

## THE CHRONICLE REVIEW

# College Is Too Late to Teach Free Speech



André da Loba for The Chronicle Review

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College students demand speech codes against wounding words and microaggressions, and insist on rescinding invitations to provocative speakers. According to a 2015 Pew poll, 40 percent of millennials believe that society should prevent speech that offends minority groups.

This prompts the question: How do young adults arrive on campus with so little appreciation of free expression and the First Amendment? But the better question is: How *could* they have gained such an appreciation when their previous schooling did nothing to instill it and a lot to undermine it? Worse still, most colleges do little, if anything, to remedy that ignorance. Indeed, with speech codes sometimes stricter than those

of public schools, colleges only reinforce students' ignorance of, if not disdain for, crucial free-speech principles.

Over the past decade, I have asked my law students from around the country what rules governed student speech at their undergraduate institutions. They have repeatedly told me that until they studied the First Amendment in my course, they had no idea that they had a constitutional right to speak up on campus. Some report that their college limited demonstrations to designated "free-speech zones." Most did not realize that such restrictions turn the First Amendment on its head. The Constitution stipulates that virtually all public spaces are free-speech zones. If incoming law students misunderstand that, imagine how misinformed their peers studying other subjects must be.

Although many factors are probably at play, this blindness to a fundamental American right can be laid mostly at the feet of public schools, which the overwhelming majority of students in the United States attend, including those headed to college. Not only do public schools fail to teach the principles underlying free expression and dissent, but they also often censor and punish controversial constitutionally protected speech of all sorts. Whether inadvertently or by design, they teach that students should be insulated from upsetting ideas, intellectual conflict, and wounding words and images.

High-school officials routinely punish or censor students who criticize teachers, athletics coaches, or administrators; student reporters who uncover information that might embarrass the school district; and budding writers and artists for fiction and images that might disturb. School censors are equal-opportunity quashers of free minds. No ideological, political, or philosophical idea is immune from their reach: speech about war and peace; for or against abortion or LGBT rights; symbols like the Confederate flag; protests against racism; views on immigrants; and even pushback against the mandatory tolerance that sometimes verges on thought control.

Consider three examples. In 2016 an 18-year-old high-school senior in Palm Beach County, Fla., faced suspension when she refused to remove a "Hillary for Prison" T-shirt after classmates objected to her political views. Last fall school administrators from Florida to Alaska sanctioned teenage athletes emulating the NFL quarterback Colin Kaepernick's refusal to stand during the national anthem as a protest against racial injustice. And, unable to distinguish between harassment and a legitimate theological stance, a high-school teacher in Michigan removed Daniel Glowacki from a Spirit Day anti-bullying lesson after Glowacki objected to the message, explaining that, as a Roman Catholic, "I don't accept gays." Silencing dissent at school not only targets nonconformists but also insulates other students from exposure to a range of viewpoints.

Ominously, public schools increasingly claim jurisdiction to punish students for what they say off-campus, online, and outside of school hours, too. Middle- and high-school students have been suspended, expelled, sent to alternative schools, and confined as delinquents for online posts about mean hall monitors or bad teachers, or for crude satires at the expense of school personnel, even when the pages were labeled as jokes.

The state is all-powerful. That's the message when schools monitor kids 24/7 — in their own homes, at their own computers — and punish them for speech that doesn't violate any laws. Not only is such intrusion unconstitutional — the threat also acclimatizes students to authoritarian scrutiny and undermines expectations of privacy, autonomy, and communicative rights. The reality and the perception of risk lead students to censor themselves, sparing government officials the effort, much like college speech codes that target all forms of microaggressions, real and imagined, whether asking a peer where she grew up or making gestures or facial expressions that might offend.

**B**ut don't many of these cases concern legal gray areas?

No. Settled constitutional doctrine accords vibrant speech rights to public-school students. In fact, federal courts have recognized expressive rights for the youngest students that surpass those embodied in most college speech codes. As government entities, publicly funded educational institutions must comply with the free-speech clause. Many private colleges have also volunteered to live by free-speech principles.

Under the First Amendment, the government generally cannot punish people for what they say based on the expression's subject matter, viewpoint, or choice of words. To pass constitutional muster, such constraints must satisfy the highest level of scrutiny.

It's true that the government, in the form of school officials, has much greater leeway to inhibit what students say at school than it has over what adults say in public spaces. A school may censor a student's personal expression on campus, but only if it can show that it reasonably anticipated that the speech threatened to materially disrupt the school's functioning.

