

## IMPEACHMENT, FREE SPEECH, AND THE CANCEL CULTURE NARRATIVE

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Bruce Castor, President Trump’s lead attorney at his second impeachment trial, closed Trump’s impeachment defense by linking his fate to that of free speech in the United States. The trial, Castor observed, “is about far more than President Trump. It is about silencing and banning the speech the majority does not agree with. It is about canceling 75 million Trump voters and criminalizing political viewpoints.”<sup>2</sup> A vote to convict, Castor warned, would be a vote “for constitutional cancel culture to take over in the United States Senate.”<sup>3</sup>

Castor’s plea captured a central feature of Trump’s legal defense and, as importantly, of the political movement in which Trump has loomed so large: a tendency to invoke the First Amendment as a talisman to shield Trump and his political allies from the political and social consequences of their expression. As a legal matter, Trump’s team argued that speech that is constitutionally protected from criminal prosecution is equally protected against impeachment. As applied to Trump, their argument was two-fold: The First Amendment would bar a criminal conviction for the speech that formed the basis of Trump’s second impeachment; consequently, it shielded him from impeachment for the same. Rhetorically, Trump’s legal team played up a theme that Trump has returned to repeatedly: Trump and “his people” are uniquely persecuted, including for their speech. This persecution takes the form not only of legal

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1. William W. Gurley Professor of Law, Northwestern University – Pritzker School of Law. Many thanks to Jill Hasday for her insightful comments, to Alan Rozenstein and Jill Hasday for inviting me to participate in this symposium, and to Tom Lewis and the student editors of *Constitutional Commentary* for their excellent work in shepherding this piece through the editing process.

2. Closing Argument of Bruce Castor, Senate Impeachment of Donald J. Trump (Feb. 12, 2021), <https://www.rev.com/blog/transcripts/trump-lawyer-bruce-castor-argument-transcript-february-12-trumps-second-impeachment-trial>.

3. *Id.*

jeopardy, but of social, economic, and political retribution. To defend them against such consequences is to defend freedom.

Several commentators pushed back forcefully, and convincingly in my view, against the notion that the House and the Senate are constrained by the First Amendment in the impeachment process.<sup>4</sup> Their essential point is that the term “high Crimes and Misdemeanors” encompasses behavior, whether criminally punishable or not, that constitutes a grievous abuse of power or betrayal of the public trust. Such acts can readily be committed through speech. For example, a President may promote fascism through diatribes that the First Amendment shields from criminal prosecution or tort liability, but that amount to a “menace to the constitutional order” and an impeachable “abuse of power.”<sup>5</sup> Some also observed that the absence of First Amendment constraints on the impeachment power is compatible with First Amendment doctrine. Indeed, it is consistent with case law affording considerable, and in some cases total leeway to government actors to terminate or otherwise discipline public employees for speech that would be fully protected from criminal or civil sanctions.<sup>6</sup>

In this Essay, I build on these arguments by focusing on the relationship between free speech, political power, and accountability. From this perspective, the Trumpian position is not only incorrect but perverse. It would privilege the most powerful actors in America—and in the case of the President, one of the most powerful people in the world—against being

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4. See, e.g., Peter D. Keisler & Richard D. Bernstein, *Freedom of Speech Doesn't Mean What Trump's Lawyers Want it to Mean*, ATLANTIC (Feb. 8, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/first-amendment-no-defense-against-impeachment/617962/>; Michael C. Dorf, *Free Speech, Due Process, and Other Constitutional Limits in Senate Impeachment Trials*, DORF ON LAW (Jan. 20, 2021), <http://www.dorfonlaw.org/2021/01/free-speech-due-process-and-other.html>; Keith E. Whittington, *Is There a Free Speech Defense to an Impeachment?*, LAWFARE (Jan. 19, 2021, 4:18 PM), <https://www.lawfareblog.com/there-free-speech-defense-impeachment>; Ilya Somin, *The First Amendment Doesn't Protect Trump Against Impeachment for His Role in Inciting the Assault on the Capitol*, VOLOKH CONSPIRACY (Jan. 8, 2021, 4:17 PM), <https://reason.com/volokh/2021/01/08/the-first-amendment-doesnt-protect-trump-against-impeachment-for-his-role-in-inciting-the-assault-on-the-capitol/>; Jonathan H. Adler, *Yes, Congress May Impeach and Remove President Trump for Inciting Lawless Behavior at the Capitol*, VOLOKH CONSPIRACY (Jan. 8, 2021, 3:21 PM), <https://reason.com/volokh/2021/01/08/yes-congress-may-impeach-and-remove-president-trump-for-inciting-lawless-behavior-at-the-capitol/>.

5. Somin, *supra* note 4.

6. See Whittington, *supra* note 4; Somin, *supra* note 4.

held to account, on the national political stage, for abusing the public trust. This would turn upside down a central principle of free speech: the necessity of robust discourse to guard against government abuse.

Training our focus on power and accountability also illuminates the parallels between the Trump team's First Amendment arguments against impeachment, and the political rhetoric used by Trump and his allies regarding free speech. Trump and his supporters repeatedly rail against purported threats to their own free speech, even when those threats amount not to government restraints, but to political or social accountability in the form of counter-speech. They also have called for legislative and regulatory actions to curtail counter-speech or to restrict publicly funded writing or teaching that they deem indoctrinating. As in the impeachment context, Trump and his allies insist that they are being persecuted by others' speech and that their freedom demands restrictions on the same. In short, they demand impunity for themselves and restrictions on others who threaten their worldviews.

