

INTRODUCTION

Free exercise, religion, speech, press, and assembly nestle at the core of American civil liberties as granted in the First Amendment.¹ Yet, these rights are historically limited to state actions as part of the grand constitutional juxtaposition of public and private spheres.² Thus, President Trump's Executive Order 13864 encouraging First Amendment compliance at public institutions and private institutions prompted a panoply of questions.³ First, is Executive Order 13864 constitutional? And, constitutionality aside, is the order simply illusory political rhetoric, or will this new directive impact private university campuses?

On March 21, 2019, Trump issued Executive Order 13864, titled *Improving Free Inquiry, Transparency, and Accountability and Colleges and Universities*.⁴ On its face this Order may seem like an innocuous nod to existing constitutional law addressing a reportedly disgruntled conservative base.⁵ However, Executive Order 13864 empowers NASA, the National Science Foundation, the EPA, and the Departments of Education, Energy, Transportation, Labor, Health and Human Services, Commerce, the Interior, Agriculture, and Defense to “take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable federal laws, regulations, and policies.”⁶ The order defines “federal research grants” as “all funding provided by a covered agency directly to an institution”⁷; this definition excludes Federal tuition, fees, or stipend programs.

While the Order may seem a mere reminder of departmental compliance with applicable policy or superficial political theatrics, questions arise in consideration of the order's departmental empowerment. Because the heads of these departments are politically-appointed, the order raises genuine concern over departmental subjectivity in implementation and

governance.⁸ This allocation of power to appointees presumably supportive of political agenda casts an oligarchical shadow over the Order itself, in its subtle suggestion that a private institution's failure to comply may result in a loss of Federal research funding. In this manner, the Order might possibly risk undermining the very "free inquiry" it purports to protect.

I. BACKGROUND

A. The Public/Private Dichotomy in First Amendment Protections

While the First Amendment protects rights of free exercise, speech, press, assembly, and petition, these rights not universal; they are limited to offering protection from governmental interference in the public sphere.⁹ Thus, courts must find a "state action" in order to invoke constitutional protections.¹⁰ The Supreme Court's state action analysis evaluates whether (1) "the defendant is the state itself"; or (2) whether the governmental influence in the behavior of private parties is such that it can be interpreted as state action.¹¹ However, evaluating case-by-case circumstances under the second tier has produced a wide swath of inconsistent jurisprudence in the American juxtaposition of private autonomy against state sovereignty; because government action is "nearly always present," there is no simple means of delineating the divide between the public and private spheres.¹² This approach is less of a balancing method than a constitutional carve-out. When determining government involvement the Court pulls certain private aspects into the public realm, leaving seemingly indiscriminate scraps—rather than a discrete set of qualifiers—in the private sector.¹³ Historically, segregationists and sexists have abused this messy plate of mangled jurisprudence to protect private acts of discrimination on the basis of race and sex in an effort to hinder civil developments, though concerns exist across the spectrum of political values.¹⁴ Despite such abuses, the private sphere remains protected from full constitutional reach. Bringing the sanctity of the private sphere into public light to limit potential

abuses lies outside the realm of judicial power; this ability is left to a more mutable legislature.¹⁵ To date, a few states have grafted these traditionally public-sphere First Amendment protections upon certain private realms, including private universities, through their state constitutions or by statute.¹⁶

B. Case History: First Amendment Protections in Universities and the Private Sphere

i. The Constitutional Carve-Out: Public Protections in the Private Sphere

Marsh v. Alabama provides an early example of the judicial expansion of First Amendment protections into the private sphere.¹⁷ Grace Marsh was charged with criminal trespass for distributing her Jehovah's Witness literature on the sidewalk near a post office in Chickasaw, Alabama.¹⁸ While sidewalks are generally considered public way, Chickasaw was a "company town,"—operating like a public town, but fully owned by a private corporation called Gulf Shipbuilding.¹⁹ Justice Black's opinion in *Marsh* disregards Gulf Shipbuilding's private ownership interests in this case—and, further suggests that Grace Marsh's First Amendment interests outweighed the private interests of Gulf Shipbuilding Corporation—because of function, appearance, related waiver of dominion, and government influence.²⁰ Black notes that the "private town" of Chickasaw does not act differently from a "public town"; that the more a private owner allows public access to his property, the more likely the public users will benefit from traditionally public constitutional protections; that the State's involvement in penalizing Marsh brought the issue into the public realm.²¹ *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* extended *Marsh* in holding that "union members had a right to picket their employer in a privately-owned shopping mall."²²

