



Campus Free Speech Protection

A policy white paper

Texas Conservative Coalition Research Institute
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Executive Summary

Despite constitutional guarantees, the rights to speak freely and to freely associate on college campuses are in peril. At an increasing rate, campus speech codes impose burdens ranging from a chilling effect to outright censorship of communication. The Lone Star State is not immune from this troubling trend.

The Legislature should re-affirm the state's commitment to open and robust dialogue on college campuses, including speech some may find offensive. Interacting with students from different walks of life who hold different views on a broad array of topics is one of the many benefits of higher education, and students should not be sheltered from or denied that opportunity because the views of some students are unpopular or controversial. To achieve these ends, the Texas Legislature should consider passing a law similar to those passed in Missouri and Virginia, and force public colleges and universities to revise their speech codes in order to conform with the U.S. and Texas constitutions.

Ultimately, passing laws to protect free speech is only the first step in ensuring that our society does not neglect the concept. Albert Einstein realized that “[l]aws alone cannot secure freedom of expression; in order that every man may present his views without penalty, there must be a spirit of tolerance in the entire population.”¹ Ultimately, as George Orwell noted, freedom of speech – the cornerstone of our democracy – must be valued by the populace or not at all:

The relative freedom which we enjoy depends of public opinion. The law is no protection. Governments make laws, but whether they are carried out, and how the police behave, depends on the general temper in the country. If large numbers of people are interested in freedom of speech, there will be freedom of speech, even if the law forbids it; if public opinion is sluggish, inconvenient minorities will be persecuted, even if laws exist to protect them.²

The public opinion of the future is being shaped by today's professors and student bodies – and they have shown an alarming disinclination to maintaining a free society, one that does not punish opinions departing from the prevailing liberal orthodoxy. If a free society is to endure, our laws, society, and culture must do everything possible to restore free speech on campus.

¹ Albert Einstein, *Ideas and Opinions* by Albert Einstein (1954).

² “Freedom of the Park,” George Orwell, *Tribune*, December 7, 1945.

Introduction

The First Amendment to the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech[.]”³ The Texas Constitution, inspired by the guarantees of its textual predecessor, goes further, guaranteeing that “[e]very person shall be at liberty to speak, write or publish his opinions on any subject,” and “no law shall ever be passed curtailing the liberty of speech.”⁴

Despite these guarantees, which in textual terms are absolute, speech is becoming less free, particularly on college campuses. Common today are speech codes that subject students to censorship and disciplinary action for expressing controversial or unpopular views. In the past, these differing opinions and beliefs have been valuable parts of the college experience. Today, some university administrators, faculty, and students view them as antagonistic and of little value.

This trend is part of a larger attack by elements of the post-1960’s Left on the core American ideals of tolerance and free expression protected by the First Amendment. Herbert Marcuse, a foundational “New Left” thinker, argued for replacing tolerance of all ideas with a “discriminating tolerance” that “would mean intolerance against movements from the Right and toleration of movements from the Left.”⁵ He specifically called for the limitation of free expression at universities, calling for:

[T]he **withdrawal of toleration of speech** and assembly from groups and movements which promote aggressive policies, armament, chauvinism, discrimination on the grounds of race and religion, or which oppose the extension of public services, social security, medical care, etc. Moreover, the restoration of freedom of thought may necessitate **new and rigid restrictions on teachings and practices in the educational institutions** which, by their very methods and concepts, serve to enclose the mind within the established universe of discourse and behavior — thereby precluding a priori a rational evaluation of the alternatives. And to the degree to which freedom of thought involves the struggle against inhumanity, restoration of such freedom would also imply **intolerance toward scientific research** in the interest of deadly “deterrents,” of abnormal human endurance under inhuman conditions, etc.⁶

This attitude, which now dominates at many college campuses, is antithetical to the promises of a free society, which is why state legislatures are taking action to correct it. The Texas Legislature should consider taking similar action in the 85th Legislative Session to address policies that are no longer compatible with the historically high value placed on free speech and are inconsistent with constitutional guarantees to that end.

Free Speech Rights in Higher Education

It is well established that students of all ages are protected by the First Amendment. Indeed, “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their

³ US Const. amend. I.

⁴ Tex. Const. Art. I, Sec. 8.