In Part I of this Essay, I provide an overview of Trump's First Amendment arguments against his second impeachment and against conviction by the Senate. I also summarize major scholarly responses to the same. In Part II, I build on existing arguments against imposing constraints derived from First Amendment case law on the impeachment process. My contribution is grounded in free speech theory and its relationship to accountability. I explain that a central purpose of free speech is to keep government actors accountable, making it more difficult for them to hide their misdeeds and enabling the people to respond to the same. Were the First Amendment to narrow the range of impeachable "high Crimes and Misdemeanors," it would constrict the potential political accountability of government officers who abuse the public trust. In Part III, I move from legal to rhetorical aspects of Trump's defense, focusing on Trump's framing of his free speech argument as a response to "cancel culture." This rhetoric, I explain, casts further light on the accountability-dodging nature of Trump's First Amendment argument, and of the cancel culture narrative itself. A conclusion follows.

I. TRUMP'S FREE SPEECH ARGUMENTS  
AGAINST HIS SECOND IMPEACHMENT AND  
MAJOR RESPONSES TO THE SAME

In their single article of impeachment against Trump, the House Impeachment Managers charged that Trump had “incit[ed] violence against the Government of the United States.”<sup>7</sup> Specifically, they concluded that his speech at the Ellipse on the morning of January 6, 2021, sparked the “violent, deadly, destructive, and seditious acts” that followed at the Capitol.<sup>8</sup> They observed that, in that speech, Trump had falsely told a crowd of supporters that “‘we won this election, and we won it by a landslide.’ He also willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol, such as: ‘if you don’t fight like hell you’re not going to have a country anymore.’”<sup>9</sup> The Managers emphasized that the speech did not arise in a vacuum, but followed months of “false statements” by President Trump to the effect that “the Presidential election results were the product of widespread fraud and should not be accepted by the American people or certified by State or Federal officials.”<sup>10</sup>

After he was impeached by the House, Trump urged the Senate not to convict him. Among other things, he argued that his January 6th speech was protected by the First Amendment, as it did not meet the definition of “incitement”—a category that the Supreme Court has deemed unprotected by the First Amendment.<sup>11</sup> Incitement, as defined by the Court in the 1969 case of *Brandenburg v. Ohio*, is speech intended to cause, and likely to cause, imminent illegal activity.<sup>12</sup> Read in context, Trump argued, his January 6th speech exhorted his supporters only to engage in peaceful efforts to uncover and protest election fraud.<sup>13</sup> He also argued that his speech could not have caused the

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7. H.R. 24, 117th Cong. (2021) (enacted).

8. *Id.*

9. *Id.*

10. *Id.*

11. Trial Memorandum of Donald J. Trump, 45th President of the United States of America at 49–53, Impeachment of Former President Donald J. Trump (Feb. 8, 2021). See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (defining incitement and deeming it unprotected by the First Amendment). *But see* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (clarifying that certain types of content-based restrictions may not be imposed on content-based subcategories of “unprotected” speech).

12. *Brandenburg*, 395 U.S. at 447.

13. Trial Memorandum of Donald J. Trump, *supra* note 11, at 4–6, 10–12, 42, 51–53,

violence on January 6th, as many of the participants championed and planned for violence prior to that date.<sup>14</sup> Furthermore, a number of them had already reached, or were proceeding toward, the Capitol before Trump finished speaking.<sup>15</sup>

Because Trump could not, in his view, be criminally prosecuted for his speech consistent with the First Amendment, he also could not constitutionally be impeached and removed from office for it. In other words, he argued that the First Amendment limits the range of impeachable offenses, no less than it restricts the scope of constitutionally permissible crimes and civil offenses. Trump quoted law professor Josh Blackman to the effect that it would be an “internal contradiction[]” were “high Crimes and Misdemeanors” to “include conduct that is itself protected by the Constitution. . . . Or, to frame it in modern doctrine, it would amount to an unconstitutional condition. . . .”<sup>16</sup> Relatedly, Trump depicted the House Managers’ position as suggesting that the President “has fewer rights under the First Amendment than everyone else in the United States,”<sup>17</sup> and he countered that “[t]he opposite is true.”<sup>18</sup> He cited the Supreme Court’s view—expressed in a majority opinion in *Wood v. Georgia*, a case that I discuss in Part II—to the effect that “[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.”<sup>19</sup> Trump also nodded to history, suggesting that the Constitution’s framers did not intend to extend impeachable offenses beyond violations of law, for fear that it would make the President “the mere creature of the Legislature.”<sup>20</sup>

The House Impeachment Managers and several legal experts responded to Trump’s arguments, as well as to similar

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57–58, 63.

14. *Id.* at 7–8, 63.

15. *Id.* at 8–9.

16. *Id.* at 39–40 (quoting Josh Blackman, *Obstruction of Justice and the Presidency: Part II*, LAWFARE (Dec. 12, 2017), <https://www.lawfareblog.com/obstruction-justice-and-presidency-part-ii>).