While *Marsh* brought a privately-owned town into the public sphere for the purposes of First Amendment protections and *Logan Valley* extended First Amendment protections for a

time, the *Hudgens* court subsequently distinguished a private shopping center as not protected by the First Amendment, thus abrogating *Logan Valley*.²³ Privately-owned shopping centers, Justice Powell concludes, did not provide the same broad functions as a state municipality or delegate.²⁴ The *Hudgens* court emphasizes Justice Black’s dissent in *Logan Valley*: “Under what circumstances can private property be treated as though it were public? The answer that *Marsh* gives us is that when property has taken on *all* the attributes of a town”²⁵ Thus, *Hudgens* highlights how public use of private property, without greater town amenities or municipal contribution, does not secure First Amendment protections. Taken together, *Hudgens* and *Marsh* depict the Federal struggle to balance the public right of free speech against private property rights.

ii. First Amendment Protections in Private Schools

This balance between public and private interests influences the definition of “state action” between public and private universities. *Powe v. Miles* highlights this disparity: while the actors, actions, and location of the act were the same, the presence of “state action” hinged on a school’s public status.²⁶ In 1968, Alfred University suspended seven students—three enrolled at the New York State College of Ceramics operating on campus, and four enrolled at the Liberal Arts College—for refusing to obey a Dean’s order while staging a protest on the university football field.²⁷ *Powe* notes the university’s football field fails to fulfill *Marsh*’s public function (thus retaining its private status), admits State action must have somehow contributed to the plaintiff’s injury, and reasons the presence of New York State regulations over Alfred’s education standard do not constitute state action.²⁸ However, *Powe* acknowledges a key distinction between the two colleges: while the Liberal Arts College was a private entity, the College of Ceramics operated more as a “contract” college under New York Statute.²⁹ Thus, the court finds no state action

occurred against the Liberal Arts students, but attributed to the State the action against the College of Ceramics students. The court notes in its holding that the Dean's actions against the Ceramics students constitutes state action simply because the "the State has willed it that way."³⁰

Absent legislative direction by states, courts appear reluctant to extend public protections upon private schools. Like *Powe*, *Rendell-Baker v. Kohn* wrestles with state action, but without legislative influence. In evaluating whether a public-regulated, 99% publicly-funded private secondary school committed a state action when it discharged an employee for expressing her beliefs, *Rendell-Baker* considers funding; state influence upon the relationship between the school and students; the public function of the private actor; and whether a symbiotic relationship exists between the state and the private actor.³¹ *Rendell-Baker* reasons that the act of receiving public funding does not automatically transmute the school into a state actor nor alter the relationship between the school and its students (the public).³² The court also notes that a mere public function is not enough to confer state action; rather, the action must be "traditionally the sole prerogative of the State."³³ Further, the court reasons that the State must profit from the symbiotic relationship between the school and the State—and where the State does not financially profit there can be no symbiotic relationship.³⁴ Thus, *Rendell-Baker* finds no state action when a public-regulated, 99% publicly-funded private secondary school discharged an employee for expressing her beliefs.³⁵

II. CONSTITUTIONALITY OF EXECUTIVE ORDER 13864 AS APPLIED TO PRIVATE UNIVERSITIES

It is unlikely Executive Order 13864 is constitutional as applied to private universities without specific state involvement through common law or legislative action; however, the state action doctrine is well-settled, and application of legislative means like state constitutions have been historically narrow.³⁶ *Marsh* and *Hudgens* offer insight into broader rationale governing the

balance of private versus public rights in First Amendment analyses. At first glance, it seems *Marsh* might push private universities into the realm of the First Amendment: private universities appear and function very similarly to public universities; they may serve similar purposes; they arguably allow substantial public access and use; and they benefit from government funds and a certain level of government oversight.³⁷ However, it is not enough that a private university act like a public one. As *Hudgens* notes by adopting Black's *Logan Valley* dissent, private property can be treated as public when it has "taken on *all* the attributes of a town."³⁸ Thus, a private university campus must take on *town* attributes, not public university attributes, for First Amendment provisions to pierce its veil of privacy under *Hudgens*.

