

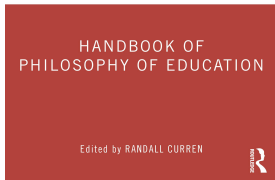
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Sigal Ben-Porath, Dustin Webster

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FREE SPEECH AND EDUCATION

Sigal Ben-Porath and Dustin Webster

In perhaps the most well-known American student free speech ruling, the Vietnam-era case of *Tinker v. Des Moines* (1969), Justice Abe Fortas, writing for the majority, struggled to strike a balance between protecting the rights of students who engage in war protest, and leaving school officials the latitude to manage their institutions. The Court decided that student speech should be protected unless it “materially and substantially” interfered with the school day and with its constructive learning environment (505). In this case the school failed to show that the speech in question – wearing black armbands – created such an interference. Since the ruling, the protections of *Tinker* may have eroded, but this central tension has remained as a powerful way to understand how free speech functions in educational institutions.

Speech protections and restrictions in educational institutions are distinct from the general protection of speech in a democracy: the latter reflects the dignity of all participants, and the humility necessitated by their equal fallibility in the search for truth; but in educational settings, in addition, speech regulations need to align with the institutional mission. To do so, the regulation of speech is considered against the broader demands of an institution operating within a democratic legal, constitutional, and political context. These sometimes conflicting pressures, and the diverse ways in which some of them are interpreted by policy-makers, educational practitioners, citizens, and courts, all contribute to the struggle over the boundaries of speech in education.

Advocates of unalloyed free speech tend to present restrictions on speech as inimical to the purposes of education, as well as to the foundations and rules of democracy. Their views are sometimes described as the “marketplace of ideas” model (Chemerinsky & Gillman 2017; Strossen 2018), and are firmly grounded in John Stuart Mill’s sweeping defense of free speech. Mill puts forward his arguments for not merely tolerating but actually embracing freedom of expression because nobody is infallible, and we should thus remain open to the possibility of finding truth in marginal views; even an opinion that is generally erroneous may contain either a grain of truth that would enrich prevailing opinions, or when it is wholly misguided, can challenge those who hold correct views to examine the reasons for their beliefs. The rational grounds of our views are more readily discernible when our views are challenged, even by false critiques. In the absence of vigorous debate, “the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct” (Mill 1859/1947: 59). This view informs contemporary liberal scholarship and jurisprudence, laying ground for the liberal argument for the inclusion of even false and harmful views in the marketplace of ideas.

This approach frames much of the scholarship on free speech in education. Two preeminent legal scholars in the field, Erwin Chemerinsky and Howard Gillman (2017) argue that “campuses never can censor or punish the expression of ideas, however offensive, because otherwise they cannot perform their function of promoting inquiry, discovery, and the dissemination of new knowledge” (Chemerinsky & Gillman 2017: 19). The unrestricted free and open exchange of ideas is for liberal champions of free speech important enough so as to include a defense of hate speech in educational institutions, since the difficulty in defining the boundaries of hate speech are such that attempts to regulate it will remain overly broad, and “risk punishing people based on political viewpoint or worldview” (104).

At the other side of the spectrum, advocates of inclusion and civility make the case for speech restrictions that preserve a constructive learning environment by preventing harms which speech might potentially cause. While notable scholars like Alexander Meiklejohn (1948) hold that the democratic interest in both individual and institutional speech stems from their epistemic contributions to self-government, public discussion on protecting free expression and some key court cases have focused on defending hateful and exclusionary forms of expression. Rejecting the unregulated marketplace of ideas, some contemporary scholars see little reason to protect within the context of education expression that can readily be recognized as hateful, bigoted, or patently false. This type of speech, they suggest, clashes with the goals of learning: epistemically, it clashes with the prioritization of truth; and socially, it clashes with the inclusion of all members of the learning community (Scott 2019; Roth 2019). Miranda Fricker sees harms and lies as often overlapping in this context: “prejudice presents an obstacle to truth, either directly by causing the hearer to miss out on a particular truth, or indirectly by creating blockages in the circulation of critical ideas” (Fricker 2007: 32). This implies that bias and prejudice can often be silenced with little cost, contrary to the “counterspeech doctrine” articulated by Justice Louis Brandeis, who argued in *Whitney v. California* (1927) that, “if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence” (377). For Fricker and others (Dotson 2011; Solorzano et al. 2000) who observe that words can also cause harm, Brandeis’s vision still requires differentiating between ideas that merit a response and those that have so little value or cause such harm that they should be restricted rather than engaged, particularly in educational settings.

