

# San Francisco Chronicle

THE VOICE OF THE WEST  
Founded in 1865 by Charles and M.H. de Young  
A HEARST NEWSPAPER  
William Nagel, Publisher and CEO

Emilio Garcia-Ruiz  
Editor in Chief

Demian Bulwa  
Director of News

Matthew Fleischer  
Editorial Page Editor

Nicole Frugé  
Director of Visuals

Michael Gray  
Director of Features  
and Daily Enterprise

Ron Kitagawa  
Director of Production

Jesse Lewis  
Director of Culture  
and Operations

Danielle Mollette-Parks  
Creative Director

Jess Marmor Shaw  
Director of Audience

Sean Jacobsen  
SVP, Advertising

Elaine Lo  
VP, Finance  
Gary Pitts  
Distribution Director  
Sean Kurysh  
VP, Human Resources

## OPEN FORUM

# Colleges can't ban hateful speech but there is much they can do to fight it

By Erwin Chemerinsky  
and Howard Gillman

Above all, the First Amendment means that all ideas — even deeply offensive ones — can be expressed on a college campus. There are certain views that we all hope never would be voiced, but the central premise of the First Amendment is that it is worse to give the government the power to outlaw particular ideas than to allow them to be voiced. As Chief Justice John Roberts declared, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”

This issue came to national attention last week at a congressional hearing when three presidents of prestigious universities refused to say that they would ban any advocacy for the genocide of Jews on their campus. The problem was that they were asked a deeply emotional question, but they attempted to respond with a nuanced answer that was technically correct on the law but too dispassionate about the traumatic impact of such speech at universities. The media latched on to a soundbite and presented the presidents as insensitive to hate and antisemitism, even though they had issued many condemnations in other answers.

To be clear, advocacy of genocide against Jews is abhorrent and inconsistent with the values of every institution of higher education we are familiar with in the United States. University leaders must speak with great clarity and force on this basic point. Leaders must not evade the serious challenges associated with the fact that too many faculty and students speak in ways that are truly horrific and frightening to Jewish students. This must be a matter of urgent attention and sustained focus throughout American higher education.

But the details of what exactly this means in terms of what can and can't be done by a university are more complicated.

To begin with, private universities do not have to comply with the First Amendment, which applies only to government institutions. However, most private universities aspire to comply with the principles of freedom of speech and academic freedom, and the university presidents who testified said that their



Mark Schiefelbein/Associated Press

**From left: Harvard President Claudine Gay, University of Pennsylvania President Liz Magill and Massachusetts Institute of Technology President Sally Kornbluth appear before the House Committee on Education on Dec. 5. When asked if they would ban any advocacy for the genocide of Jews on their campus, they gave evasive answers viewed as insensitive to hate and antisemitism. Magill has resigned over the controversy.**

campus policies were designed to mirror the constitutional obligations imposed on public universities.

This leads to the second incontrovertible point: The First Amendment imposes an absolute bar on what public universities and colleges can do about the isolated and fleeting expression of even abhorrent views by students or faculty.

It is tempting to say that any advocacy of genocide should be banned and outside the scope of the First Amendment. That, though, is not and never has been the law. Allowing the government such a power of censorship would not be easily cabined. Some argue that what Israel is doing in Gaza is genocide. Could a university then ban speech supporting Israel? Those who oppose abortion have often described it as a form of genocide. Could a college so inclined ban all pro-choice speech?

The courts have been consistent that hateful speech is constitutionally protected. In the early 1990s, over 360 colleges and universities adopted hate speech codes. Every one, without exception, that has come to court was declared unconstitutional as a violation of the First Amendment.

But there certainly are circumstances where universities can punish advocacy of genocide or other hateful speech. Speech can be punished if it is incitement of illegal activity, which the Supreme Court has said requires that there be a likelihood of illegal activity and that the speech be directed at causing imminent illegal activity. Speech is not protected by the First Amendment if it is a “true threat,” meaning that the speaker acted with a conscious disregard that there was a substantial likelihood that the speech would be regarded as a threat of violence — which is a standard that in many circumstances would allow punishment of advocacy of genocide. And a university must act if speech rises to the level of harassment, which usually requires that the speech be so severe and pervasive as to materially interfere with educational opportunities based on race, sex, religion or national origin.

What also was not expressed is that there is much that university officials can and should do besides punishing speech when there is hateful speech. Indeed, federal law requires that colleges not be “deliberately indifferent” when there is harassment. University officials

have many tools, including using their voices to condemn hateful speech, providing educational programs and training about antisemitism and other types of bigotry, and providing support for students. If people are advocating genocide, that must be responded to as an abhorrent violation of campus values, even when the First Amendment does not permit the censorship or punishment of the individual speaker.

There always is a temptation to want to censor the speech we don't like. No one can fault the members of Congress for wanting to stop any advocacy of genocide. And they are right to expect that universities will not sit idly by while groups of people are calling for genocide against others. No one disagrees with that, including the presidents who testified before Congress. But what exactly can and cannot be done is regulated by well-established principles of constitutional law and federal law. That is what the college presidents were trying to say but never really got to express.

*Erwin Chemerinsky is dean at the UC Berkeley School of Law. Howard Gillman is the chancellor of UC Irvine.*

LETTERS TO THE EDITOR Submit your letter at SFChronicle.com/submit-your-opinion

## Fund public schools with state property taxes

Regarding “California schools could face cuts as state budget deficit soars to \$68B” (California, SFChronicle.com, Dec. 7): We are reading yet another article about our state's increasing budget deficit and cuts to our public schools, and once again our leaders in Sacramento are not providing us any real solutions to this.

