

Diversity and Free Expression in Higher Education

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Introduction

Across the United States today, college campuses face two major distinct but interrelated challenges. The first is a legislative threat. Since 2021, state legislatures have enacted 15 laws or policies in 11 states that directly undermine university autonomy and academic freedom. As of this writing, 119 legislative restrictions on higher education have been introduced in 34 states since 2021, and there are now 14 states with such a legislative or policy restriction. The second threat has to do with how university administrators and other campus stakeholders respond to political tensions on campus in a manner that upholds both the prerogatives of inclusivity and robust protections for academic freedom. This article examines these two challenges in tandem, offering guidelines for how to champion academic freedom and free expression while simultaneously fostering inclusive campus communities. Both goals, we argue, are crucial to upholding higher education's democratic mission.

The first part of this article explores the genesis and proliferation of this legislation and then offers a vision for how to defend against it. We then turn to the question of how universities can uphold robust protections for free speech and academic freedom for a wide range of views while simultaneously working to ensure students from all backgrounds feel included and have an equitable opportunity to access and participate in the learning environment. While the norms of inclusivity and freedom sometimes conflict with one another, we argue that these two sets of precepts are not inherently incompatible. In fact, scholars such as political theorist Sigal Ben-Porath argue that these aims can actually buttress one another (Ben-Porath, 2017). We urge university stakeholders to foster open and respectful exchange and to acknowledge the harms of certain forms of speech and how this can leave students feeling threatened or unmoored. Without

prohibiting such speech, we provide concrete guidance on how universities can try to remedy the harmful impact of said speech by equipping campus professionals with the tools to engage in productive dialogue across differences. Doing this is vital to furthering higher education's democratic mandate and, ultimately, will buttress the higher education sector against attempts to undermine it.

Educational Gag Orders

PEN America calls legislation that undermines academic freedom *educational gag orders*, because this nomenclature aptly captures the actual and intended effect of these bills, which is to stifle free expression. Beginning in 2023, a growing number of censorial bills have focused instead on restricting various aspects of university governance, including curricula, tenure, accreditation procedure, and the right of a university to open or operate an office or initiative that promotes DEI. These bills do not meet PEN America's definition of educational gag orders, but we still consider them censorial. Educational gag orders emerged in response to the political environment of 2020 (PEN America, 2021). That year, the United States underwent something that could be termed a "racial reckoning." The *New York Times*' 1619 Project, which places slavery and racism at the center of US history, quickly became one of the top-read features the *Times* had ever published; it was subsequently adapted into a curriculum and, eventually, a book. The protests spurred by the police killing of George Floyd catapulted issues of police brutality and racial discrimination to the forefront of the nation's attention. In an "equity backlash" response to Americans' newfound willingness to reckon with the history of racial prejudice, think tanks like the Manhattan Institute and the Heritage Foundation and conservative activists such as Christopher Rufo began to deploy the term *critical race theory*, which is a school of legal thought that foregrounds the embeddedness of racism in United States institutions, as a catch-all for all discussions of race that made them uncomfortable (on critical race theory, see Delgado & Stefancic, 2023; White, 2022). This vague deployment of the term would come to form the basis of many of the early educational gag orders, which were premised on the inaccurate allegation that critical race theory was being used to indoctrinate schoolchildren.

In September 2020, President Donald Trump signed Executive Order 13950, "Combating Race and Sex Stereotyping" (Executive Office of the President, 2020). This order consisted of a list of concepts that could not be taught in diversity trainings in government agencies in the federal government. While many of the imperatives it contained seemed reasonable—for example, the idea that diversity trainers should not teach that one race is superior to another—the order was worded in an intentionally vague manner to chill discussion of racism and other forms of inequality. Executive Order 13950 was stayed by a court in September 2020 and repealed by President Joe Biden on the first day he took office. However, the language it contained soon appeared in state-level legislation aimed at schools and colleges, promoted by conservative think tanks. The first educational gag orders were thus grounded in the language of Executive Order

13950 and the manufactured panic over CRT. The victory of Glenn Youngkin as Republican governor of Virginia in November 2021 helped spur the proliferation of educational gag orders. Youngkin ran a campaign that focused on these issues. In the aftermath of his election, the number of educational gag orders spiked dramatically, jumping from about 55 bills introduced in 2021 to 150 in 2022 (Friedman et al., 2023).

The impacts of this legislation on education are dire. Replicating the ambiguous language of Executive Order 13950, educational gag orders have wide-ranging implications for free expression across academic disciplines. Most obviously, they implicate discussions of race, racism, and gender in history, ethnic studies, and literature courses. However, the impacts are not relegated to the humanities. In sociology and other social sciences, as well as in certain STEM fields such as economics and statistics, the study of racial and other forms of inequality have or could become targets (Knowles, 2021; Golden, 2021; AAUP, 2023).