We focus this chapter first on the value, purpose, and justifications for protecting free speech in education. We identify two core values to protecting speech in educational settings: an epistemic value, or value based on the mission of schools and universities to produce, introduce, and disseminate knowledge; and a civic value, or value anchored in the social and democratic mission of education. We then consider the justifications for setting general boundaries for speech, as well as specific ones first in K-12 (or primary and secondary) schools, and then in higher (or post-secondary) educational institutions. The context of K-12 education intensifies tensions around speech regulation. In the K-12 years children are compelled by law to attend school, and the adults supervising them in public schools are agents of the state. Young children do not enjoy the same rights and privileges afforded to adults, and even in higher education students are often considered to be citizens in formation rather than full social participants. Epistemic and democratic ideals require that in these circumstances, knowledge production and dissemination organize the regulation of speech in ways that facilitate open inquiry and exchange, prioritize evidentiary practices and rigorous study, and aim to include all members in an ongoing conversation.

The Value of Free Speech in Education

Speech in education is protected in different ways, and for different reasons, from the general protection of speech in a democracy. The defense of free speech in schools and universities is

broadly justified by two core arguments: first, that speech in education has an epistemic value, or value related to the process of intellectual development; and second, that speech in education has a social and civic value, or value related to the cultivation of democratic citizens. While the two types of values – the epistemic and the democratic – are related, and in some aspects rely on each other, it is useful to consider them in turn to clarify the ways in which free speech enables each of them.

Epistemic Value of Free Speech in Education

Mill famously notes that, “However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not living truth” (Mill 1859/1947: 34). Continuous examination of views and beliefs with an open mind is necessary for learning and growth. Even those ideas which may be wrong or objectionable, when allowed to enter into the discourse, present challenges that enable rethinking, refreshing one’s arguments in opposition, and a thoughtful rejection. This aspirational liberal perspective presents the exchange of views as central to an educational institution or a learning community, in which the expansion of one’s mind, and the critical and considerate assessment of facts and arguments, are core aspects of the mission. It assumes that educational institutions operate as reliable and equitable epistemic communities, in which learning is cooperative and symmetrical, and evidentiary practices guide everyone’s epistemic efforts (assumptions that can readily be challenged in non-ideal unequal, discriminatory environments, or ones in which misleading information is propagated). As epistemic institutions, schools and colleges need to provide the conditions for empowering students to expand their minds, and these rely on the critical assessment of beliefs. Encountering a broad range of ideas, theories, and visions is a significant aspect of helping students become careful critical thinkers, with a basic knowledge of the world and society around them. Such encounters are made possible and accessible to students when they take place within an atmosphere that encourages an honest and equitable engagement. Many of the protections of free speech in education are crafted so as to allow these epistemic and cognitive processes to take place.

The epistemic benefits of free speech in education are hence accrued through the introduction of diverse views in the curriculum or syllabus, as well as through maintaining an atmosphere of open inquiry in the classroom, where students and instructors feel welcome to share their views, interpretations, knowledge, and questions. The breadth of perspectives represented in both school and college courses is a matter of continual debate. Notably, ongoing “history wars” pull curricula between glorified and critical versions of national history (Taylor & Guyver 2012; Zimmerman 2005), while legislative and administrative efforts aim to regulate or restrict discussion about “divisive” or “corrupting” topics. The selection of subjects and perspectives reflects a set of evolving professional, political, and moral considerations. In teaching basic skills like reading, the same tensions arise, using literary texts or nonfiction paragraphs which represent views and experiences that would be familiar to some and new to others. Books are promoted or censored by political and administrative decisions (Berkowitz 2021); scientific theories are centered or discarded, sometimes with the advancement of knowledge, and sometimes not (Laats & Siegel 2021). The freedom of instructors to represent diverse views and voices in the curriculum is always bound by political and administrative guidance, but given the significance of representing a diverse set of perspectives in the curriculum and on syllabi, it is critical to the epistemic mission of education to preserve the freedom of curriculum developers, teachers, and instructors to use their professional judgement and expertise about these matters (Maxwell et al. 2019).