⁵ “Repressive Tolerance,” Herbert Marcuse, 1965, in *A Critique of Pure Tolerance* by Robert Paul Wolff, Barrington Moore, Jr., and Herbert Marcuse (Boston: Beacon Press, 1969), pp. 95-137. Available online at: <http://www.marcuse.org/herbert/pubs/60spubs/65repressivetolerance.htm>

⁶ *Ibid*, emphasis added.

constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.”⁷ That statement was made in an opinion by Justice Abe Fortas in 1969, making that holding “unmistakable” for nearly a century now in 2016.⁸ Specifically relating to higher education, the Supreme Court has held:

[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”⁹

Indeed, the Supreme Court has held that First Amendment protections on campus are necessary for the preservation of our democracy.¹⁰ Thus, there can be “no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”¹¹

At private institutions, the discussion is more nuanced. For example, the policies at the Latter Day Saints institution Brigham Young University provide that “[T]he exercise of individual and institutional academic freedom must be a matter of reasonable limitations. In general, at BYU a limitation is reasonable when the faculty behavior or expression seriously and adversely affects the university mission or the Church.”¹² Nevertheless, courts have generally found that the relationship between a student and a private university is contractual, and universities are generally held accountable for the commitments they make to students in handbooks and other policies – which can provide legal grounds to enforce students’ free speech rights at such institutions.¹³

Despite the Supreme Court’s robust protection of free speech under the First Amendment, the grounds of acceptable discussion on many university and college campuses today are severely limited. University of California President Janet Napolitano has warned, “[W]e have moved from freedom of speech on campuses to freedom from speech. If it hurts, if it’s controversial, if it articulates an extreme point of view, then speech has become the new *bête noire* of the academy.”¹⁴ The motivations for imposition of speech limitations vary. University of Chicago President Robert Zimmer, who has been a champion for student free speech rights, has written:

The attack is sometimes driven by a desire of an individual or group not to have its authority questioned. Other times it derives from a group’s moral certainty that its particular values, beliefs or approaches are the only correct ones and that others should adhere to the group’s views. Some assert that universities should be refuges from

⁷ *Tinker v. Des Moines Independent Community School Dist.*, 939 F.2d 988 (1969).

⁸ Although there have been limitations developed in more recent cases, including an educational institution’s being allowed to regulate “indecent” speech (*Bethel School District v. Fraser*, 478 U.S. 675 (1986)), and speech promoting the usage of illegal drugs (*Morse v. Frederick*, 551 U.S. 393 (2007)).

⁹ *Papish v. Board of Curators of University of Missouri*, 410 U.S. 667 (1973).

¹⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

¹¹ *Widmar v. Vincent*, 454 U.S. 263 (1981).

¹² Source: Foundation for Individual Rights in Education (FIRE) at: <https://www.thefire.org/in-court/state-of-the-law-speech-codes/>

¹³ *Id.*

¹⁴ “It’s time to free speech on campus again,” Janet Napolitano, Boston Globe, October 2, 2016. Online at: <https://www.bostonglobe.com/opinion/2016/10/01/time-free-speech-campus-again/v5jDCzjuv710Mc92AhaAqL/story.html>

intellectual discomfort and that their own discomfort with conflicting and challenging views should override the value of free and open discourse.¹⁵

Incidents of suppressed speech on campus have become drastically more common in just the last two years. For example, when Erika Christakis, Associate Master¹⁶ at Yale University's Silliman College, sent residents a 2015 email suggesting that the issue of cultural appropriation in Halloween costumes was nuanced, it set off months of campus protest and a petition by members of the faculty and the student body for Erika and her husband Nicholas Christakis, the college master, to step down.¹⁷ When Nicholas suggested to a student protester that part of his duty was to challenge students intellectually, the student responded in part:

Who the f*** hired you?! You should step down! If that is what you think about being a master you should step down! It is not about creating an intellectual space! It is not! Do you understand that? It's about creating a home here. You are not doing that!... You should not sleep at night! You are disgusting!"¹⁸

In May of 2016, dogged by months of controversy, Nicholas and Erica Christakis resigned.¹⁹ In a nearly contemporaneous sequence of events, there were months of protests at the University of Missouri in 2015-16. They lacked a clear focus but alleged that the administration was insufficiently focused on the problem of racism on campus, citing a handful of incidents involving individuals who may or may not have been students.²⁰ Many students reported feeling intimidated by campus protesters, especially after messages appeared on social media with suggestions such as "#Mizzou black students need to stop protesting and start killing."²¹ The protesters not only condemned disagreement with their views but even attempts to cover the story; when a student journalist attempted to film one such event, a *journalism professor* – Melissa Click – who was participating in the protest shouted: "Who wants to help me get this reporter out of here? I need some muscle over here."²² Ultimately the protesters succeeded in forcing the resignation of system president Tim Wolfe, who said that "[t]his is not the way change should come about," calling on the community to stop yelling at each other and start listening to each other.²³

¹⁵ "Free Speech Is the Basis of a True Education," Robert Zimmer August 26, 2016. Online at: <http://www.wsj.com/articles/free-speech-is-the-basis-of-a-true-education-1472164801?tesla=y>

¹⁶ A residential advisor position.

