, government has very little power to impose content-based controls on speech (or images, for that matter). Since the remaining government restrictions (on such things as libel, copyright infringement, or extreme pornography) already apply to universities, almost any separate campus policy will be more restrictive than rules applying to the general public.

Downs decries the fact that some universities did try to impose more restrictive or protective campus policies, but it is hard to argue that access to truth is greatly inhibited by such policies. In recent years, certainly, faculty and students have had access to an incredible variety of arguments, sources, statistics, and official and historic documents through the Internet. Even if they wanted to, universities could not prevent students or professors from tapping into this extraordinary wealth of information and commentary.

Downs can counter that a university is more than a mere location for personal research, more, that is, than a library or an Internet connection. What troubled him about the code at Wisconsin was the possibility that it might inhibit professors from speaking freely in the classroom. He remains concerned that students might be inhibited by restrictive rules on other campuses. These are serious concerns, particularly given that such campus standards are usually entrusted to bureaucrats who do not place high value on preserving vigorous debate.

If the issue is the quality of intellectual challenge on the campus, however, formal restrictions on offensive speech are hardly the main threat. Challenging debate requires divergent views. Yet on most American campuses today, the range of opinion stretches through all the variations found between the soft Left and the more extreme Left. Certainly the range of opinion on college faculties is less broad than the range of opinion in, say, the U.S. Congress or even on the U.S. Supreme Court.

Advocates of affirmative action have claimed that minority students will be hesitant to voice their views if they are too much in the minority. So, for example, the University of Michigan Law School insisted, in defending its racial preference policies for admission, that a "critical mass" of minority students was required to provide the full benefits of "diversity" for the general student body. Whether this argument makes sense for the articulation of "black" or "Latino" viewpoints, it surely has a point when it comes to social conservative or libertarian viewpoints: It is harder to speak up or speak out if you must expect to be entirely isolated.

Yet, hardly anyone seriously argues that universities should try to ensure a representative sampling of American opinion in their student bodies or their faculties. Certainly conservatives, who regard race-based admissions or hiring policies as insulting (as I do), cannot be pleased with the prospect of bureaucratic tallies for student or faculty opinions. Apart from the indignity of such classification schemes, there is the hard fact that a good debate—whether in a seminar, a campus publication, or a campus event—requires more than a set number of participants from different viewpoints. The contending views need to be articulated by people who are intelligent and informed and serious about their arguments. If the contending views are left to dolts or crackpots, no one will be much challenged. For mere rant, you can always find a chat group on the Internet.

There may not be any direct policy to assure wider intellectual diversity on campuses. It is not reassuring, though, that Downs's paean to intellectual freedom skips over this entire problem. As he says several times in the course of the book, free speech rests on "formal" legal principles. But the ultimate goal of universities—let us



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call it intellectual challenge or serious inquiry—is not assured by formalities.

Even if one goes beyond the formalities, one might agree with Downs (as I do) that speech codes aiming to protect students from a "hostile environment" are less likely to encourage respectful exchange than to stifle worthwhile dissent. But I do not think the Wisconsin experience really tells us as much about the vitality of free speech as Downs suggests.

There are many reasons why the pressure for speech codes, largely championed by feminists, had already begun winding down by the end of the 1990s. The Clinton scandals, which saw feminists retreat into silence rather than embarrass a political ally, probably helped undermine the momentum of feminist moralism. At the same time, it was hard to reconcile feminist warnings about discomfort to women (from sexual innuendo generating a "hostile environment") with demands of gay rights advocates for open discussion and display of alternate sexuality. Some feminists wanted to restore old rules of demure speech, while others wanted to attack gender roles and stereotypical assumptions about the special vulnerability of women. It was never going to be easy to maintain political discipline in a constituency—"women"—so large, so diverse, so entangled with its supposed opposite ("men"). Perhaps feminism simply ran through the usual life cycle of protest movements, achieving some goals and then dissipating as activists moved on to other priorities.

In any case, it did not require great courage, by the late 1990s, to question the propriety of campus speech codes. It is not particularly inspiring to me that the Wisconsin faculty senate agreed to disavow its codes in that era. Downs's account of what happened there takes the trouble to highlight the role of student activists urging repeal of the speech code at Wisconsin—conveniently including a gay rights advocate, several women, a black, a Latino, and so on. There is no reason at all to doubt the sincerity of these individuals and others who responded to their arguments. But one may doubt that by the time they entered these debates, the campus was really highly polarized on the issue.