17. *Id.* at 41.

18. *Id.* at 41.

19. *Id.* at 42 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). Trump also cited *Bond v. Floyd*, 385 U.S. 116 (1966) to similar effect. Trial Memorandum of Donald J. Trump at 42–44. I discuss *Bond* in Part II as well.

20. *Id.* at 40 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 86 (Max Farrand ed., rev. ed. 1937)).

arguments offered by a few commentators.<sup>21</sup> They argued, for one thing, that “high Crimes and Misdemeanors” are not limited to offenses punishable by the criminal law. Rather, they entail abuses of the public’s trust. Such acts can, but need not, overlap with criminal conduct. For example, “the Framers ‘anticipated impeachment if a President placed his own interest in retaining power above the national interest in free and fair elections.’”<sup>22</sup>

Given their view that impeachments should be directed toward abuses of power, they argued that it would make little sense to shield presidential speech from impeachment when it serves as the vehicle for such abuse. Professor Keith Whittington asked readers to imagine, for example, “if Trump had responded to the Charlottesville riots not with a series of ambiguous and contradictory statements but with an impassioned speech in defense of white nationalists and the need for street justice against left-wing protestors.”<sup>23</sup> Had Trump done so, said Whittington, he should have been “hastily impeached and removed precisely because [he] would [have] engaged in behavior fundamentally incompatible with the high office that he held and subversive of the ideals and functioning of the American republic.”<sup>24</sup> Other commentators added that “a central object of the Constitution was to restrain a government leader who was a ‘demagogue.’ And essential to being a demagogue is engaging in ‘passionate political’ speech.”<sup>25</sup>

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21. Commentators who supported President Trump’s argument that the First Amendment precluded his impeachment by the House or his conviction by the Senate included Alan Dershowitz, Josh Blackman, and Seth Barrett Tillman. See Alan Dershowitz, *Impeachment Over Protected Speech Would Harm the Constitution*, NEWSWEEK (Jan. 12, 2021, 2:52 PM), <https://www.newsweek.com/impeachment-over-protected-speech-would-harm-constitution-opinion-1560512> (arguing that an impeachment power that extends to constitutionally protected speech would be subject to substantial abuses); Josh Blackman and Seth Barrett Tillman, *Can President Trump Be Impeached and Removed on the Grounds of Incitement*, VOLOKH CONSPIRACY (Jan. 8, 2021, 3:57 AM), <https://reason.com/volokh/2021/01/08/can-president-trump-be-impeached-and-removed-on-the-grounds-of-incitement/> (same).

22. Trial Memorandum of the United States House of Representatives at 38, *Impeachment of President Donald J. Trump* (Feb. 2 2021) (citing H.R. REP. 116–346, at 52 (2019)).

23. Whittington, *supra* note 4.

24. Whittington, *supra* note 4 (offering this example, as well as several others, of presidential speech that likely would be immune from criminal prosecution under the First Amendment, but that should subject a president to impeachment). See also, e.g., Somin, *supra* note 4 (making a similar point through examples); Keisler & Bernstein, *supra* note 4 (same).

25. Keisler & Bernstein, *supra* note 4.

Finally, the House Managers and several commentators suggested that impeachment is more akin to termination from public employment than to criminal prosecution or civil fines. As such, the most pertinent case law supports extremely broad, if not unfettered discretion on the part of the House to impeach and the Senate to convict and remove.<sup>26</sup>

## II. IMPEACHMENT, FREE SPEECH, AND ACCOUNTABILITY

### A. OVERVIEW

The House Managers and commentators have the better of the argument, in my view. To be clear, the argument to which I refer is that the First Amendment does not limit the House's ability to impeach Trump or the Senate's ability to convict him.<sup>27</sup> This is so even if we assume, *arguendo*, that the First Amendment would bar Trump's criminal prosecution for the same speech.<sup>28</sup>

Impeachment is squarely directed toward abuses of the public trust, and some of the worst such abuses can take the form of public speech. As Professor Kate Shaw has insightfully observed, the rise of the "rhetorical presidency"<sup>29</sup> in the past

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26. Trial Memorandum of the United States House of Representatives, *supra* note 22 at 46 (explaining that "the Supreme Court has made clear that the First Amendment does not shield public officials who occupy sensitive policymaking positions from adverse actions when their speech undermines important government interests."); Whittington, *supra* note 4 ("When job security rather than criminal prosecution is on the table, the Supreme Court has long recognized that government employees can be removed from their positions for engaging in speech that would be lawful and constitutionally protected if uttered by a private citizen."); Somin, *supra* note 4 (observing that high-level, policymaking employees who work for the government are not protected from removal for their speech); Adler, *supra* note 4 ("[T]he fact that the government cannot criminalize certain speech does not mean that the government may not sanction government officers or employees for otherwise protected speech."); *cf.* Dorf, *supra* note 4 ("[T]he First Amendment has different implications for different sanctions.").

27. I am also assuming that, if the First Amendment did apply to impeachment proceedings, its enforcement would be left to the House and Senate, rather than the courts. *Cf.* *Nixon v. United States*, 506 U.S. 224, 226, 230–36 (1993) (rejecting, as nonjusticiable, a former federal judge's argument that the Senate had not properly "tried" him following his impeachment).