¹⁷ "The Perils of Writing a Provocative Email at Yale," Conor Friedersdorf, the Atlantic, May 26, 2016. Online at: <http://www.theatlantic.com/politics/archive/2016/05/the-peril-of-writing-a-provocative-email-at-yale/484418/>

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ "The incidents that led to the University of Missouri president's resignation," Elahe Izadi, Washington Post, November 9, 2015. Online at: <https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/the-incidents-that-led-to-the-university-of-missouri-presidents-resignation/>

²¹ "Mizzou Records Show Students Feared Violence and Felt Targeted by Protesters," Jillian Kay Melchior, April 20, 2016, online at: <http://www.nationalreview.com/article/434260/mizzous-protesters-frightened-many-campus>

²² "I Need Some Muscle": Missouri Activists Block Journalists," Austin Hoguelet and Daniel Victorov, New York Times, November 9, 2015. Online at: <https://www.nytimes.com/2015/11/10/us/university-missouri-protesters-block-journalists-press-freedom.html>

²³ Izadi, *supra*.

Texas Campus Speech Policies

Abuses of speech rights occur on Texas campuses as well. The Foundation for Individual Rights in Education (FIRE), which “reads through the rules governing student speech at more than 400 of our nation's biggest and most prestigious universities “ every year in order to document and rate campus speech policies, does not rate a single university in Texas with their “green light” status, indicating the highest tolerance for free speech.²⁴ Several public universities – including the University of Texas at Austin, the University of Houston, and the University of North Texas – have been designated with “red lights,” indicating that they have at least one policy that both clearly and substantially restricts freedom of speech.²⁵ Others, including Texas A&M College Station, Texas Tech, and Texas State – San Marcos, have been designated with a yellow light, indicating at least one ambiguous policy that too easily encourages administrative abuse and arbitrary application.²⁶ The speech codes at many of these institutions are open to abuse.

At the University of Texas at Austin, “rude or harassing correspondence” may result in disciplinary probation, suspension from the university, or criminal prosecution, among other penalties.²⁷ At Sam Houston State University (SHSU), “displays that tend to incite a breach of the peace” and “evinced some obviously offensive manner” is provided as an example of “campus disruptive activities or disorderly conduct[,]” a third instance of which triggers an automatic expulsion and ineligibility to attend any school college, or university receiving funds from the State of Texas for the subsequent two-year period.²⁸ At the University of Houston (U of H), “epithets or slurs, negative stereotyping... [and] denigrating jokes” are defined as examples of harassment, violations of which may lead to an investigation and “sanction[s] imposed on the student [that] will be determined by and imposed by the Dean of Student’s Office or its equivalent...”²⁹ It is all too easy to imagine an innocent joke or an unconscious generalization leading to the punishment of speech on campus – and as will be seen below, this attitude at U of H led to the punishment of a student government official who dared to assert that “all lives matter.”

Policies restrictive of speech rights are imposed at private universities in Texas as well. At Rice University, a private institution, “unsolicited information that... panders to bigotry” may not be sent by email.³⁰ Such language might be broad enough to capture mainstream conservative positions, as some on the Left and in academia argue that it is a form of racism to oppose to “affirmative action” admission or hiring policies which take race into account.³¹ At Southern Methodist University, also private, each student living in campus housing must sign a statement indicating that “I understand that any activity

²⁴ FIRE: Using the Database. Online at: <https://www.thefire.org/spotlight/using-the-spotlight-database/>

²⁵ FIRE: Campus spotlight for Texas schools. Online at: <https://www.thefire.org/spotlight/?y=TX>

²⁶ *Id.*

²⁷ “Office of the Chief Information Officer: Acceptable Use Policy,” March 11, 2016. Available at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2004/01/30000000/Acceptable-Use-Policy--UT-Austin-ISO.pdf>

²⁸ Sam Houston State University Information Technology Services Acceptable Use Policy, September 22, 2016, available online at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/09/30071946/shsu-IT.pdf>

²⁹ University of Houston Discrimination and Harrassment Policy, February 16, 2016, online at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2004/06/22000000/Microsoft-Word-01D07.pdf>

³⁰ Rice University General Policy No. 832-99, Appropriate Use of Computer Resources, March 11, 2016. Online at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2013/10/28032546/Appropriate-Use-of-Computer-Facilities--Rice-University.pdf>

³¹ See, e.g., “How Colorblindness Is Actually Racist,” Dani Bostick, Huffington Post, July 11, 2016, online at: http://www.huffingtonpost.com/dani-bostick/how-colorblindness-is-act_b_10886176.html; “Colorblind Ideology Is a Form of Racism,” Monnica T. Williams, Psychology Today, December 27, 2011, online at: <https://www.psychologytoday.com/blog/culturally-speaking/201112/colorblind-ideology-is-form-racism>.

that has a negative impact on others will not be tolerated.”³² Texas Women’s University (TWU) provides that “[u]sers must not intentionally access, create, store, or transmit material which TWU may deem offensive....”³³ This and more information about speech codes at Texas campuses is compiled in an appendix below.