This Executive Order may have been crafted to address *Rendell-Baker* in an effort to bring the actions of private universities into the realm of the First Amendment. Even so, the order fails to meet *Rendell-Baker*'s requirements. Under *Rendell-Baker*, private universities are likely not considered state actors; simply receiving Federal funds for research is not enough to confer state actor status upon a private university.³⁹ The Executive Order's directive for departmental oversight in funding procedures will likely not heavily influence the manner in which students interact with professors.⁴⁰ And while free inquiry and education generally are government interests, *Rendell-Baker* requires these be "traditionally the sole prerogative of the State."⁴¹ The existence of private universities and (in some cases) private institutional policies regarding free inquiry prove these interests are not solely State interests. Further, it is unlikely that the State financially profits substantially enough from the "symbiotic relationship" it shares with private universities to confer state action.⁴² Regardless, a government attempt to direct the behavior of these private universities into fulfilling the requirements of *Rendell-Baker* would already likely prove unconstitutional. University of Chicago's former provost Geoffrey Stone notes, "For the

government to tell a private institution that you can or cannot teach a certain course or deal with particular conflict in a certain way directly impairs the First Amendment rights of those institutions.”⁴³ Thus, although the Executive Order may have been crafted to address *Rendell-Baker*, it is likely unconstitutional.

III. RAMIFICATIONS OF EXECUTIVE ORDER 13864

A. The Order Risks Further Political Polarization of Higher Education

Some experts claim Executive Order 13864 simply “amounts to reminding universities about existing law.”⁴⁴ Even if the order is determined constitutionally impotent, it highlights the interplay between politics and education and serves as a tool to empower the President’s conservative base while generating academic alarm. While surrounded by conservative representation, the President signed the order and announced, “I am with you all the way. Universities that want taxpayer dollars should promote free speech, not silence free speech.”⁴⁵ Taken together, this visual rhetoric depicts strong support of conservative ideals, but also reinforces conservative distrust in universities.

A Conservative viewpoint is that college campuses are far too liberal and discriminate in implementing First Amendment protections by restricting certain types of speakers and content.⁴⁶ Yet Jeffrey Sachs’ 2018 Niskanen Center study indicated a decline in campus incidents threatening free speech.⁴⁷ Sachs notes that some conservatives may be self-censoring in a liberal environment, but that self-censorship flows both ways where “hate speech” is mistaken for “protected speech” and vice versa.⁴⁸ While free speech has been associated with topics on race, gender, LGBT rights, and sexual assault, topics on both ends of the spectrum may attract negative and aggressive attention.⁴⁹ For example, murals celebrating a Muslim Students Association and a Republican Student Group have both been defaced on college campuses.⁵⁰

Although less highlighted in the mainstream, conservative topics attract attacks as well, as highlighted by events at Middlebury College: “Conservatives said that the students were intolerant, had engaged in mob mentality and were quashing free speech, while those on the left maintained that the speaker was racist and hateful and had no place on their campus.”⁵¹ However, Sachs notes this mutual misunderstanding is not a conservative crisis and likely didn’t require the level of attention a Presidential directive attracts.⁵² While a shout-down pales in comparison to threatening to lynch an African-American woman for speaking against Trump, the full political spectrum falls under the directive of the executive order.⁵³ Yet, that Trump marketed this executive overkill to his base alone highlights the reality of this political play. Ultimately this may empower both ends of the political spectrum to double-down on their misconceptions of “protected speech” on campus; thus, this Executive Order may further polarize education and politics.