What's most absurd is that we were so close to finding a real sustainable solution to fully fund our public schools. Californians came close to reforming Proposition 13 with a ballot measure in 2020 that lost by 2 percentage points.

And if people forgot, according to the 2020 initiative, reforming just the commercial side of Prop. 13 would help the state restore over \$12 billion for our public schools and services every year.

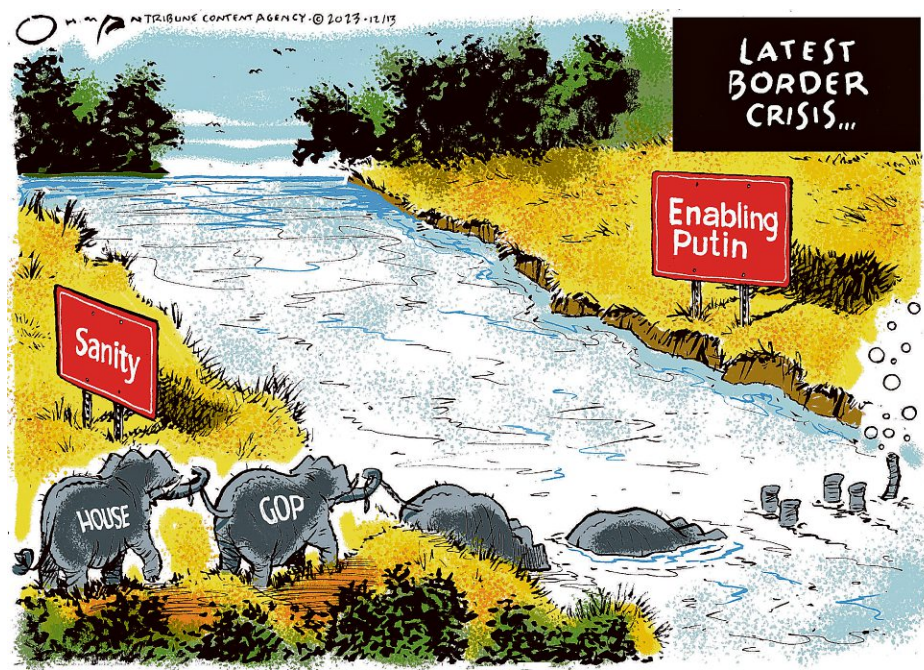
As the article mentions, “California is famously a boom-and-bust state, its fortunes tied to high-tech companies and the stock market.” And therein lies the problem.

We need to stop relying on a volatile economy and start figuring out a more sustainable source of revenue for one of — if not the most important — public service. Maybe one that funds public schools the way every other state does — property taxes.

*Gillian Garaci, San Francisco*

### Support public transit

Regarding “Bay Area voters aren't ready to fund BART, transit agencies with taxes. Here's why” (Bay Area, SFChronicle.com, Dec. 8): I'd like to offer my support for public transportation while acknowledging that transit officials must steward public funding responsibly.



Jack Ohman/Tribune Content Agency

The 80% of respondents to the Metropolitan Transportation Commission's poll who agreed it's important to preserve transit in the Bay Area are right.

Letting our transit systems deteriorate would be a disaster — safety, reliability and ridership could decline, and service cuts might render the system unusable. People would be forced to utilize their cars more or use rideshare apps for longer trips — boosting greenhouse gas emissions at a pivotal moment in the climate crisis.

Transit, even for those who don't frequently ride it, is a public good. It enables the modern economy to function and alleviates congestion from our crowded highways. Given the increased

cost of living, we cannot ask riders to bear more of the costs, especially on BART, where fares are already prohibitive for some.

The costs of sustaining and improving our transit systems should be borne by taxpayers via income and sales tax, yes, but also by the companies that benefit from public transportation via a payroll tax.

*Brian Wagenaar, San Francisco*

### No comparison to Trump

Regarding “Bush won either way” (Letters to the Editor, Dec. 8): George Steffner engages in some hypocrisy of his own in his letter when he tries to re-

frame Al Gore's presidential election loss as similar to Donald Trump's claims.

I am very tired of this “both sides are the same” argument coming from the right.

No, both sides are nowhere near the same. The right is the group that continues to push the stolen election lies of Trump.

As for Steffner's claim, this is all easily Googled: Media organizations later analyzed the ballots and found that, under specified criteria, the originally pursued recount of undervotes of several large counties would have confirmed a Bush victory, whereas a statewide recount would have resulted in a Gore victory. Florida later retired the punch-card voting machines that produced the ballots disputed in the case.

The right is still trying to rig elections, just as a right-leaning Supreme Court orchestrated Bush's win.

*Bret Yeilding, Seattle*

### Charge polluters

Regarding “To phase out or phase down fossil fuels? That is the question at COP28 climate talks” (U.S. & World, SFChronicle.com, Dec. 5): Here's hoping that COP28 negotiators can reach a global consensus. Whether there's a phase-out or phase-down of fossil fuels, it will be important to have carbon pricing globally.

It is also encouraging to see a bipartisan collection of new climate bills in Congress that would reduce emissions through carbon taxes or a carbon fee and dividend, along with carbon border adjustments that would reduce emissions abroad.

*Ernest Chow, San Francisco*