These examples openly repudiate the idea that speech can be valued and contextualized in the marketplace of ideas. The nature of these policies not only allows arbitrary enforcement on a case-by-case basis without any predictability on the part of the speaker, but it provides a mechanism by which certain viewpoints can be prioritized based on the whims of the moment.

Violations of Free Speech Rights on Campuses in Texas

Blinn College – Limiting the Time, Place, and Manner of Free Speech

More specific examples better illustrate the problem. Consider the case of Blinn College student Nicole Sanders, who was working to charter a Young Americans for Liberty chapter at the Brenham campus. She spent about 90 minutes in front of the student center in February 2015 with a sign that read “Defend Gun Rights on Campus.”³⁴ At the time, extension of the privilege to bear firearms on campus (“campus carry”) was a divisive issue being debated during the 84th Legislative Session.³⁵

Sanders was confronted by a campus administrator and three armed police officers who informed her that she did not have the needed “special permission” to express her views.³⁶ The official reportedly stated: “I don’t know that you can get special permission [to advocate for gun rights]... on campus, I’m not so sure.”³⁷ Sanders requested clarification from another administrator who sent her copies of a college policy requiring student organizations to obtain permission a month in advance for most on-campus expressive activity, which even thereafter must be conducted within a designated “free speech zone.”³⁸

Free speech zones are a particularly pernicious tool of university bureaucracies that set aside limited public places for public protesting in order to regulate the time, place, and manner of public expression. Approximately one in six universities in America – including many in Texas – have created such

³² Residence Life & Student Housing: Community Standards- Disruptive Behavior, October 21, 2016. Available online at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2015/11/01040000/Community-Standards-for-Residents-SMU.pdf>

³³ University Policy Manual: 9.01 Computer & Software Acceptable Use Policy, last reviewed May 2013. Online at: <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/06/30111448/Computer-and-Software-Acceptable-Use.pdf>

³⁴ “Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs ‘Special Permission’.” Foundation for Individual Rights in Education, May 4, 2016. See: <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission/>

³⁵ The bill, ultimately signed into law, prohibited public institutions of higher education from adopting rules specifically prohibiting license holders from carrying handguns on the institution’s campus. While many considered the bill an important affirmation of the constitutionally protected right to bear arms, at least five self-identified university faculty and administrators, as well as several students, testified against the bill in the Senate committee.

³⁶ “Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs ‘Special Permission’.” Foundation for Individual Rights in Education, May 4, 2016. See: <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission/>

³⁷ *Id.*

³⁸ *Id.*

policies.³⁹ At Texas Tech University, for example, a single 20 foot-diameter gazebo was established as a “free speech zone” for a campus of 28,000 students. Following litigation in 2003-4, a federal judge struck down the policy as a violation of the First Amendment rights of affected students.⁴⁰

As the Houston Chronicle noted, “the size of Blinn's free speech zone is smaller than most. The lawsuit alleges it’s roughly the size of a parking space.”⁴¹ Sanders sued Blinn, challenging its restrictions on free speech, including its “free speech area” policy which required all expressive activity to take place in an area comprising less than 0.0007 percent of the 62-acre campus.⁴² She also challenged a policy requiring that college officials approve all materials distributed on campus.⁴³ In May 2016, Blinn settled, agreeing to revise its policies and pay Sanders \$50,000 in damages and attorney’s fees.⁴⁴ Blinn students may now engage in “peaceful assembly and expressive activity in outdoor common areas of the College District,” which include plazas and walkways, and if more than fifty students are expected to participate, must provide 24 hours’ notice of the event to the campus administration.⁴⁵

Texas Christian University – Suspending a Student for Offending a Nonstudent on the Internet

In another recent incident, Texas Christian University (TCU) student Harry Vincent was penalized for alleged racially charged comments on his personal Facebook and Twitter profiles about hot-button issues such as riots in Baltimore and the Islamic State.⁴⁶ A nonstudent living in Maryland used her personal Tumblr internet page to start an internet-based campaign against him on April 28, 2015.⁴⁷ Within *a single day* of the Tumblr post, Associate Dean of Campus Life Glory Z. Robinson charged Vincent with violating two student conduct code provisions: “Infliction of Bodily or Emotional Harm” and “Disorderly Conduct.”⁴⁸ Following “investigative meetings” conducted on May 1, mere days after Vincent’s original comments were posted, Robinson directed Vincent to write a letter of apology and detail the punishment that he felt would be appropriate.⁴⁹