The importance of freedom in selecting class materials and facilitating discussion is easy to recognize when considered against contexts in which these are absent. In the United States, some Christian Evangelical schools teach books which decry American moral decline and celebrate Christian nationalism as the moral alternative to “immoral philosophies” such as multiculturalism,

globalism, and environmentalism (Greenawalt 2005: 174–176). These schools may be successful in limiting their students' exposure to values that they find harmful, at the cost of the opportunity to develop independent thinking. Other religious schools limit instruction to worksheets, eliminating the open exchange of views among students (Dwyer 2001: 194), whereas some “no excuses” schools control student speech to the point of silencing (Golann 2021). These illustrations of restricted curriculum and discussion highlight the epistemic significance of freedom of speech in the classroom: absent such freedom for both teachers and students, the epistemic benefits of education dwindle, leaving students ill-informed and lacking in the skills and attitudes required for conscientiously and critically assessing views and perspectives, and for developing independent thinking.

Exposure to a broad range of ideas is a core aspect of the epistemic development of students at all levels of education. This process might generate discomfort and intellectual challenges, which are juxtaposed by some with the sense of safety that students demand (Lukianoff & Haidt 2019). However, such safety is often a precondition to students' ability to participate in the learning community with its opportunities for growth and evolution of thought (Ben-Porath 2017; Callan 2016).

An atmosphere that supports the positive epistemic development of students starts with treating all students as “knowers” to a similar degree, namely, as people who have some knowledge, whose knowledge may be worth sharing or considering, and who are capable of obtaining further knowledge through learning. Accruing the epistemic benefits of learning in educational institutions thus requires avoiding common forms of epistemic injustice, particularly the replication of power imbalances through presuppositions about the capacity of members of some groups to know or learn (Fricker 2007).

Academic Freedom and the Epistemic Value of Free Speech

Academic freedom, as defined and defended by the American Association of University Professors (AAUP), is established to bolster instructors' protection in sharing their knowledge to the benefit of their students' epistemic development. It is meant to protect researchers from political, institutional, and other pressures or threats as they work to contribute to the advancement of knowledge. The value and necessity of such freedom was articulated by the AAUP formally in a document known as the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*, which was prompted by the dismissal of two faculty at the University of Utah. John Dewey, president of the newly formed organization, saw it as imperative that faculty be provided with these protections.

Academic freedom protections reflect the established view that the epistemic value of free speech in education is beneficial not solely to students, who gain opportunities to expand their knowledge and challenge their beliefs. It is also essential to scholars and researchers, who rely on it as part of an infrastructure that protects open inquiry, as they expand the boundaries of knowledge to the benefit of society at large. Free inquiry is necessary for the search for knowledge, and academic freedom uses administrative mechanisms, like tenure, to protect scholars from being penalized for pursuing controversial lines of work and expressing unpopular views.

The AAUP (1915) declaration outlines three broad areas that are protected under academic freedom. These are: “freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action” (AAUP 1915: 20). The first two areas offer protections along with professional responsibilities related to the pursuit of knowledge. Freedom of research operates along with disciplinary standards and evidentiary practices; classroom speech and conduct are similarly constrained by professional norms and the mission of the institution. Hence, the value of academic freedom implies boundaries to its application. It might be tempting to think about academic freedom as functioning to protect the “marketplace of ideas” by allowing unpopular or unorthodox views to be presented, but at the same time it sets limits by not allowing certain types of speech. In this way, academic freedom is not entirely compatible with the marketplace framework (Reichman 2019).

The boundaries of protected ideas and actions are negotiated within the community of researchers, in a discipline or an institution. Academic freedom thereby maintains the autonomy of scholarly researchers. Yet, this autonomy does not come without tension, as deciding whether or not some speech or idea conforms to the standard of a discipline can also have a conservative or stifling influence. “Disciplinary communities provide the consensus necessary to justify academic freedom as a special freedom for faculty. But the inseparable other side of this regulatory and enabling authority is that it can suppress innovative thinking in the name of defending immutable standards” (Scott 2019: 52).