In addition to the Wisconsin experience, Downs reports episodes at Columbia, the University of Pennsylvania, and Berkeley. Only in his discussion of Berkeley does he touch on an experience of recent years. In response to student protests, the *Daily Cal* apologized to readers for accepting a paid advertisement by David Horowitz, which derided the notion that African Americans should receive "reparations" for slavery. Downs provides the text of the ad, allowing his readers to verify that it was not, whatever its other attributes, an argument that could reasonably be described as racist or insulting. The same student paper published a cartoon, shortly after the 9/11 attacks, depicting bearded and turbaned figures in a flaming hell. Here, too, there were protests—on the grounds that the cartoon purveyed insulting stereotypes—but the paper did not apologize. The author again includes a reproduction of the cartoon, which most readers probably would not regard as offensive or malicious.

We may not hear much demand these days for protection of women from sexualized language or imagery, but we are likely to hear quite a bit more demand for rules to protect Muslim students and perhaps other minorities from "stereotypes" that affront them. Calls for such restraints will be hard to sort out. There have been some episodes of violence or vandalism against Muslim institutions, and it is easy to sympathize with efforts to reassure students who feel threatened, particularly if they have come to an American institution after growing up elsewhere. To draw sharp lines between proper restraints on harassment and improper constraints on free speech may not be easy—particularly if people demanding protection claim to be insulted by quite general political comment (of the sort exemplified by the *Daily Cal* cartoon).

The most difficult problem, though, is not the challenge of protecting protestors from overreaching rules but from abusive or intimidating protests. At the *Daily Cal,* protestors took their protest to the offices of the newspaper. Was that threatening or just communicating? Elsewhere, protests against newspapers (usually smaller conservative papers) have taken the form of interfering with their distribution. At a college in Minnesota recently, a professor tried to post copies of the Danish cartoons that sparked attacks on Danish embassies in Muslim countries. The cartoons were repeatedly ripped down from bulletin boards, even when placed under a warning label and a separate cover to assure that no one would have to see them without wanting to see them. Century College seems to have made no effort to find the perpetrators of this abuse or to prevent its recurrence.

What Downs actually demonstrates, in his case studies, is that university administrators typically do not have strong convictions and tend to follow the path of least resistance. Faculty members tend to be preoccupied with their own work and not very engaged by debates about standards for the campus in general. So activists tend to have a highly disproportionate impact, whether they are arguing for wider freedom or tighter inhibitions. In other words, "the academic community" is not, in fact, a very strong community, and so it is easily prodded or bullied by small elements in its midst.

I do not think that campus speech can be greatly imperiled in the midst of a larger society that remains so accustomed and so attached to free debate. But assuring conditions for civil debate on campuses must be an ongoing effort. It will not be "restored" just by repealing a feminist speech code.



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Rarely have I read a book with whose core thesis I so fully agree but which nonetheless so sets my teeth gnashing. I begin with the agreement, which is more important, and return later to the gnashing.

A recipient of the Gladys A. Kammemer Award of the American Political Science Association for his earlier work on the politics of pornography, Donald Alexander Downs argues in *Restoring Free Speech and Liberty on Campus* that over the past two decades, we have seen a dangerous rise in "progressive" (that is, liberal) censorship on college and university campuses that threatens academic freedom and betrays the most fundamental values of American liberalism. Embodied in various forms of speech codes, this new censorship, he argues, is deeply connected to the pervasiveness of affirmative action and to the unthinking willingness of liberals to sacrifice free expression on the alter of diversity. Rather than teach students—minority students, in particular—the fundamental values of autonomy, self-reliance, independent thought, and intellectual and personal resilience, advocates of affirmative action and speech codes seek to coddle these students by shielding them from the slings and arrows of uninhibited and robust debate. In short, the price of admitting academically unprepared students in order to achieve diversity is the suppression of ideas that might threaten their security and sense of self-worth.