B. This Order Risks Institutionalized Abuse of the First Amendment by Politically-Appointed Bureaucracy Lacking Requisite Constitutional Competence

The greater cause for alarm resides in the delegation of funding, oversight, and governance to politically-appointed department leaders who may lack the relevant training to properly apply the directive. Executive Order 13864 directs heads of government agencies to “ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable federal laws, regulations, and policies.”⁵⁴ The list of government agencies includes NASA, the National Science Foundation, the EPA, and the Departments of Education, Energy, Transportation, Labor, Health and Human Services, Commerce, the Interior, Agriculture, and Defense.⁵⁵ These organizations are led by political appointees who may lack the ability to conduct proper constitutional analysis. President of the Association of Public and Land

Grant Universities Peter McPherson notes how the Order empowers these political appointees to “strip or block federal research funding from universities they subjectively believe aren’t permitting the diverse debate of ideas,” while The University of Chicago’s Geoffrey R. Stone notes, “People not trained in the way judges are trained, who don’t have lawyers presenting arguments to them, means that they will be able to put enormous pressure on public universities under the guise of applying the Constitution.”⁵⁶ Such financially-coercive and oligarchical federal oversight seems to threaten the very “free inquiry” the order purports to protect.

Yet another issue lies beyond the absence of objectivity and requisite competence required to implement the directive: the vague language of Executive Order 13864 offers little guidance to institutions and departmental authorities regarding standards of compliance.⁵⁷ The order confuses many university leaders, who recognize universities are founded on the principles of free inquiry; others raise concern over federal micromanagement in an absence of proper protocols.⁵⁸ What does the “promotion of free inquiry” look like? How is it measured? Are institutions now required to report measurements or adages to these department administrators? Will agencies conduct a case-by-case or broad statistical analysis of universities? Are there other penalties (outside potential loss of funding) involved for failing to achieve some arbitrary departmentally-created benchmark? For now these questions remain unresolved. FIRE’s Joe Cohn fails to see a benefit in developing another level of bureaucracy, but recognizes the possibility that agencies may simply ask for some form of proof of compliance similar to the existing approach to antidiscrimination policy.⁵⁹ Regardless, the order’s vague language and absence of direction promotes speculation and generates more issues than it resolves.

CONCLUSION

While some consider it to be a simple reminder of existing responsibilities under the law, Executive Order 13864 is most likely an unconstitutional political tool implemented to appeal to a political base which generally lacks understanding of the public and private tensions in First Amendment jurisprudence. The order disregards the long-settled state-action doctrine in attempting to inject federal control into private institutions, by conditioning institutional access to federal funding upon compliance with vague requirements which heads of various federal departments have yet to establish. These departmental authorities to which the order has granted governance likely lack the ability to properly identify and evaluate First Amendment challenges under the law and will likely generate more conflict than the order claims to address. This order risks circumventing the judicial system while subjecting institutional practices to an incompetent bureaucracy of political appointees who will likely serve a greater agenda in their governance; thus Executive Order 13864 undermines the very principles it purports to represent.

¹ “Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people to peaceably assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend I.

² Julian N. Eule, as completed by Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes A Curse*, 45 UCLA L. REV. 1537, 1543-45 (1998).

³ Exec. Order No. 13864, 3 C.F.R. 1104 (2019).

⁴ *Id.*

⁵ Zach Beauchamp, *Trump's Free Speech Executive Order Isn't About Free Speech*, VOX, (Mar. 21, 2019, 5:00 P.M.), <https://www.vox.com/policy-and-politics/2019/3/21/18275839/trump-free-speech-executive-order-turning-point-usa>. (discussing how one expert indicates this “basically amounts to reminding universities about existing law”) (referencing President Trump’s signing statement: “[u]nder the guise of free speech codes and safe spaces and trigger warnings, these universities have tried to restrict free thought, impose total conformity, and shut down the voices of great young Americans”); Beth McMurtrie, *Trump's Free-Speech Order Could Have Been Harsher. But Higher-Ed Leaders Still Don't Approve*, THE CHRONICLE OF HIGHER EDUCATION, (Mar. 21, 2019), <https://www.chronicle.com/article/Trump-s-Free-Speech-Order/245956> (noting that the President signed the order, while surrounded by students representing various conservative causes, and stated, “Now you have a president that is fighting with you. . . I am with you all the way. Universities that want taxpayer dollars should promote free speech, not silence free speech”).

⁶ Exec. Order No. 13864.

⁷ *Id.*

⁸ McMurtrie, *supra* note 5.

⁹ Eule, *supra* note 2, at 1543 (noting the constitutional rights as protected “only from government incursion”).

¹⁰ *Id.* at 1544.