Perhaps where the tension between free speech and academic freedom becomes most apparent is when it comes to faculty engaging in extramural speech, or speech outside of their official capacity as a researcher and educator. These often reflect political tensions. For decades, “frequent and fierce debates about the nature of academic freedom have resulted from a systematic and sustained effort to discipline what some regard as an out of control liberal professoriate” (Finkin & Post 2009: 2). Ideological expression can raise difficult questions, particularly when a faculty member is speaking outside of their discipline or area of expertise, or engages in “epistemic trespassing” (Ballantyne 2019). When considering a controversial instance of such speech, Joan Scott (2019) says we must ask questions like, “Was there a responsibility to behave in a certain ‘academic’ manner even when one was exercising one’s rights as a citizen? Did the special right of academic freedom entail limits on the public right of free speech?” (Scott: 57). It seems likely that the public will in many cases assign more credence to the words of an academic with advanced degrees, regardless of the relationship of those words to that individual’s areas of expertise. Although Scott notes that thus far few argue that this means academics have a responsibility to restrict their extramural speech, it still raises difficult questions about the position of academic speakers and institutions in the public debate.

The Civic Value of Free Speech in Education

Presenting diverse ideologies, perspectives, and identities in the curriculum is not sufficient for fulfilling the aims of free speech in education, if discussion about them is stifled. The benefits of freedom of speech in education accrue not just from protections for teachers and instructors presenting diverse views, or simply from students sharing theirs, but also from the opportunity to consider, reflect, and debate these diverse views in the structured context of the classroom (Hess 2009). In the early grades, students are introduced to the idea of a “persuasive essay” and taught how to express their opinions in a clear and compelling way. They learn about the scientific method and how information about the world is gathered and assessed. In the older grades, students are introduced to more advanced forms of rhetoric and the way in which the discourse of competing ideas functions for knowledge production. Higher education continues this mission by exposing students to a broader array of perspectives and methods of inquiry. All of these developmental opportunities require that students be exposed to new and diverse ideas, and also that they be able to freely express, try out, and revise their views.

An atmosphere of open inquiry, open expression, and open dialogue in education contributes to the development of key democratic civic traits, attitudes, and relations, which can be understood together as the civic value of free speech. Hess and McAvoy (2015) argue that the benefits of such open discussion extend even to the inclusion of issues in the classroom that might otherwise be considered “empirically closed,” or no longer the subject of meaningful debate within the relevant community of experts. They provide the example of a student who may deny the reality of climate change. Rather than censor such views immediately, the teacher can use the situation as an opportunity to engage students in a discussion around the difference between political and empirical questions and how empirical questions are settled, even if they ultimately do not entertain an actual debate about whether climate change is real or not in the classroom (McAvoy & Hess 2013: 39).

During primary and secondary education, civic education is one of the explicit aims of schooling (Coleman 1998), an aim that can be advanced by focusing on democratic pedagogical practices as well as training students in the deliberative skills that are necessary to participate in a democracy (Gutmann 1999). This aim also extends to higher education where, as students develop into young adults, they are able to more independently engage in the habits and routines that mark being a citizen in a democratic, pluralist society.

Strengthening students' capacities to make their voices heard in the democratic context in an informed and effective way is both pressing and feasible. Yet, in the United States as in some other democracies, the erosion of speech protections for students (Ross 2015) and teachers (Maxwell et al. 2019) intensifies the challenges to implementing proven democratic pedagogical practices that sustain free speech in service of its civic value. Since no one is born with the skills and knowledge required to be an engaged citizen, political content, speech, and debate are needed to sustain this unique form of government (Hess & McAvoy 2014). Democracies everywhere easily slip into trouble: they become polarized, steeped in disinformation, their civic infrastructure erodes, and their citizens become distrustful of government and of each other. We need "active citizens who care about democracy and are willing to work for it," but this requires cultivation of "the requisite traits" (Hart & Youniss 2018: 57).