28. As signaled by my use of the term "*arguendo*," I do not address the question of whether a criminal prosecution of Trump for his speech would run afoul of the First Amendment. *Cf.* Alan Z. Rozenstein & Jed Handelsman Shugerman, "January 6, Ambiguously Inciting Speech, and the Overt-Acts Rule," 37 CONST. COMM. 275.

29. This term itself was coined, of course, by political scientist Jeffrey Tulis. *See* JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

hundred years or so has opened the door to the presidential demagoguery that the Founders feared, and thus to the reasonable prospect of “impeachable speech.”<sup>30</sup> Commentators are also correct to point out that the concept of “unconstitutional conditions” does not preclude impeachment based on presidential speech. To the contrary, unconstitutional conditions case law—including that defining the scope of public employee speech rights—allows government actors far more leeway to fire or discipline those on the government payroll than to impose criminal or civil sanctions on them.<sup>31</sup>

A deeper dive into free speech doctrine and theory further affirms the view that one can be impeached for speech for which they could not be prosecuted criminally. The crux of the argument is about accountability: a central purpose of free speech is to keep government actors accountable, making it more difficult for them to hide their misdeeds and enabling the people to respond to the same. Impeachment and removal proceedings are uniquely important mechanisms to hold officers accountable. They are also unusually visible means to do so, and thus themselves generate public information and debate, crucial ingredients of accountability. Were Trump’s First Amendment arguments to prevail, they would undermine these layers of accountability.<sup>32</sup> At minimum, they would preclude votes on the substance of alleged wrongdoing—that is, on whether particular speech by the President, or by another official, so abuses the public trust as to constitute a high crime or misdemeanor. Worse still, they can short-circuit investigation into, and debate about, such alleged abuses.

These accountability-based concerns are cast in even starker relief by free speech doctrine regarding speech by public employees. As the House Managers and several legal experts observed, judicial precedent gives government actors wide berth to terminate or otherwise discipline public employees for their speech. The dissonance between these cases and Trump’s First Amendment arguments is highlighted still further by the cases’ accountability-based reasoning. The Supreme Court has repeatedly stressed that elected officials (or those who report to them) must have broad discretion to control government

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30. Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 42–45 (2020).

31. See *infra* Part II(C).

32. See *infra* Part II(B).



employees' speech, as elected officials can be held to account at the ballot box. As I have written elsewhere and repeat below, these cases misapply the accountability principle, making it easier for elected officials to cover up inconvenient information that might enhance public accountability. That said, the principle itself is a worthy one, and it is hard to envision a more fitting application for it than impeachment and removal proceedings.<sup>33</sup> They are highly visible political events, fundamentally geared toward holding high officials accountable for alleged abuses of the public trust.

I elaborate on these points in the next two Subparts.

#### B. FREE SPEECH THEORY AND ACCOUNTABILITY

Although courts and scholars disagree on many things regarding free speech theory and doctrine, there is one point on which virtually all agree: whatever other purpose the Free Speech Clause serves, it undoubtedly protects the conveyance of information and opinion about government to support an informed citizenry.<sup>34</sup> This point also encompasses—sometimes implicitly and sometimes explicitly—the notion that such communications are meant to oversee and check government.<sup>35</sup> These central aspects of free speech value also are underpinned by an awareness of government fallibility. As Fred Schauer put it in his canonical book, “[t]he special concern for freedom to discuss public issues and freedom to criticize government officials” can be traced to an awareness that the risks of error and abuse are especially high in matters of government.<sup>36</sup>

These insights converge on the notion that it is essential, in a democratic system, to permit and foster robust inquiry and debate regarding the actions of public officials. This idea manifests itself in many areas of free speech doctrine, including precedent on government employee speech, as discussed in Subpart B. Perhaps most famously, it underpins the case law involving defamation against public officials. In the landmark case of *New York Times v. Sullivan*, for example, the Supreme

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33. See *infra* Part II(C).

34. See HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY at 59 nn.59 & 63 (2015).

35. See *id.* at 59 n.64 (2015) (citing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR. FOUND. RSCH. J. 521, 548, 553–54, 557–65).

36. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 46 (1982).

Court celebrated the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>37</sup> The *Sullivan* statement echoes important reflections on the purpose of free speech from early American history. For example, shortly before the American Revolution, the Continental Congress approved a declaration regarding the importance of a free press. Among the reasons for this freedom, they explained, is the press’s “ready communication of thoughts . . . whereby oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.”<sup>38</sup>

Of course, discourse among the people and in the press is distinct from official impeachment proceedings in the House and Senate. Nevertheless, free speech theory is highly relevant to impeachment. Impeachment proceedings are unusually visible events. They constitute important forums for engaging and informing the public, and Senators and Representatives themselves, on alleged abuses of the public trust—a matter that lies at the very heart of free speech value. Thus, even if there is some free speech cost to holding the President accountable for his speech through impeachment and removal, there are grave free speech costs as well to precluding such proceedings.

Furthermore, although impeachment entails official consequences, the consequences—and the proceedings that lead to them—are less akin to criminal punishment and more akin to critical counter-speech, coupled with political or social rebukes. Impeachment proceedings not only are important and highly visible speech events; they are political events involving political consequences meted out by elected congresspersons who must themselves answer to voters. This suggests, again, that there are serious free speech costs to precluding impeachment proceedings for presidential speech. It also suggests that any free speech costs on the President’s side of the balance are minimal.