Robinson announced on May 8 that Vincent would be placed on a “Suspension in Abeyance” through August 15, 2016, and on “Disciplinary Probation” through his graduation.⁵⁰ The apology letter and proposed punishment Vincent had been directed to write were used as evidence of Vincent’s guilt.⁵¹ Under the terms imposed, Vincent can only attend his classes and may not reside on campus, participate

³⁹ “Free Speech Zones on Campus,” Foundation for Individual Rights in Education, available online at:

<https://www.thefire.org/pdfs/5bed6be4733c1eb18e3adec122073a22.pdf>

⁴⁰ Associated Press State and Local Wire, October 2, 2004, online at:

https://d28htnjz2elwuj.cloudfront.net/pdfs/5151_3594.pdf

⁴¹ “Student sues Blinn College, says ‘free speech zone’ violates First Amendment,” Benjamin Wermund, Houston Chronicle, May 20, 2015. Online at: <http://www.houstonchronicle.com/local/education/campus-chronicles/article/Student-sues-Blinn-College-says-free-speech-6275705.php?t=cb53f0e96f7b6b599e&cmpid=twitter-premium#photo-8015836>

⁴² “Victory: Texas College Settles Free Speech Lawsuit After Telling Student That Gun Rights Sign Needs ‘Special Permission’.” Foundation for Individual Rights in Education, May 4, 2016. See: <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission/>

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ “Blinn updates policies regarding student expression, facility usage.” Blinn College, Mya 10, 2016. Online at:

<https://www.blinn.edu/news/2016/may/Blinn-updates-policies-regarding-student-expression-facility-usage.html>

⁴⁶ See: <https://www.thefire.org/texas-christian-university-tramples-students-rights/>

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

in any co-curricular activities, or utilize any non-academic facilities on campus; he must also complete a course on “Issues in Diversity,” complete 60 hours of community service, and meet with Robinson regularly.⁵² A panel of TCU faculty and administrators denied Vincent’s appeal on July 16. In a July 24 letter formalizing the decision, Student Conduct and Grievance Committee Chair Lynn K. Flahive stated: “[t]he choices you made caused harm to other individuals. These types of comments are not acceptable at TCU....”⁵³

The University of Texas at Austin – Operating a “Thought Police” System to Report on “Offensive” Student Behavior

At the University of Texas at Austin, a “Campus Climate Response Team” (CCRT) has existed since 2012 to enable students, university employees, campus visitors and contractors to report “campus climate incidents” to the Orwellian-named “Office for Inclusion and Equity.” The CCRT’s website, hosted on the University’s publicly funded .edu domain, calls for students and others to report “offensive” conduct by their fellows, with text that virtually shouts:

- Do you know of a student organization hosting a party with a racist theme?
- Have you seen derogatory graffiti on bathroom walls and buildings regarding sexual orientation or gender identity and expression?
- Have you overheard malicious threats intended to intimidate another person because of their religion?
- Are you worried that somebody has created a hostile or offensive classroom environment?
- Do you have concerns about a campus climate incident but you are not sure what to do?

If so, please contact the Campus Climate Response Team by submitting your concerns using the Campus Climate Incident Online Report Form.⁵⁴

In 2013, UT fraternity Phi Gamma Delta hosted an off-campus party that had what was variously described as an “Old West,” “South of the Border” or “Border Patrol” theme, and included party-goers wearing sombreros and ponchos. The CCRT received multiple complaints about the incident and the university launched an immediate investigation.⁵⁵ Ultimately, the Dean of Students determined that no campus rules were violated at the party, with the official UT account responding to a query on Twitter that “[w]hile the behavior doesn’t mirror UT core values, it’s within students’ right to freedom of speech at private off campus event.”⁵⁶

In October of 2016, a student-led movement has arisen to *ban* the Young Conservatives of Texas (YCT) on the University of Texas campus, where it has been active since the 1970’s. For the second time in recent years, YCT satirized university admission practices that take race into account with an “affirmative action bake sale” - goods were sold based on the purchaser’s race and ethnicity.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Campus Climate Response Team, University of Texas at Austin. Online at: <http://diversity.utexas.edu/ccrt/>

⁵⁵ See e.g., “Theme party spurs UT fraternity investigation,” Lindsay Bramson, February 9, 2015, online at: <http://kxan.com/2015/02/09/university-of-texas-frat-investigated-after-theme-party-complaints/>