In *Our Common Purpose* the authors indicate that beyond "names and dates ... The American citizen today must be prepared to acknowledge our nation's mistakes, to recognize that we have grappled over time to improve our imperfect union, to find pride in those struggles, and to recognize that, at our best, everyone is included ... citizens today must be able to deal with ongoing debate and argument, be able to engage in debate, find compromise ..." (AAAS 2020: 63). The centrality of open expression, as a broad commitment by the school rather than as a topic for a lesson plan, is the key to this type of civic education. Students could be taught about this directly, particularly by learning the history of student open expression. This exposure to the evolving boundaries of their own speech could begin to illustrate to them why it is important. But students also need the ability to exercise this right themselves.

The habits of democracy, which are shared, civic, and social, must be developed through a shared process of truth-seeking and open discussion, so that students can overcome the single-minded pursuit of conspiracy theories, and the polarizing effects of self-segregation and mistrust. Sharing the process of information production, assessment, and distribution – sharing the judgement of what is reliable and what should be shared – can produce trust, if done within broad and clear norms of speech and exchange. To enable the development of democratic civic skills, schools need to maintain a robust context for students to voice and share their views. Strict and punitive boundaries that focus on strict hierarchical structures of authority do not allow students to develop the connections and the capacity and inclination to engage across differences, which is necessary for democratic revitalization.

While student speech on political and scholarly topics might be most evidently important, other speech is similarly deserving of protection. Criticizing school and other institutions, and forming social relations through an open exchange of views and sharing of experiences, both contribute to the civic attitudes and skills that sustain democracy.

Public schools serve the vast majority of students in many democracies, so protecting speech in these institutions facilitates the development of civic skills across students from all backgrounds and walks of life, although notable differences exist in the quality of civic instruction and outcomes. Meira Levinson describes what she calls a "civic empowerment gap": the alignment of active participation in democracy with citizens' class, whereby upper classes participate more in voting and other formal civic practices; and similarly with race and educational level, which themselves are aligned with class background (Levinson 2012). One of the vectors that expresses and exacerbates the difference in civic skills development is the more open and discursive schools typical of upper

and middle class neighborhoods, and the more restrictive and authoritative contexts available to most poor, minority, and working class children (Anyon 1981; Ben-Porath 2007; Golann 2021). In post-secondary or higher education, students further develop their political voices and civic skills. In this context, broad speech protections are necessary for unpopular and unorthodox views to be voiced and considered, allowing mainstream, popular, and orthodox views to be questioned and tested. Contemporary struggles regarding the boundaries of legitimate expression at universities need to be understood and addressed in light of the expansion of this mission, and the changing social and political environment in which it takes place. Polarization and the geographic separation of different groups results in limited exposure of young people to competing worldviews and to increased distrust of those who hold them. Higher education continues to carry the torch of developing young citizens, which is handed off to them after the high school years.

The Educational Boundaries of Speech

The right to speak freely, like all rights, has boundaries, enshrined in laws and legal precedents as well as institutional practices and social norms. In many democracies, libel and defamation, breaches of intellectual property, harassment, and incitement to violence are among the impermissible forms of expression. In educational settings, additional considerations can reasonably curtail speech. Such limitations are most commonly based on three types of considerations: administrative requirements; harm and exclusion; and the goal of seeking true knowledge.

Administratively, speech regulation can result from professional and institutional expectations: teachers in public schools can be compelled to speak to the curriculum that is prescribed to them, regardless of general legal protections against government compelled speech; student newspapers can be censored by administrators, thus not benefitting from press freedom protections; professors can be required to read attendance, or abide by other administrative practices, regardless of free speech or academic freedom protections. While administrative regulations on speech are sometimes taken as technical and often go without a challenge (Fish 1994), they can also create public and normative complications, as with the case of requiring that instructors use students' correct pronouns in class (Meriwether v. Hartop 2021).