Downs observes that universities serve a range of often-conflicting ends. They pursue truth, prepare students to be thoughtful and informed citizens, and promote civility and mutual respect. Speech codes, he maintains, undermine all of these values. Even more important, he chastises institutions of higher learning for failing in their responsibility to instill in the next generation of America's and the world's leaders an appropriate understanding and appreciation of the essential principles of freedom. Universities, he concludes, must get over their obsession with sensitivity and get on with the task of preparing their students for the challenges of contributing to self-governance in a free and open society.

The author argues that to combat the pressures for political correctness and censorship, the defenders of civil liberties—professors, students, trustees, and administrators—must stand fast against hysterical and unfounded claims of racism, sexism, homophobia, and the like. They must learn to act strategically, to organize politically, to form effective alliances with the general media and the public, and to use outside organizations and individuals who can help refute the claims of those who demand suppression. To substantiate these claims, he uses several case studies, examining in extraordinary detail controversies that arose at Columbia, Berkeley, Wisconsin, and Penn in recent years. Those case studies comprise some 75 percent of the book.

Although Downs's analyses occasionally strike me as over the top, for the most part he gets it right. Universities are institutions dedicated to the discovery and transmission of knowledge, understanding, and truth. They are designed, at their best, to nurture and shape the intellectual, scientific, moral, artistic, political, and economic leaders of the future. They are committed to free and uninhibited discourse, not because such discourse is a law of nature but because it is the best means to these ends. As Robert Maynard Hutchins once observed, universities that do not permit the full and open discussion of even the most odious and unnerving ideas are not universities. The commitment to eschew censorship is so elemental that it constitutes the very *definition* of a university.

What are the limits of this proposition? If a professor has a right to teach communism, does another have a right to teach intelligent design? Does a university violate its commitment to free expression when it makes faculty appointment and promotion decisions based on the "merits" of the candidate's ideas? Does a mathematics professor have a right to teach history? Does a professor have a right to give a student a low grade because of a disagreement with the student's ideas? Does a professor have a right to teach in a course on American history that African Americans or women are genetically inferior to white men? Does he or she have a right to refer to African American students as "darkies" or women students as "chicks"? Does a student newspaper, which is funded by a university, have a right to advocate violence against Muslim students?

It is often easier to celebrate a principle than to apply it. Downs makes much of the idea of academic freedom, but he never quite defines it or explains its relation to the First Amendment. This was one cause of my gnashing. Throughout the book, Downs invokes the First Amendment as if it governs private as well as public universities. It does not. Like the Constitution more generally, the First Amendment regulates only the *government.* Although the University of California and the University of Wisconsin can violate the First Amendment, Columbia and Penn have no capacity to do so. As private institutions, they are not *in any way* subject to the constraints of the Constitution. This is a fundamental point about constitutional law. It is disappointing that Downs exacerbates the general confusion on this point—all the more so because he clearly understands it. (At least once in the book, he properly draws the distinction.) This matters because when we speak about speech codes, Columbia and Penn are in a completely different legal and constitutional position from Berkeley and Wisconsin. Downs's failure to make this point plain is deeply discouraging, especially to a constitutional lawyer who relishes the notion that citizens should have *some* understanding of their Constitution.

Moreover, it is not enough simply to assert the principle that academic institutions should not engage in censorship and then condemn speech codes as incompatible



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with that principle. The source of the principle (whether it be the First Amendment or "academic freedom") is important, and as I hope my hypothetical examples make clear, the substantive meaning of the principle is hardly self-evident.

So, is academic freedom simply another name for the First Amendment? Are private institutions "bound" by the same principle as public institutions, even though only the latter are governed by the Constitution? If so, what is the source of that constraint, and who enforces it? In fact, academic freedom is quite different both in its origins and its meaning from the First Amendment. The First Amendment in the university setting is directed primarily to the types of restrictions public institutions may constitutionally impose on free speech. May the University of Colorado fire a professor for publishing deeply offensive statements about the victims of September 11? May the University of Texas expel a student for calling another student a "fag"? In answering such questions, the First Amendment may constrain the decisions of the public university, and it is the courts who may ultimately resolve the issue.