In the next Subpart, I elaborate on the distinction between impeachment proceedings and criminal prosecutions or civil

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37. *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

38. David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455, 463–64 (1983) (quoting *ADDRESS TO THE INHABITANTS OF QUEBEC* (1774)).

damages actions. I focus especially on what free speech doctrine can tell us about this distinction. I also consider the light that judicial precedent can shed on the relationship between speech, impeachment, and accountability more broadly.

### C. FREE SPEECH DOCTRINE AND ACCOUNTABILITY

As the House Impeachment Managers and several commentators observed, the Supreme Court long has distinguished between the government imposing criminal prosecutions or civil fines on speakers, and government employers disciplining employees for their speech. First, and most relevant to the impeachment context, the Court has acknowledged that government employees who occupy high-level, policymaking positions usually can be terminated constitutionally from their jobs for ideological reasons, given the relevance of politics and ideology to many such jobs.<sup>39</sup> Second, even civil servants receive far less protection from discipline or dismissal for their speech than they receive against criminal prosecutions or civil fines. Such employees are completely unprotected from dismissal for their work product speech—that is, for speech conveyed in the course of performing their jobs.<sup>40</sup> For speech that does not constitute a part of their work product, such employees are protected only to the extent that their speech involves a matter of public concern and the free speech interests at stake outweigh their employers' managerial needs.<sup>41</sup>

In past work, I have been very critical of the Supreme Court's public employee speech jurisprudence as it relates to career employees who are hired for their disciplinary expertise.<sup>42</sup> I have been especially critical of the Court's categorical exclusion of such employees' work product speech from the First Amendment's reach.<sup>43</sup> My argument has centered on the related

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39. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 518 (1980) (explaining that “the ultimate inquiry . . . is whether . . . party affiliation is an appropriate requirement for the effective performance of the public office involved.”).

40. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

41. *Connick v. Myers*, 461 U.S. 138, 142–43, 146–47 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

42. See Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 95 WASH. U. L. REV. 1405 (2018) [hereinafter Kitrosser, *Public Employee*]; Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 [hereinafter Kitrosser, *Special Value*].

43. See Kitrosser, *Public Employee*, *supra* note 42; Kitrosser, *Special Value*, *supra* note 42.

notions of distortion and accountability. Distortion can occur when the government purports to hire employees based on their disciplinary expertise rather than partisanship or ideology, but disciplines or terminates them for partisan or ideological reasons.<sup>44</sup> Impacted government employees may include, for example, economists, scientists, or auditors. If government can freely fire or discipline such persons for their work product speech, it opens the door to political manipulation of information and analyses. This, in turn, can undermine the political accountability that lies at the core of free speech value. It enables elected officials and their appointees to skew the factual and analytical backdrops against which the public can judge their activities.

It would get things entirely backwards, from the perspective of free speech value, were government officers not only given free rein to terminate public employees for truthful, expertise-driven speech that might aid public accountability, but also given a pass from being held politically accountable for their own speech that abuses the public trust. Part of the Supreme Court's justification for curtailing public employees' free speech rights are the notions that employees' on-the-job speech belongs to the government, that elected officials will be held accountable for the government's speech at the ballot box, and that these officials thus should control such speech.<sup>45</sup> That rationale does not make much sense as a justification to allow elected officials to stop valuable information from reaching the public.<sup>46</sup> It makes perfect sense, however, as a reason to enable elected officials to be held politically accountable for their own speech.

To be sure, the concept of political accountability is not a catch-all through which all manner of official action can be taken against disfavored speech by high-level officers. Two cases on which Trump relies heavily in his impeachment trial brief stand

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44. See Kitrosser, *Special Value*, *supra* note 42.

45. See *Garcetti*, 547 U.S. at 422 (likening public employer control over public employee work product speech to the Court's "government speech" doctrine, whereby, "[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"); *Walker v. Sons of Confederate Veterans*, 576 U.S. 200, 207 (2015) (applying government speech doctrine and assuring that "the democratic electoral process . . . provides a check on government speech."). See also Kitrosser, *Special Value*, *supra* note 42, at 334–35 (describing *Garcetti*'s accountability-based rationale).

46. See Kitrosser, *Special Value*, *supra* note 42, at 302–03, 323–25, 329–30.

for this unremarkable point. In one case, *Wood v. Georgia*, the Supreme Court held that Georgia state courts had acted unconstitutionally in holding an elected sheriff in contempt of court for publicly commenting on ongoing grand jury proceedings.<sup>47</sup> The contempt charge carried criminal penalties, and the Supreme Court observed that it had previously limited the contempt power for “out-of-court publications” to “the clear and present danger standard.”<sup>48</sup>

The other case on which Trump relies, *Bond v. Floyd*, hits somewhat closer to the mark, but ultimately stands for the same simple proposition as does *Wood*—that government actors do not have free reign to mete out official punishments for speech. In *Bond*, the U.S. Supreme Court held that the Georgia House of Representatives could not exclude a newly elected Representative from office on the basis of his public criticisms of U.S. military operations and the draft.<sup>49</sup> Crucially, the *Bond* Court found that the Georgia Constitution contained an exhaustive list of qualifications and eligibility criteria for state legislators, and that Bond met them all.<sup>50</sup> In other words, the state constitution provided no mechanism through which House members could exclude Bond for his speech. The Court also declined to read such a mechanism into the state and federal constitutional oath provisions. Those provisions, it observed, do “not authorize a majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution.”<sup>51</sup>