⁵⁶ “Fiji ‘border patrol’ party did not violate University rules, administrators say,” Daily Texan, Samantha Ketterer, March 2, 2015. Online at: <http://www.dailytexanonline.com/2015/03/02/fiji-border-patrol-party-did-not-violate-university-rules-administrators-say>

“Hispanics,” “Native Americans” and “African Americans” were sold goods at lower prices compared to “Asians” and “Whites,” who were given the highest prices.⁵⁷

On the day of the bake sale alone, 178 complaints were filed with the CCRT.⁵⁸ Within days, a petition circulated by student Guneez Ibrahim identifying the bake sale as a “hate crime” and calling for the university to prohibit the organization had obtained more than 800 student signatures.⁵⁹ Explaining the rationale for the petition, University-Wide Representative Ashley Choi argued that:

When [universities] don’t have concrete policy defining what constitutes a hate crime, a lot of the lines get blurred, and a lot of the racist, misogynistic, homophobic and transphobic incidents happening on campus are disguised as freedom of speech or academic freedom... Because of [this] a lot of organizations, especially Young Conservatives of Texas, have been getting away with this kind of racist disaster.⁶⁰

The impulse of students like Ibrahim and Choi is to suppress views that they find disagreeable – notably, those related to the issues of race relations and sexual identity. On November 1, 2016, like-minded members of the University of Texas Student Government filed a resolution calling for the University to ban and YCT and to “respond to future incidents of bias on campus with the possibility of punitive action such as putting an individual or organization on disciplinary probation, suspending them or expelling them from campus.”⁶¹ The proposal was immediately “fast-tracked” by a sympathetic student government.⁶²

YCT has remained adamant about their rights, providing in a statement that “YCT-UT will not be deterred by liberal elites that would love nothing more than to silence conservative, common sense voices on campus... We will continue to speak out against policies that are harmful or give preferential treatment based on nothing more than immutable characteristics.”⁶³ Ultimately, under threat of legal action by YCT to protect the organization’s rights, the University came down on the side of the Constitution. UT’s statement on the matter provided: “A role of the university is to help its students understand and respect the rights of free speech. The ‘bake sale’ event last week was an example of the exercise of free speech. No students or organizations will be punished for that display.”⁶⁴

The University of Houston – Enabling Student Government to Sanction a Student for Opposing the Political Goals of “Black Lives Matter”

In yet another recent incident, the University of Houston Student Government Association (SGA) Vice President, Rohini Sethi, was sanctioned by her peers in the Student Senate for a comment on her private

⁵⁷ “Student-created petition calls for removal of Young Conservatives of Texas from campus,” Van Nguyen, Daily Texan, October 28, 2016.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ “UT student government wants to ‘disband’ Young UT Conservatives for ‘hate-filled’ bake sale,” College Fix, College Fix staff, November 2, 2016. Online at: <http://www.thecollegefix.com/post/29750/>

⁶² *Id.*

⁶³ Nguyen, *supra*.

⁶⁴ College Fix staff, *supra*.

Facebook page: “Forget #BlackLivesMatter; More like #AllLivesMatter.”⁶⁵ This comment was posted within five hours of the fatal shootings of five Dallas Police officers who were protecting a Black Lives Matter protest.⁶⁶ Although Sethi deleted the post shortly thereafter, the Student Senate voted (13-2 with one abstention) to give SGA President Shane Smith the power to suspend or otherwise sanction Sethi. Writing that “the first amendment does not protect people from receiving other consequences [besides jail] for what they say, including workplace discipline....” Smith ordered the following disciplinary consequences for Sethi:⁶⁷

1. A fifty day suspension from all SGA activity.
2. Mandatory attendance of a three-day sensitivity workshop.
3. Mandatory attendance of three cultural events at UG which “should include... the Black Student Caucus...”
4. A letter of “reflection” demonstrating that Sethi understands how her speech affected the SGA and broader university.
5. A public presentation by Sethi as to the “knowledge she has gained about cultural issues facing our society” at a subsequent SGA meeting.

Not only has the SGA penalized Sethi for expressing her view that all lives matter, she is being forced to denounce herself and her own views and attest that she has adopted the views of her peers in power.