Similarly, in business courses, the study of racialized employment disparities could come under fire. In medicine, training in family planning and abortion provision could land professors in hot water (Gluckman, 2023). Beyond the classroom, student groups such as Black student unions could be banned or refused university funding (Minta & Harrison, 2022). These impacts are not merely hypothetical; survey data show that professors in states where educational gag orders have gone into effect report fear of teaching their subjects and discussing their research (Woo et al., 2022; Woo et al., 2023; American Association of University Professors (AAUP), 2023; PEN America, 2023).

Even in states where only bills targeting K-12 schools have become law, higher education has been affected. Teacher training, student teaching, and continuing education for teachers are affected, and so are concurrent enrollment and early college credit programs. Perhaps the most significant impact is that K-12 students may arrive at college unprepared for college-level work, not having been offered a thorough education in the world they live in. Ultimately, educational gag orders, whether at the K-12 or postsecondary level, may hinder students from becoming fully informed citizens in a democratic, pluralistic society. In sum, the effects of educational gag orders are far-reaching across the disciplines and the educational span and pose a dire threat to the health of American democracy.

In 2023, the form and content of the assault on higher education morphed significantly (PEN America, 2023). In place of educational gag orders that directly restrict classroom teaching, the 2023 state legislative sessions produced an onslaught of bills that strike at the heart of university governance and autonomy, or what some scholars term *institutional academic freedom*: the institutional apparatus that supports individual academic freedom (Cain, 2023). Together, these two instantiations of academic freedom are fundamental to the full, robust realization of academic freedom. Here we draw from scholars such as Henry Reichman (2021) who argue that

while academic freedom is expressed most overtly in the form of individual faculty members' right to free expression in matters of teaching, research, and extramural speech, the rights afforded by academic freedom are, ultimately, ancillary to a more fundamental aim: that of allowing universities to meet their democratic obligations to the public by disseminating and cultivating knowledge and critical inquiry. Under this legislation, all manner of decision-making that would normally be left to individual institutions— such as hiring and firing decisions, decisions about tenure, and decisions about institutional stances— would fall under state authority. Ohio's SB 83, which nearly passed in June 2023 and came close again in December 2023, would have mandated an extreme version of institutional autonomy for public colleges and universities, prohibiting university administrators from opining on issues as generic as sustainability, marriage, or inclusion. A dean celebrating the unveiling of a new sustainable roof for her building or a hospitality program advertising an LGBTQ+ wedding venue during Pride Month could run afoul of this law. And if SB 83 had passed, students could have faced mandatory discipline for "violating the intellectual diversity rights" of anyone on campus, including senior administrators. According to the American Association of University Professors, a national higher education advocacy group whose statements on academic freedom constitute to the most widely understood conceptualizations of the category, university students, like professors, deserve robust protections for expression, speech, and association (AAUP 1992; on the primacy of the AAUP in defining academic freedom, see Finkin & Post 2009 and Reichman 2021). SB 83 represents a clear violation of students' academic freedom.

In their effort to undermine institutional academic freedom, lawmakers set their sights on diversity, equity, and inclusion (DEI) initiatives. For example, Florida's SB 266, which became law in May 2023, bars public institutions of higher education from allocating public funds to initiatives that "advocate for diversity, equity, and inclusion, or promote or engage in political or social activism" (as cited in PEN America, 2023). In response to this legislation and its implementing regulations, the University of North Florida has eliminated its women's, LGBT, intercultural, and even interfaith centers (Stofan, 2024). Texas's SB 17 bans DEI offices and initiatives and restricts accreditors' ability to enforce diversity standards. It is likely that the 2024 and 2025 state legislative sessions will produce more bills that ban DEI initiatives, dismantle gender studies programs, restrict accreditation, provide state governments with unprecedented authority over hiring and firing, and undermine tenure.

Fighting Back

Educational gag orders are written in a profoundly vague manner. They ban everything and nothing. The vagueness is intentional because the purpose of these bills is rarely to be legally enforced. Direct enforcement does occur, but rarely. Instead, this legislation is designed to be enforced via over-compliance and administrative censorship (Pollock et al., 2022). The other problem is self-censorship: teachers and professors become too afraid to teach their material.

It is imperative that teachers, professors, and administrators avoid doing the censors' work for them. To be clear, we are not advocating that anyone break the law or imperil their job. But we encourage educators to continue teaching their subjects the way they ought to be taught, in accordance with scholarly and pedagogical expertise and disciplinary standards, without preemptively censoring themselves unless the institution or the law specifically forbids it.