The impeachment setting differs wildly from the criminal contempt proceedings at issue in *Wood* or the state legislative exclusion action taken in *Bond*. Impeachment proceedings are explicitly provided for in the U.S. Constitution. Furthermore, there is substantial textual, structural, and historical support for the notion that “high Crimes and Misdemeanors” can include public speech through which the President or another officer abused the public trust. Finally, this interpretation of “high

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47. *Wood v. Georgia*, 370 U.S. 375, 376, 383–84 (1962). See also Trial Memorandum of Donald J. Trump, *supra* note 11, at 41–42 (relying on *Wood*).

48. *Wood*, 370 U.S. at 382–84 (citing *Bridges v. California*, 314 U.S. 252, 263 (1941)).

49. *Bond v. Floyd*, 385 U.S. 116, 118–26, 137 (1966). See also Trial Memorandum of Donald J. Trump, *supra* note 11, at 42–44 (relying on *Bond*).

50. *Bond*, 385 U.S. at 129.

51. *Id.* at 132.

Crimes and Misdemeanors” is compatible with the political accountability principle underlying the government employee speech cases.

### III. IMPEACHMENT AND THE CANCEL CULTURE NARRATIVE

Trump’s conflating of political accountability with speech suppression is further highlighted by his legal team’s adoption of “cancel culture” language. As I observed at the start of this Essay, Trump’s lead impeachment trial attorney, Bruce Castor, closed his defense by warning that a vote to convict would be a vote “for constitutional cancel culture to take over in the United States Senate.”<sup>52</sup> And Trump would not be cancelled alone. Rather, such a vote would be “about canceling 75 million Trump voters and criminalizing political viewpoints.”<sup>53</sup>

Other Trump supporters echoed the cancel culture narrative. Republican Representative Matt Gaetz of Florida tweeted that “[i]mpeachment is the zenith of cancel culture.”<sup>54</sup> Similarly, Republican Representative Jim Jordan of Ohio, speaking during the House Impeachment proceedings, said that Democrats are out to “cancel the president and anyone who disagrees with them.’ [Jordan] warned that ‘cancel culture will come for us all.’”<sup>55</sup> Also speaking during the House Impeachment proceedings, Republican Representative Glenn Grothman of Wisconsin framed the actions of January 6th participants themselves as a response to cancel culture. Grothman explained that “tens of thousands of peaceful protestors” were in Washington on January 6th, and that “they’re scared to death that nobody else will fight the cancel culture as we head towards

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52. See Closing Argument of Bruce Castor, *supra* note 2.

53. *Id.* Trump’s team similarly argued in their Impeachment Trial brief that Trump was “elected to be the voice for his national constituency,” and that silencing him (through a vote to convict) would constitute silencing them. Trial Memorandum of Donald J. Trump, *supra* note 11, at 44–45. See also *id.* at 1 (describing impeachment as a means to “silence a political opponent and a minority party.”).

54. W. Bradley Wendel, *Lawyer Shaming*, 2022 U. ILL. L. REV. 175, 200 (quoting Matt Gaetz (@RepMattGaetz), TWITTER (Jan. 25, 2021, 12:31 PM), <https://twitter.com/RepMattGaetz/status/1353772373049282560>).

55. WATCH: Jordan Says Second Trump Impeachment is a Product of ‘Cancel Culture,’ PBS NEWS HOUR (Jan. 13, 2021, 1:53 PM), <https://www.pbs.org/newshour/politics/watch-jordan-says-second-trump-impeachment-is-a-product-of-cancel-culture>.

an era where some things can't be said."<sup>56</sup>

The term “cancel culture” has become ubiquitous in public discourse over the past several years. Although the term has a complicated history,<sup>57</sup> it is used today primarily as a disparaging label for a perceived culture of intolerance toward opposing views.<sup>58</sup> Right-wing figures, especially, have embraced the label as a rallying cry, insisting that conservatives are under siege, and at constant risk of cancellation, by liberal students, faculty, media, and corporations.<sup>59</sup> For example, the Republican National Committee adopted a resolution at their 2020 convention decrying “the cancel culture movement.”<sup>60</sup> At the same convention, “at least 11 GOP speakers—about a third of those who took the stage . . . —addressed cancel culture as a concerning political phenomenon.”<sup>61</sup> Trump himself spoke to convention attendees about the problem, telling them that “[t]he goal of cancel culture is to make decent Americans live in fear of being fired, expelled, shamed, humiliated and driven

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56. Craig Gilbert, *In House Vote to Impeach President Trump, Wisconsin Lawmakers Split By Party. Here is What They Said*, MILWAUKEE JOURNAL SENTINEL (Jan. 14, 2021, 4:35 PM), <https://www.jsonline.com/story/news/politics/2021/01/13/trump-impeachment-wisconsin-lawmakers-split-party/4145409001/>.