Hence, administrative boundaries sometimes arise in reference to the core mission of the institution and relate to the key normative considerations relating to the core mission of educational institutions: including all members in the process of learning and expanding true knowledge. Consequently, speech can be organized so as to prioritize true or reliable speech over inaccurate, misleading, or fraudulent speech; and speech that undermines the ability of some students to participate as equal members of the learning community might be regulated. Note that we say "prioritize" and "regulate" rather than prevent, censor, or punish. There are many options short of hardline restrictions that are available to educational institutions when dealing with acts of speech that might be seen as challenging or in some way harmful. Considerations related to truth and to inclusion need to be weighed against their costs, and enacted, within the boundaries of local laws, in a way that aims to maintain both a commitment to an expansive and open exchange of views, and to ensuring that this exchange is grounded in disciplinary evidentiary practices (or, is advancing true knowledge), and is accessible to all students, allowing them to engage with it and respond to it (or, is inclusive).

Arguments for limiting speech rely on the foundational idea that for some speech, the harm it causes is enough to justify its restriction. The notion of harm has been central to the liberal debate at least since it was articulated by Mill, who notes that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (Mill 1859/1947: 9). With this, Mill provides both the suggestion that speech is capable of doing harm, and also that harm is a reasonable justification for its restriction. While this articulation may seem quite broad in that the case can be made that all sorts of speech cause some kind of

“harm,” it should be noted that Mill is sometimes understood to have envisioned “harm” as a more limited concept, and thus to have claimed that the right to speak freely is not necessarily limited even when words cause harm (Jacobson 2000; D’Orazio 2020).

But what qualifies as “harm” that justifies restricting speech? The answer is highly contested, even in the case of extreme and hateful speech (Post 2009). Hate speech – protected in the United States under the First Amendment, but legally restricted in most other democracies – is commonly perceived as causing harm. Some argue that this epistemic and social harm is reason enough to restrict it, especially in educational settings: “In evaluating hate speech, we are not just weighing the civil standing and dignity of victims against the supposed self-revealing autonomy of hate speakers. We are weighing an illusory gain in autonomy for hate speakers, against a very real loss in autonomy for their targets. Hate speech is bad for everyone’s autonomy: the speakers, and the spoken against” (Langton 2016: 868). Beyond preserving one’s autonomy, perceiving all members of a learning community as equal in their capacity to make contributions as knowers and speakers is the foundation of true inclusion in a school or campus. In this way, the unique harm of hate speech in the context of education, especially that which is aimed at a particular group, is that it can undermine a group member’s ability to fully participate in the social or educational community, effectively limiting their access to learning. Paradoxically, the protection of expressions of hateful rhetoric can function as a restriction on the ability of others to express themselves in an equal way.

Beyond inclusion, the educational mission of learning and knowledge production also suggests possible limitations on speech. Cornel West and Robert P. George, two eminent scholars who represent opposing ideological views, claim that “All of us should be willing – even eager – to engage with anyone who is prepared to do business in the currency of truth-seeking discourse by offering reasons, marshaling evidence, and making arguments” (George & West 2017). In this, West and George aim to prioritize truth, and to permit speech that might be hurtful, if it is part of the truth-seeking mission of the institutions. Prioritizing truth in educational settings is in itself a principle that can justify restrictions on speech. Some have argued that patent lies and distortions have no room in the classroom, and that misleading views – holocaust denial, anti-science stances, and the like – should not be represented in the curriculum or in educational settings. Universities’ truth-seeking mission implies that they have a responsibility to restrict certain ideas or to not welcome certain speakers. “Every day, universities exclude some ideas from debate while inviting others. Before we look at which kind of speech gets invited, we need to understand that this vetting process in the university is not a secondary matter in the speech debates, but essential to everything we value in education” (Baer 2019: 11).

In sum, beyond the administrative regulation of speech in classrooms, educational institutions regulate speech in alignment with their mission: they aim to protect inclusive environments and to avoid harm, so that all members are able to equally participate in the learning community; and they prioritize truth-seeking over the spreading of falsehoods and misinformation. The specific boundaries of each of these limitations continue to be contested. Below we look at some of these contests, first in K-12 and then in higher education.

Boundaries of Speech in K-12 Schools

The boundaries of K-12 speech as reflected in Court decisions as well as in policy and practice are influenced by the fact that students are children, and thus are not afforded the same speech (and other) rights as adults. That allows for further regulation of speech, beyond what is acceptable in higher education or in broader society. Children are perceived to have less knowledge, and to need greater protection from harm than adults, therefore expanding the reach of both justifications for regulation.