This type of activity on the part of government and its surrogates on public school campuses is precisely what the First Amendment is meant to protect against. Furthermore, it denies students the opportunity to hear differing views by sheltering them through censorship. That is at odds with one of the historical benefits of attending college—exposure to diversity of thought. As Justice Louis Brandeis wrote, the Founders understood that only a society that valued freedom of speech could maintain stability, social cohesion, and the protection of minorities:

[The Founders] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.⁶⁸

Each of the circumstances noted above is different. At Blinn College, the time, place, and manner of speech was restricted to a small area. At TCU, a student was punished for expressing controversial political and social views in an off-campus setting. At the University of Texas at

⁶⁵ “Student body vice president writes a ‘forget Black Lives Matter’ post, and a university erupts,” Cleve R. Wootson, Jr., Washington Post, August 1, 2016. Online at: <https://www.washingtonpost.com/news/grade-point/wp/2016/08/01/student-body-vice-president-writes-a-forget-black-lives-matter-post-and-a-university-erupts/>.

⁶⁶ *Id.*

⁶⁷ “Vice President of UH’s SGA Sanctioned for BLM Comments,” ABC 13, Houston, July 30, 2016. Online at: <http://abc13.com/education/uh-student-leader-sanctioned-for-black-lives-matter-comments/1449956/>

⁶⁸ *Whitney v. California*, 274 U.S. 357 (1927).

Austin, the administration has created a mechanism for students and faculty to report on each other for expressing non-politically-correct views, which has tended to be a vehicle for Left-wing students to recommend censorship and discipline of those expressing right-wing views on issues such as “affirmative action” and immigration. And at the University of Houston, a student government punished elected members who did not agree with the Left-wing orthodoxy on the “Black Lives Matter” movement. All are instances showing a campus environment that is not friendly towards unpopular speech, and especially speech that disagrees with Left-wing political views – speech that too frequently leads to harassment and censorship in the modern academic setting, even in Texas.

Legislative Solutions

As has been written in *Forbes Magazine*, “[a] good argument can be made that nowhere in America is free speech less safe than on private college and university campuses.”⁶⁹ Unfortunately, there is zero question but that the Texas Legislature currently spends billions of taxpayer dollars to fund universities which have policies that have been applied to squelch views that contradict Left-wing philosophies. This situation is intolerable and requires immediate action by the Legislature.

State legislatures are taking action against the First Amendment encroachments on college campuses. In 2015, for example, Missouri passed the Campus Free Expression Act, providing that “[a]ny person who wishes to engage in noncommercial expressive activity on campus shall be permitted to do so freely, as long as the person's conduct is not unlawful and does not materially and substantially disrupt the functioning of the institution....”⁷⁰ Where a university violates these expressive rights, the aggrieved person would be expressly empowered to file legal action to recover compensatory damages and attorney and court costs.⁷¹

Somewhat similarly, Virginia in 2014 passed a bill prohibiting public universities from restricting speech at outdoor areas of the campus unless the restrictions are (a) reasonable, (b) justified without reference to the content of regulated speech, (c) narrowly tailored to serve a significant government interest, and (d) leave open ample alternative channels to communicate the information.⁷²

Texas students should be granted the right, as provided in Missouri and Virginia, to engage in noncommercial expressive activity without undue restriction so long as the conduct is not unlawful and does not substantially disrupt the university’s functioning. As importantly, Texas must provide protections against a student being penalized solely on the basis of the perceived offensiveness of speech by another student, a faculty member or university administrator, or any other individual. Where a student is penalized solely for the expression of thoughts which are unpopular with an individual or violate the Left-wing political norms on campus – as is occurring today at both public and private universities in Texas – the university is no longer a place of either learning or freedom. Texas students deserve better.

⁶⁹ “Where Speech Is Least Free In America,” George Leef, *Forbes*, December 17, 2015. Online at:

<http://www.forbes.com/sites/georgeleef/2015/12/17/where-speech-is-least-free-in-america/#1bad9bea64a9>

⁷⁰ Missouri Revised Statutes 173.1550.

⁷¹ *Id.*

⁷² Code of Virginia §23-9.2:13.

Tiny “free speech zones” actually restrict the ability of students to express their views freely, inside and outside the classroom; the entire campus should be a zone where speech is celebrated in order to encourage learning and the free exchange of ideas.

Appendix A: FIRE Speech Code Ratings of Texas Schools

The Foundation for Individual Rights in Education (FIRE) states that:

An overwhelming majority of colleges and universities across the country deny students the rights they are granted under the First Amendment or institutional promises. Every year, FIRE reads through the rules governing student speech at more than 400 of our nation's biggest and most prestigious universities to document the institutions that ignore students' rights—or don't tell the truth about how they've taken them away.