57. The term seems to have originated in several works of black popular culture, including the film *New Jack City*, a song by hip hop artist Lil Wayne, and dialogue on the reality show *Love and Hip Hop*. See Khiara M. Bridges, *Language on the Move: “Cancel Culture,” “Critical Race Theory,” and the Digital Public Sphere*, 131 YALE L.J. F. 767, 774–75 (2022); Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX (Aug. 25, 2020, 12:03 PM), <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate>. Following the reference to it on *Love and Hip Hop*, the concept of cancel culture “began to spread via Black Twitter.” *Id.* Romano adds that cancel culture “appears to channel Black empowerment movements dating as far back as the civil rights boycotts of the 1950s and ‘60s.” *Id.*

58. See, e.g., Wendel, *supra* note 54, at 199–202; Bridges, *supra* note 57, at 773–74; Aja Romano, *The Second Wave of “Cancel Culture,”* VOX (May 5, 2021, 1:00 PM), <https://www.vox.com/22384308/cancel-culture-free-speech-accountability-debate>; Danielle Butler, *The Misplaced Hysteria About a ‘Cancel Culture’ That Doesn’t Actually Exist*, ROOT (Oct. 23, 2018), <https://www.theroot.com/the-misplaced-hysteria-about-a-cancel-culture-that-do-1829563238>.

59. See, e.g., Romano, *supra* note 58; Butler, *supra* note 58; Matt Vasilogambros, *GOP Targets ‘Cancel Culture’ in School Lessons, Political Speech*, STATELINE (Feb. 26, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/02/26/gop-targets-cancel-culture-in-school-lessons-political-speech>.

60. REPUBLICAN NAT’L COMM., RESOLUTION UPHOLDING THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA IN THE RESPONSE TO THE CORONAVIRUS PANDEMIC AND THE CANCEL CULTURE MOVEMENT (2020). See also Romano, *supra* note 58 (describing and linking to the resolution).

61. Romano, *supra* note 58.

from society as we know it.”<sup>62</sup> Another prominent right-wing group—the Conservative Political Action Committee—framed their 2021 annual convention as a response to cancel culture, calling the event “America Uncanceled.”<sup>63</sup>

A major problem with the cancel culture narrative is that there is little consensus as to what constitutes “cancellation.” At best, this makes the term unilluminating, as it can refer to anything from job termination to critical counter-speech.<sup>64</sup> More troublingly, this ambiguity opens the door to actual government speech suppression in the name of fighting cancel culture. For example, the Texas and Florida state legislatures recently passed, and several other states have considered, legislation to restrict the ability of private social media platforms to manage the speech content that they host.<sup>65</sup> Such laws raise serious constitutional concerns. As Scott Wilkens of the Knight First Amendment Institute at Columbia University explains, “the Texas and Florida laws are ‘pretty clear violations of the platforms’ First Amendment rights to speak themselves by actually deciding what they will and won’t publish.”<sup>66</sup> Yet many conservatives champion such laws as blows for freedom. They deem the laws necessary responses to social media “cancellations” of some right-wing members.<sup>67</sup> The purported cancellations include companies’ suspending the members’ accounts for violent or false content or attaching warning labels to some of their posts.<sup>68</sup> Referencing his own suspension from major platforms after his supporters attacked the Capitol, former President Trump called for a “stop to the blacklisting, banishing and cancelling.”<sup>69</sup>

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62. *Id.* (quoting Trump’s Republican National Convention speech); see also *All Things Considered: How Cancel Culture Became Politicized—Just Like Political Correctness*, NAT’L PUB. RADIO (Jul. 26, 2021), <https://www.npr.org/2021/07/09/1014744289/cancel-culture-debate-has-early-90s-roots-political-correctness> (same).

63. Vasilogambros, *supra* note 58.

64. Indeed, this is evident in the quote from Donald Trump in the preceding paragraph, where he references Americans living “‘in fear of fired, expelled, shamed, humiliated and driven from society as we know it.’” See *supra* text accompanying note 63.

65. Rebecca Kern, *Push to Rein in Social Media Sweeps the States*, POLITICO (Jul 1, 2022).

66. *Id.*

67. *Id.*

68. *Id.*

69. See *All Things Considered*, *supra* note 62.



Still more ominous for free speech is the tendency of conservatives to conflate “cancellation” with progressive ideas on the basis that the latter are indoctrinating. This reasoning has helped to fuel ongoing state legislative efforts to purge books, curricula, and other activities associated with anti-racism from public schools, including higher education.<sup>70</sup> It also enables supporters of such measures to frame them as freedom enhancing. For example, Christopher Rufo, the right-wing activist who helped to generate a nationwide panic over critical race theory,<sup>71</sup> wrote in *City Journal* that “critical race theorists and their enablers . . . want the right to enshrine their personal ideology as official state dogma. They prioritize the ‘freedom of the state’ over the ‘freedom of the individual’—the prelude, whether deliberate or accidental, to any totalitarian system.”<sup>72</sup> State legislators similarly justify bills that would bar certain classroom lessons or materials, including the *New York Times*’ 1619 Project, on the basis that the targeted items and topics are indoctrinating. One Missouri state representative explained, for example, that “[t]he curriculum is ‘designed to manipulate our children into hating our country.’”<sup>73</sup>

Just as the conservative movement has wielded the cancel culture label more broadly, so Trump used it in the impeachment process to paint himself as a martyr for his political views, and to frame the process as censorious. Importantly, Trump linked his martyrdom to that of his many followers, suggesting that impeachment threatened them all. Recall Bruce Castor’s warning that a Senate vote to convict Trump would be a vote to “cancel[] 75 million Trump voters and [to criminalize] political viewpoints.”<sup>74</sup> This rhetorical move—

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70. See, e.g., Jeremy C. Young & Jonathan Friedman, *In Higher Education, New Educational Gag Orders Would Exert Unprecedented Control Over College Teaching*, PEN AMERICA (Feb. 1, 2022), <https://pen.org/in-higher-education-new-educational-gag-orders/>; Vasilogambros, *supra* note 58.