The rich legal history of speech in education cannot be explored in full here, but it is useful to outline the arc of legal decisions about speech in schools to frame the role that core values play in the

process, from bringing a case to court, to the court's decision, and on to its impact on education policy. The legal treatment of free speech in schools varies across countries: in the United States, the contemporary history of how the courts have dealt with speech in education, particularly in K-12 education, provides an example of how "mission" can imply boundaries. As noted above, the *Tinker* test set by the Court decided that speech which would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" could be prohibited. The school's mission is to educate its students, and thus, interfering with that mission by sufficiently disrupting the conditions in which that education occurred established the "learning environment" boundary. In *Tinker*, speech won the day, but since then, the courts have continuously restricted students' speech rights by expanding the scope of what is required for a suitable learning environment. In that, the Courts have generally not taken minors to be citizens deserving of full constitutional protections, and whose views deserve to be heard. The Court in the decades since *Tinker* has restricted a student's right to engage in an innuendo laden political campaign speech for a classmate (*Bethel School District v. Fraser*, 1986); students' rights to cover controversial topics such as teen pregnancy and divorce in their school newspaper (*Hazelwood School District v. Kuhlmeier*, 1988); and nonsensical student pranks, such as a student unfurling a banner at an out-of-school event reading "BONG HiTS 4 JESUS" (*Morse v. Frederick* 2007). The most recent decision at the time of drafting this chapter, however, represented a departure from this trend. In 2021, the Court upheld a student's right to use profanity on social media outside of school in expressing her frustration with her club sport placement (*Mahanoy Area School District v. B.L.*). This decision was narrow, and the Court left the door open for other out-of-school speech to be regulated, but significantly, for the first time since *Tinker* the Court sided with student speech, limiting the learning environment argument for school speech regulation.

Students may be young and often in need of greater protection and greater exposure to knowledge, but supporting the development of their voices is essential to the practice of education. As Paulo Freire (1970/1996) recognized, children should take part in the production of knowledge and not simply be seen as passive recipients. Freedom of speech in the classroom is foundational to this endeavor. The shifting boundaries of speech in schools reflect evolving social views on the capacity of children and youth to participate in knowledge production, and on the responsibility of schools to prepare them for their civic roles.

Boundaries of Speech in Higher Education

In 2014, the University of Chicago released their "Report of the Committee on Freedom of Expression" (Zimmer & Isaacs 2014), which has since become known as simply "the Chicago Statement." The report was prepared in response to incidents involving controversial speakers on various campuses, and briefly affirms the university's general commitment to free speech and open expression on campus. Based firmly in the marketplace of ideas defense of free speech, the report says in part that,

The University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose.

(Zimmer & Isaacs 2014)

It further expresses that though the right to protest speech is also protected, such protest cannot “obstruct or otherwise interfere” with the expression that the protestors find objectionable. The report was lauded by many who worried that in the effort to embrace inclusion and avoid harm to students, institutions of higher education had leaned too far toward restricting speech, for example by cancelling events and speakers, or enacting speech codes. The Chicago Statement, while seen as controversial by some (Whittington 2019: 55–56), was embraced by various organizations committed to free speech in higher education, including the Foundation for Individual Rights in Education (FIRE),¹ which tracks the dozens of institutions that have adopted it. It has also been embraced by some local governments in the United States and Canada that demand its endorsement by public institutions.

The implementation of free speech principles such as Chicago’s in higher education is complicated by the fact that many of these institutions are residential, and therefore function not only as learning environments but also as homes to their students. The regulation of speech in classrooms is distinct from that in dorms, and the understanding of speech in these contexts is often expanded to include expression in the naming of buildings, more broadly in the built environment, and in the social and civic meaning that those exude (Barczak & Thompson 2021). In class, the epistemic goals of free speech organize the boundaries of expression by prioritizing the production and dissemination of true knowledge. Outside of class, the social and civic benefits of free speech inform the boundaries of expression around the goal of maintaining an inclusive atmosphere.