However, this "material disruption" rule is narrow. Grounded in sensitivity to the "special characteristics of the school environment," it emerged from a 1969 case in which the Supreme Court upheld the right of the Tinker siblings and a friend to wear black armbands protesting the Vietnam War. The court noted that school officials wanted to "avoid the controversy" the armbands might provoke. But, eschewing the logic of what we have come to know as "microaggressions," the justices rebuked officials who claimed they had acted in part to spare the feelings, and avoid the possible reactions, of students who were friends with a recent graduate who had died in the war. The court acknowledged that "any word ... that deviates from the views of another person may start an argument or cause a disturbance." But it starkly warned in language that resonates today: "Our Constitution says we must take this risk."

Increasingly conservative Supreme Court benches have since crafted a taxonomy that gives public-school educators much greater discretion to censor student expression that is lewd, appears to advocate the use of illegal substances, or is school-sponsored — meaning that it appears to be the speech of the school itself rather than of the student. But the material-disruption standard and the principles surrounding it continue to govern most personal speech by students.

Too many teachers, principals, and school-board members disdain this constitutional regime. Others simply don't know the law. Many teacher-training programs and graduate schools of education don't offer or require courses in education law. Even where school law is taught, the syllabi often omit students' First Amendment rights.

It's no wonder, then, that students arriving at college have only a dim grasp of the principles that underlie free expression. It's not just that they have been "coddled," as a widely noted article in *The Atlantic* argued. Too often, their first 13 years of school have not conveyed the importance of tolerating the controversial and sometimes offensive ideas the speech clause protects. Insults, group disparagement, and offensive speech targeting individuals are, naturally, a shock to young men and women who have been shielded from them.

The remedy is clear, if not easy: Public schools must allow free speech. That means allowing students to wear Confederate symbols unless a school has a history of serious racial conflict, including violent incidents. It means principals can't punish children who hurl racist and sexist insults at classmates unless the slur is accompanied by physical acts. If bullying consists of words alone — no matter how toxic — the speech clause usually protects the speaker and prevents the state from imposing punishment.

Take the teenager whose T-shirt proclaimed: "Homosexuality is a sin! Islam is a lie! Abortion is murder!" A federal court ruled that he had the right to wear the shirt, even though it could be expected to offend. Efforts to silence such sentiments in the name of supporting diversity led another judge to condemn the teacher who had "modeled oppression and intolerance" by telling Daniel Glowacki to leave the classroom because he resisted the day's lesson of tolerance for lesbian, gay, bi, and trans students.

Similarly, speech-clause principles bar government penalties for hate speech. There is "a very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech," as Justice Samuel Alito explained in an opinion holding that a high school's well-intentioned speech code violated the rights of student speakers. The scholar and federal appellate judge Richard Posner explained: There is "no hurt feelings defense" for a school that violates student speech rights to protect the vulnerable. All this explains why every single federal court that has reviewed a college code penalizing speech that could not legally be regulated in other public places has ruled that the code violates the First Amendment.

The Constitution requires more resilience from K-12 students than those college codes expect of undergraduates, and more than some of today's college students expect of themselves. It asks students, whether they're 6 or 26, to use the traditional constitutional responses to vile speech: Walk away, don't listen, or respond, as Justice Brandeis famously advised, with more and better speech. When schools violate the speech clause by punishing group disparagement and the use of slurs, they not only abuse their power but also mislead students into thinking that the state will use its coercive powers to shelter them from abusive words in the future. That gives them false expectations for later in life, and ill-prepares them to respond to offense and abuse when it happens, whether from a colleague, a stranger on the street, or an ideologue on TV.

It's crucial to note that none of this renders schools powerless to respond to intentionally hurtful speech. Nothing stops officials, whether at public schools or public colleges, from promoting sensitivity, tolerance of difference, and civil behavior. And nothing keeps them from finding ways to turn volatile moments that divide communities into teachable moments designed to educate students while expanding speech rather than curtailing it.

When an alumnus invited the white nationalist Richard Spencer to speak at Texas A&M in December, the university's president led by example, scheduling a counter event at the same time across the street, drawing a crowd several times larger than the one that attended Spencer's talk.

Such approaches leave students free to speak out against expression that wounds them, to confront peers whose words or Halloween costumes offend, and to demand action or retractions from administrators, as did the Yale student captured on YouTube accosting the faculty head of her residential college. (After all, free expression requires faculty members and administrators as well as students to grow thick skins.)

Free expression in college is a matter not just of law but of mission: to promote critical thinking in teaching, learning, and research; grappling with unsettling views and information; keeping an open mind; challenging long-held truths; and seeking to refine and articulate new, more complex understandings. "A good university," as the First Amendment scholar Harry Kalven put it, "like Socrates, will be upsetting."

Living with free speech is like many other life skills — tying shoelaces, shooting baskets, parallel parking. It requires practice. We should not expect college students to champion free expression if no one has taught them how or explained to them its meaning and history. To ensure that understanding, public schools must do what the Constitution demands of them: Allow students to learn liberty by living it. Until then, colleges should remediate their students' constitutional illiteracy.

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