University mission statements can be a useful tool here. As explained previously, states are beginning to undermine institutional autonomy in such a manner as to insert state control over university mission statements at public institutions. Nevertheless, at least in states where this is not the case, university mission statements usually clearly articulate the importance of diversity and of fostering a rich community of ideas. University professionals forced to defend their scholarly and pedagogical decisions should turn toward their university mission statements in their defense.

The United States is undergoing an assault on higher education with few parallels in our nation's history. This moment calls for a smart, strategic, multifaceted response from all those who have a stake in defending academic freedom. Polls show that roughly 75% of Americans, including majorities of Republicans, believe that what is actually taught in college and even high school history classes is appropriate and should not be restricted (Burkholder & Schaffer, 2021; Backus & Salvanto, 2022). Similarly, a majority of Americans support DEI initiatives (Minkin, 2023; McKown-Dawson, 2023). What, then, explains the proliferation of these bills? A few things. First, there is an intensity gap between the majority of Americans who support higher education and its right to govern itself and the minority of Americans who want to censor it. Those who support academic freedom see defending academic freedom as only one of many competing political priorities (Young & Friedman, 2023). Thus, it is incumbent on higher education advocates to raise the salience of this issue to make sure that Americans see educational gag orders as a threat not only to higher education but to democracy itself.

Another explanation for the proliferation of educational gag orders is that conservative support for higher education has plummeted in recent decades (Brenan, 2023). Interestingly, these poll numbers do not correlate with anything specific. So far, there is little evidence of a decline in support for respondents' own alma maters or home institutions, the schools their children attend, or their desire for their children to attend college. What we see, instead, is a nebulous sense that higher education as a sector does not add value to society. These findings call for a robust, passionate defense of higher education as a sector— not merely a defense of individual institutions but a campaign to rehabilitate the image of higher education as a public good. While we realize that sitting presidents may be limited in their ability to speak out without risking consequences for their institutions, those who find themselves in more secure situations must do what they can to advocate for educational freedom. Educational censorship laws pose a unique

threat to the entire sector of higher education. As such, there is a unique opportunity for higher education as a sector to unify on this issue, an opportunity for a wide range of stakeholders to work together to find solidarity – to link hands and affirm the value of higher education to society.

Ultimately, the fight against educational gag orders is a fight for the soul of higher education’s democratic mandate. Producing and disseminating knowledge, cultivating critical inquiry, and fostering open dialogue: these objectives are central to the democratic mission of the university, and it is in the service of this mission that robust protections for academic freedom exist. Protecting academic freedom against legislation that seeks to undermine it involves a full-throated defense of higher education as a bedrock of democracy.

Upholding Free Expression and Inclusion

Defending higher education against the existential threat of educational gag orders goes hand-in-hand with fostering campus communities that value inclusivity alongside free expression because both are central to higher education’s democratic mission. The steps below provide a roadmap for how universities can create campus environments that uphold robust protections for free speech while also supporting civic dialogue and respectful and responsible discourse.

Separate Legality from Impact

It is critical to understand free expression from a legal perspective in order to uphold robust protections for free speech. However, a legal framework alone only offers partial solutions when the ideals of upholding free speech and advancing inclusion are truly in tension. When responding and defending free speech on campus, it is important to distinguish between legality and impact, because while speech may be protected by the First Amendment, it can still affect members of the campus community negatively. Part of the work of defending free speech and academic freedom includes recognizing the harm that speech can cause and responding appropriately. Most incidents on campus, barring true criminal behavior, or actions that cross into civil rights violations, are protected under freedom of speech law for all public universities or through policies at many private universities. If universities only ask whether an incident violates official law or policy and whether it ought to be punished, it can impede them from attending to and addressing how the incident affected people or caused them harm. Addressing the ramifications of speech can happen in many different ways and take on different forms. Some suggestions are explained in detail below, but will overall take into account support for those impacted and education for the entire community. By responding to more than just the legality of an incident, the steps taken will be more comprehensive and, the end result, more effective. This shift is an important one that takes into account the whole community and can provide learning opportunities for all involved.

Provide Ongoing Opportunities for Students and Others to Learn About Free Speech

Investing in support services (counseling, healthcare, considerations for coursework) and personnel to advance these services is key to any outreach to campus members impacted by legal but harmful speech. Campuses also need to educate students about free expression, especially regarding the law and policies surrounding free speech on campus. How do campuses onboard new students when it comes to free expression and how do they continue this education throughout their time on campus? These are important considerations for leadership to create a campus with a foundation for protecting free speech for all. This education is useful for all students, but perhaps especially so for students who feel that we live in a society where people of certain identities are better able than others to enjoy their rights to freedom of expression. Informing students about their free speech rights is also empowering; for example, understanding these rights also means understanding one's own right to free speech. This can then allow for more speech to flourish. Instead of calls for canceling speech, students can use their own voices in things like counter-speech through protests, petitions, and op-eds to the school paper.