¹¹ *Id.* at 1544 (discussing the Supreme Court’s “two-track analysis” in determining state action and noting where the defendant is not the state itself, a state action may be found where government “involvement, assistance, encouragement, authorization, or delegation, in the ‘action’ of nominally private parties can be fairly attributable to the state”).

¹² *Id.* at 1544-46.

¹³ *Id.* at .1549.

¹⁴ *Id.* at 1551 (noting the state action doctrine’s “pedigree is tainted by its historical use by segregationists as a shield for private racism. . . . More contemporarily, the state action doctrine—and the distinction between exercises of public power and private power that it presupposes—have been tarred as culprits in systematically disadvantaging women and entrenching the status quo”).

¹⁵ *Id.* at 1552.

¹⁶ *See generally* Powe v. Miles, 407 F. 2d 73 (2nd Cir. 1968). *See also* Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976) (noting that the Constitution does not provide public First Amendment protections in private spaces without a common law or statutory extension of protections).

¹⁷ *Marsh v. Alabama*, 326 U.S. 501 (1946) (permitting free press and freedom of religion to a trespasser on private property dedicated to public use); Steven P. Aggergaard, *The Question of Speech on Private Campuses and the Answer Nobody Wants to Hear*, 44 MITCHELL HAMLINE L. REV. 629, 644 (2018).

¹⁸ *Id.* at 502.

¹⁹ Eule, *supra* note 2, at 1554.

²⁰ *Marsh*, 326 U.S. at 509 (noting “when we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position”); Eule, *supra* note 2, at 1555.

²¹ *Id.*; *See Marsh*, 326 U.S. at 506-509.

²² Aggergaard, *supra*, note 17 at 646.

²³ See generally *Hudgens*, 424 U.S. 507 (1976).

²⁴ *Id.* at 519-20 (reviewing the holding in *Lloyd Corp v. Tanner*, 407 U.S. 551 (1972) that distributing leaflets protesting the Vietnam War at a privately-owned shopping center was not protected under the First Amendment).

²⁵ *Id.* at 516 (quoting *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)).

²⁶ See generally *Powe*, 407 F. 2d 73.

²⁷ *Id.* at 79.

²⁸ *Id.* at 80-81.

²⁹ *Id.* at 75.

³⁰ *Id.* at 82.

³¹ *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-42 (1982).

³² *Rendell-Baker*, 457 U.S. at 840 (acknowledging State responsibility for private action only when the State exerts “coercive power or has such provided such significant encouragement, either overt or covert”) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

³³ *Id.* at 842 (quoting *Jackson v. Metropolitan* at 353).

³⁴ *Id.* at 842.

³⁵ See generally *Id.*

³⁶ *Powe*, 407 F. 2d at 82 (noting that the court finds state involvement simply because the legislature “willed it that way”); *Hudgens*, *supra*, note 16 at 513; *Aggergaard*, *supra*, note 17 at 665 (noting “to date, only Pennsylvania and New Jersey supreme courts have used state constitutions to protect speech on private campuses and only in the narrow context of political events held open to the public”).

³⁷ *Marsh*, 326 U.S. at 506-509; *Eule*, *supra*, note 2.

³⁸ *Hudgens*, 424 U.S. at 516. (Black, J., dissenting).

³⁹ *Rendell-Baker*, 457 U.S. at 840.

⁴⁰ *Id.* at 841.

⁴¹ *Id.* at 842 (quoting *Jackson v. Metropolitan* at 353).

⁴² *Id.*

⁴³ *McMurtrie*, *supra* note 5.

⁴⁴ *Beauchamp*, *supra* note 5.

⁴⁵ *McMurtrie*, *supra* note 5.

⁴⁶ *Beauchamp*, *supra* note 5.

⁴⁷ *Id.*

⁴⁸ *Aggergaard*, *supra* note 17, at 635 (detailing how a protester who had been removed from an event for chanting and “shouting down” believed he was acting within his First Amendment rights.)

⁴⁹ *Id.* at 635-37.

⁵⁰ *Id.*

⁵¹ *Id.* at 636 (describing the Middlebury College event in which speakers on race issues were shouted down).

⁵² *Beauchamp*, *supra* note 5.

⁵³ *Id.*

⁵⁴ Exec. Order 13864.

⁵⁵ *Id.*

⁵⁶ *McMurtrie*, *supra* note 5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*