Academic freedom exists wholly apart from the First Amendment and it exists (or may exist) in private as well as public institutions. It is not imposed by any external source of law. It is a commitment each college or university makes to itself and to its various constituencies (that is, faculty, students, alumni, etc.). It is often unenforceable in a court of law (although it may sometimes be enforceable if it is embodied in some form of contract between the university and its faculty or students). Most fundamentally, academic freedom is less about *what* restrictions a college or university may impose upon free expression than about *who* may impose those restrictions. The central meaning of academic freedom is faculty governance. It promises that faculty members, applying professionally accepted scholarly and pedagogical standards, rather than administrators, trustees, students, or legislators, will determine the manner in which the quality of one's ideas and expressions may be evaluated within the academy.

Downs's failure to articulate the essential difference between academic freedom and the First Amendment compounds the failure to distinguish clearly between public and private institutions. He presents higher education as largely unitary when, in fact, the legal and cultural restraints that govern these institutions, and the sources of those restraints, may vary widely. In short, the analysis of speech codes, or of any restrictions on expression in the setting of higher education, is much more complex and nuanced than Downs acknowledges.

Having said all this, I ultimately come out pretty close to Downs. As he documents in his four case studies, college and university speech codes too often have been ideologically motivated devices designed to cleanse the academy of politically incorrect ideas. To that extent, they are incompatible with *both* First Amendment principles and the values of academic freedom, and he is right that they should be excised from higher education.

Why, then, my gnashing (apart from what some might dismiss as my merely "legalistic" points)? Let me offer three criticisms. First, too often Downs sounds like a shameless pitchman for his heroes, Alan Kors, Harvey Silverglate, FIRE (Foundation for Individuals Rights in Education), and CAFR (Committee for Academic Freedom and Rights). Granted, they have made significant contributions, but Downs's incessant celebration of their courage, wisdom, integrity, and zeal is downright embarrassing.

Second, and related to this point, Downs's tone is too often self-satisfied, high-minded, self-righteous, and far too cocksure. Good advocacy (and this is a book of advocacy) requires credibility. It demands the ability to get inside the skin of one's opponents and to understand the complexity of the issues from their perspective. *Restoring Free Speech* does not do this. Too often, it lapses into free speech slogans and seemingly self-evident assumptions that are not self-evident at all. Too often, it fails to exhibit that very self-critical thinking, empathic reasoning, and scrupulous scrutiny of argument that free speech at its best is all about.

Third, Downs sometimes makes important leaps that are largely unexplained. Consider the incident at Penn, which involved a student who shouted "Shut up, you water buffalo!" to a group of African American women students who were making noise late at night outside his dorm. He was accused of using a racist epithet in violation of Penn's speech code. Was it a racist epithet? Downs says "no" because the student was Jewish and in Hebrew a phrase similar to "water buffalo" means a rude or rowdy person. If the student had shouted "Shut up, you rowdy person!" no one would have construed his exclamation as racist. But is that the central point of the incident? Should the central question not be whether the incident had *anything* to do with academic freedom? What is the connection between our precious academic freedom, which is designed to promote free and robust academic discourse, fierce intellectual debate, and courageous scholarly inquiry, and a student shouting "water buffalo" from his dorm room at a group of boisterous students? What does this have to do with academic freedom? (Note that because Penn is a private institution, the incident has *nothing* to do with the First Amendment.)

It is incumbent on those of us who believe that punishing a student for such speech poses a serious threat to academic freedom and, in a public university, a serious infringement of constitutional rights, to *explain* why this is so. There are good and compelling reasons to support this conclusion, but they do not make much of an appearance in the book. Of course, there are "slippery slopes." If you can punish this student, then why not punish the



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teacher who refers to his African American students as "darkies"? And given those two cases, which way does the slope slip, anyway? Even Downs concedes that he would allow speech in a university to be punished if it constitutes a threat or harassment. But why draw the line there? Simply to assert this is not to make an argument, let alone to win one. He would have done well to devote fewer pages to applauding his heroes and obsessing over the details of these incidents and more to setting forth the subtle and critical reasoning on which his principles rest.

I have been hard in this review. I do not know Downs, but I know he will understand, for that is what his book is all about. This is a very good and very useful book. It is right in its conclusions and passionate in its convictions. I just wanted it to be even better. Here is a test: Would a reader who did not agree with Downs at the beginning of the book agree with him at the end? My guess is not. To the contrary, I suspect that the reader would be even more convinced at the end that he or she was right all along. Alas, that is usually the price of overstating one's case.



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