None of the Texas institutions rated by FIRE received their highest “Green Light” rating. Some of the policies that FIRE is concerned may limit students’ rights to free expression are listed below:

Institution	Speech Code Rating	Suspect Policies Include:
Angelo State University	Yellow ⁷³	Students engaged in freedom of expression activities may be subject to disciplinary action under the Code of Student Conduct for the following actions: ... Activities that include the use of obscenities, libelous statements, or “fighting words,” as defined by law.
Rice University	Red ⁷⁴	[U]nauthorized use [of computers] includes, but is not limited to the following types of activities. Harassment or threats to specific individuals, or a class of individuals: * Transmitting unsolicited information that contains obscene, indecent, lewd or lascivious material or other material which explicitly or implicitly refers to sexual conduct. * Using e-mail or newsgroups to threaten or stalk someone. * Transmitting unsolicited information that contains profane language or panders to bigotry, sexism, or other forms of prohibited discrimination.
Sam Houston State University	Red	Campus disruptive activities (see subparagraph 5.4) or disorderly conduct... include but not be limited to: using abusive, indecent, profane or vulgar language; making offensive gestures or displays that tend to incite a breach of the peace; perpetrating fights, assaults, acts of sexual violence, abuse, or threats; or evincing some obviously offensive manner or committing an act that causes a person to feel threatened.
Southern Methodist University	Yellow	<u>Residence Life & Student Housing: Community Standards- Disruptive Behavior:</u> I understand that any activity that has a negative impact on others will not be tolerated.
Tarleton State University	Yellow	The following activities are prohibited: * Sending email that is intimidating or harassing
Texas A&M University – College Station	Yellow	Bias/hate related events are those actions or behaviors committed that involve the intentional selection of a victim based on their

⁷³ Yellow light colleges and universities are those institutions with at least one ambiguous policy that too easily encourages administrative abuse and arbitrary application.

⁷⁴ A red light university has at least one policy that both clearly and substantially restricts freedom of speech.

		membership in a group identified by race, ethnicity, disability, religion, national origin, ancestry, age, gender, or sexual orientation.
Texas Southern University	Yellow	When communicating with others via the University computer system, ensure that communications reflect high ethical standards, mutual respect and civility.
Texas State University – San Marcos	Yellow	Sexual Harassment is any unwelcome verbal, nonverbal, written, electronic or physical behavior of a sexual nature directed at someone, or against a particular group, because of that person’s or group’s sex, or based on gender stereotypes...
Texas Tech University	Yellow	Examples of inappropriate behavior that may constitute unlawful sexual harassment include, but are not limited to... gender-based threats, discrimination, intimidation, hazing, bullying, stalking, or violence...
Texas Women’s University	Red	Users must not intentionally access, create, store, or transmit material which TWU may deem offensive, indecent or obscene (other than in the course of academic research where this aspect of the research has the explicit approval of the TWU official processes for dealing with academic ethical issues).
University of Houston	Red	Harassment — Defined as subjecting an individual on the basis of her or his membership in a Protected Class to unlawful severe and pervasive treatment that constitutes: * Humiliating, abusive or threatening conduct or behavior that denigrates or shows hostility or aversion toward an individual or group; * An intimidating, hostile or abusive learning, living or working environment or an environment that alters the conditions of learning, living or working; or * An unreasonable interference with an individual’s academic or work performance. ... Harassment that satisfies this legal standard includes, but is not limited to, epithets or slurs, negative stereotyping, threatening, intimidating or hostile acts, denigrating jokes and display or circulation (including through e-mail) of written or graphic material in the learning, living or working environment.
University of North Texas	Red	Sexual Harassment – unwelcome conduct of a sexual nature including but not limited to unwelcome sexual advances, requests for sexual favors, sexual violence and other verbal, nonverbal or physical conduct of a sexual nature.
University of Texas at Arlington	Red	Sexual harassment is defined by the Equal Employment Opportunity Commission (EEOC) and the courts to be any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when... such conduct has the purpose or effect of unreasonably interfering with the individual’s employment (or the student’s educational experience) or creating an intimidating, hostile, or offensive academic environment.

University of Texas at Austin	Red	<p>Be civil. Do not send rude or harassing correspondence. ... What are the consequences for violating the rules listed in Section V of this document?</p> <p>Punishment for infractions includes, but is not limited to: * Verbal warnings * Revocation of access privileges * Disciplinary probation * Suspension from the university * Criminal prosecution</p>
University of Texas at El Paso	Yellow	The following activities are, in general, prohibited: ... Sending unsolicited e-mail messages
University of Texas at San Antonio	Yellow	Disciplinary proceedings may be initiated against any student for any of the following acts or violations: ... engages in an inappropriate or disproportionate use of an information technology resource owned or controlled by the University or System or uses an information technology resource for an illegal, threatening, or disruptive/destructive purpose; prohibited conduct includes but is not limited to circumventing system or network security, committing copyright infringement, transmitting unsolicited e-mail