Engage in Proactive Rather than Reactive Communications

At this moment, political tensions are exacerbated by mis- and disinformation. University administrations must take steps to ensure that students are equipped with the media literacy they need to make informed decisions about the information they consume and the importance of choosing one's words carefully. Administrators can model this behavior by thinking carefully about the statements they release, especially amid political turmoil, and how those statements affect different groups of students. Again, when something controversial or offensive that involves speech occurs on campus, it is important to consider both impact and legality of the speech at hand as two separate, but both important considerations. Statements made by leaders should address the legality, but they can lead with a focus on the impact on the community. They should make every effort to consult members of the group most directly affected, bearing in mind, of course, that no single individual can act as a spokesperson for an entire community. Moreover, sometimes, perhaps, silence is the best option. Not everything requires a statement. In addition to these considerations, administrations should be constantly thinking about and grappling with others, such as: what team needs to assemble to craft statements, what are moments that require statements, who should the statement come from, and what needs to be written in an affective statement? These are all important to determine and can and should be discussed thoroughly and consistently. The time to answer these questions is not during a crisis.

Cultivate a Restorative Campus Culture

Restorative practices, which are premised on the importance of centering those who have been harmed, are often the best approach to remedying speech incidents on campus. The terms “accountability” and “punishment” are often seen as interchangeable, but in reality, they mean different things. As much as possible, administrators should advocate for accountability over punishment. Calls to expel students and fire professors who have engaged in offensive speech violate the principles of academic freedom and ultimately do little to rectify the impact of that speech on the people targeted by it. Creating space for dialogue is important for all parties. For those who have engaged in speech that some, or many, find offensive, it requires sitting down and considering the impact of their words on those who have been negatively impacted. This restorative practice can put marginalized students’ needs front and center and be an educational experience for all involved.

Campus stakeholders should strive to foster a culture of “calling in” versus “calling out” (Ross, 2021). The latter is a practice with punitive undertones that involves attacking the character of a person who has engaged in harmful speech and attempting to undermine their standing as a member of a community. Calling in, by contrast, invites dialogue and reflection, providing those who have been perceived as the perpetrators with the opportunity to learn and rectify the negative impacts of their actions. In certain cases, such as when a person has engaged in, say, extreme forms of hateful speech or when there exists a marked institutional power differential between two parties, calling in may not be appropriate and calling out, or a senior leader stepping in may be needed.

Have a “CASE” Plan: Classroom, Atmosphere, Strategic Communications, and Engagement

The CASE plan provides an overarching framework that can be applied to the entire campus community. In the classroom, professors may think about class structures for engagement and what they include on their syllabi to foster dialogue across differences in class. On a campus-wide level, to create an atmosphere that upholds free speech and inclusivity, administrators can implement tools such as restorative practices and deeper education on free speech and respectful dialogue. Leaders should strategize and plan how to implement effective communications. Finally, leaders need to engage with their communities on free speech and inclusion consistently - the work is challenging and ongoing and requires many interventions in different areas of campus life. Ultimately, this will be an ongoing, iterative process with no clear conclusion.

Failing to cultivate a sense of inclusion alongside support for free expression can, in the long run, erode public trust in US colleges and universities. While there is no single solution to address these pressing demands, having strategies available for classrooms, the atmosphere on campus, strategic communications, and ongoing engagement can help harmonize the vital campus principles of inclusion and free speech for all.

Conclusion

Higher education in the United States is in existential peril. Nationwide, a legislative assault on academic freedom and institutional autonomy threatens to undermine professors' ability to research and teach with fealty to their disciplines. Similarly, the legislative undermining of DEI initiatives promises to reinforce barriers to access for students who already face hurdles in higher education. Defending higher education against this legislative assault involves defending the mission of higher education as a public good and a democratic institution. This article has provided a number of suggestions for how professors, administrators, and institutions can empower themselves to do this. The response must be multiscalar, both individual and sector-wide, beginning in the classroom and on the quad. Every day, it is incumbent on on-campus stakeholders to do the often quiet, often unrewarded work of fostering democracy by equipping new generations of students with the tools to have dialogue across differences, to address harm without shutting down debate and discussion, and to live as citizens in a pluralistic society.

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