As with other educational contexts, higher education institutions regulate speech according to their mission, and set boundaries related to the search for knowledge and truth, and to the aims of diversity and inclusion (and the related prevention of harm). It is commonly acknowledged in many institutions’ mission statements and practices that freedom of speech can be realized through the rejection of intolerance and through openness to dialogue. The freedom to express intolerant views remains a matter of struggle: universities are challenged to consider the price that some of their members pay for expressing controversial views, particularly on matters that are of ideological or cultural concern. As places where knowledge is developed and disseminated, universities require the freedom to inquire, question, and probe established views and new visions without fear of retribution or silencing. This freedom is central to research, to teaching, and to learning. Speech protections are therefore necessary if researchers and their students are to make the kinds of contributions that society expects them to make, and for which they join the university. At the same time, universities need to consider the uneven costs of hateful speech borne by some members of the community, and that the same groups tend to be the targets of such speech again and again (Roth 2019: 99).

It is notable that speech itself is a matter of ideological controversy, pushing some American undergraduates to argue that First Amendment rights are secure (Gallup 2020), while still nearly half of the surveyed students support some restrictions on speech. Many frame their concern around the threat that certain views pose to themselves or their peers, contrary to the common concerns in the late 60s, when students were mostly concerned about threats to their ability to express their dissenting views. Students “increasingly favor restrictions on speech that targets minority groups,” but also believe that “colleges should not be able to restrict expression of political views that are upsetting or offensive to certain groups” (Gallup 2020: 1). The diminished value students attach to the protection of speech indicates for some a dangerous slide toward authoritarian control of opinions, or a retreat to comfort that prefers to avoid challenges to the orthodoxy of the day. However, they might simply reflect a generational shift in focus, away from taking free speech as an orthodoxy in itself, and toward voicing greater concern regarding potential harms caused by open expression particularly on college campuses, especially in response to the politicization of the speech struggle in public, on social media, and in the courts. In this way, the concerns raised about the liberal vision of speech (as reflected by the Chicago Statement for example) might be misguided: free speech could

be strengthened and expanded by incorporating the diverse views of members of groups that were excluded either formally or effectively in the past, and ensuring that they enjoy a constructive learning environment.

That could mean that expressing certain views, particularly those that undermine participation in the campus discourse, can be justifiably restricted: “A campus visitor who argues that some students are inherently inferior, materially undermines the conditions that make speech free” (Baer 2019: 80). For leaders in higher education, a host of responses to such speech are possible, from prohibiting or censoring speech, to clearly expressing their opposing values, and to actively supporting speech by students or other visitors who better reflect those values. In cases of bigoted, biased, and otherwise controversial views, speech can legitimately be seen as exclusionary and thus as undermining the equal standing of diverse members of the community. Focusing on these marginal cases can be helpful to improving a university’s practice and its climate, but it also distracts from the fact that for the most part the two values go hand in hand, especially in the higher education context. In these marginal cases, a framework of inclusive freedom distinguishes between speech that is based in an effort to take intellectual risks, and to explore new (even unpopular) ideas, and on the other hand, speech that is causing dignitary harms by expressing ideas that are silencing and marginalizing, compounding existing forms of exclusion and discrimination (Callan 2016).

Conclusion

Freedom of speech in education has both epistemic and civic-social value and this value justifies broad protection of diverse ideas and forms of expression at all levels of education. The boundaries of speech in education include administrative, democratic, and legal restrictions, and incorporate additional regulations aimed at maintaining a constructive learning environment, as appropriate to the mission of the educational institution. The commitment to open expression and the commitment to inclusion are commonly portrayed as being in tension with one another, and indeed they sometimes collide, particularly around the expression of biased views that threaten to harm some members of the community. But overall, this exaggerated dichotomy contributes to the politicization of speech, and fails to reflect the ways in which schools and colleges regularly incorporate commitments to inclusion into their open expression practices. Educational institutions honor both inclusion and open expression by ensuring a robust and open inquiry in which all can equally participate, or, through a commitment to inclusive freedom. The aims of education are tightly linked with the value and practice of free and open exchange of ideas, in which all can be seen as contributors, and all can participate in the production and dissemination of knowledge. Free speech in education, with its epistemic and civic benefits, is thus a foundational aspect of education theory, policy, and practice.

(Related Chapters: 10, 11, 25, 27, 28, 29, 31.)

Note

1 <https://www.thefire.org/>

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