71. See Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, NEW YORKER (June 18, 2021), <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory>.

72. Christopher F. Rufo, *Critical Race Fragility*, CITY JOURNAL (Mar. 2, 2021), <https://www.city-journal.org/the-left-wont-debate-critical-race-theory>.

73. Vasilogambros, *supra* note 58.

74. Closing Argument of Bruce Castor, *supra* note 2. Trump’s team similarly argued in their Impeachment Trial brief that Trump was “elected to be the voice for his national constituency,” and that silencing him (through a vote to convict) would constitute silencing them. Trial Memorandum of Donald J. Trump, *supra* note 11, at 44–

framing cancel culture as a threat to “real Americans,” their viewpoints, and their ways of life—was also reflected in the speech that Trump gave to his supporters on the morning of January 6th. Repeating his big lie of a stolen election, Trump assured the crowd, “We will not let them silence your voices. We’re not going to let it happen, I’m not going to let it happen.” Contrasting his supporters with their would-be censors, he flattered the crowd, telling them: “You’re stronger, you’re smarter. . . . And they try and demean everybody having to do with us. And you’re the real people, you’re the people that built this nation.” Trump even connected these musings back to school curricula, thundering that “They also want to indoctrinate your children in school by teaching them things that aren’t so. They want to indoctrinate your children. It’s all part of the comprehensive assault on our democracy, and the American people are finally standing up and saying no.”<sup>75</sup>

Like right-wing cries against cancel culture in general, Trump’s free speech arguments against impeachment depict himself and his followers as bold truth-tellers, whose freedoms of speech and thought are under siege. Just as anti-cancel culture screeds are used, paradoxically, to justify the suppression of purportedly indoctrinating speech, so Trump sought, through his First Amendment defense, to delegitimize a major means of political accountability—indeed, perhaps the most important and transparent such means in the United States—in the name of freedom.

### CONCLUSION

In hindsight, Trump’s First Amendment defense against impeachment exemplifies an important and under-appreciated phenomenon: the wielding of arguments about free speech to stifle or delegitimize the speech of others. Trump invoked the First Amendment as a tool to resist political accountability through impeachment. In invoking the cancel culture narrative, he also connected his defense with a technique used more broadly in right-wing politics today: conflating speech that

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45. See also *id.* at 1 (describing impeachment as a means to “silence a political opponent and a minority party.”).

75. *Read Trump’s Jan 6 Speech, A Key Part of Impeachment Trial*, NATIONAL PUBLIC RADIO (Feb. 10. 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

challenges certain figures or worldviews with oppression, thus justifying squelching such speech in the name of freedom.

Underlying all of these efforts is a populist vision of “real Americans” under siege by unpatriotic others. Trump’s speech on the morning of January 6th, extolling his supporters as “the real people” and promising that he will not let their voices be silenced, captures this vision perfectly.<sup>76</sup> From the vantage point of a “real person” who is under siege, it is not far-fetched to view free speech and political accountability as zero-sum games. From this perspective, anything short of impunity for one’s favored political leaders and zero tolerance for perceived indoctrination may be unacceptable.

These themes manifest themselves differently—and call for different responses—in different contexts. Elsewhere, I have explored in more depth how the cancel culture narrative, and the closely related “political correctness” narrative, can give rise to legislation that threatens academic freedom.<sup>77</sup> I have also explained the somewhat mixed state of First Amendment doctrine that one must confront in challenging such legislation.<sup>78</sup> In the impeachment context, matters are a bit simpler. In this setting, free speech principles—not to mention free speech doctrine and the Constitution’s impeachment clause—cut against the notion that the First Amendment limits the scope of impeachable context in the first place. Were it otherwise, the effect would be deeply ironic: the same free speech protections that Americans rely on to ensure political accountability would protect some of the most powerful officials in the nation, if not the world, from being held to account for abusing the public trust.

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76. *Id.*

77. See Heidi Kitrosser, *Protecting Public Knowledge Producers*, KNIGHT FIRST AMEND. INSTIT. AT COLUM. U. (PAPER SERIES ON “LIES, FREE SPEECH, AND THE LAW”) (Dec. 16, 2022), <https://knightcolumbia.org/content/protecting-public-knowledge-producers> [hereinafter Kitrosser, *Knowledge Producers*]; Heidi Kitrosser, *Free Speech, Higher Education, and the PC Narrative*, 101 MINN. L. REV. 1987 (2017).

78. See Kitrosser, *Knowledge Producers*, *supra* note 77.

