

**A TIMELESS TRUTH:  
FREEDOM OF EXPRESSION ON THE  
CONTEMPORARY COLLEGE CAMPUS**

**Oklahoma Association of College  
and University Business Officers  
Tulsa, Oklahoma  
November 7, 2019**

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**Introduction**

Thank you for inviting me to speak to you today on a topic of great import. But, before we go any further, let me thank you for the hard work you do for higher education in Oklahoma. You, our college and university business officers, do so much to make higher education work. Without strong business leadership, the great things we all want and expect higher education to do simply

will not happen.

Consider the situation higher education has faced the last several years. Traditionally, public higher education has received its funding from two sources: tuition and legislative appropriation. Yet, for primarily demographic reasons, fewer students attend college today. Moreover, for the last several years, our Legislature has slashed its funding of public higher education. Today, in 2019, in dollars unadjusted for inflation, the legislative appropriation stands at essentially the same level as it did in 1999.

To be clear, that does not even account for the over 50% inflation we have experienced in the intervening twenty years. While public support has diminished, public criticism has increased.

Without you, the business officers, higher education would not be able to do the things we expect it to do. And this is especially true in tough times, as the last several years have been.

It has taken some creative leadership to guide our campuses through these tough times. Thank you for all you do to keep our campuses functioning at the high level necessary to make our state's future all it can be.

Despite recent setbacks, I am hopeful we have turned a corner. For the first time in a long time, I see several signs that Oklahomans in general and Oklahoma's political leaders are ready to promote public higher education in significant ways. And that is all to the good. For, in my judgment, there is nothing we do as a society that is more important than supporting higher education. Higher education enables our future generations to build on today's foundation.

So let's hope that our government leaders properly fund public higher education. Doing so would be a great start. But we, too, must do our part. We must be innovative. We must be efficient. And we must do a better job of explaining why higher

education is so important. That means we must get involved in the public arena. We must tell our story. We must show the public what we are doing, why we are doing it, and how our work positively affects our state and its future.

Again, thank you for all you do to make the benefits of higher education a reality in Oklahoma. Having served on two boards of regents – nine years on the Board of Regents for the Oklahoma Agricultural & Mechanical Colleges and three and a half years on the Oklahoma State Regents for Higher Education (as well as three years on the board of trustees of a private institution, Eureka College in central Illinois). I can tell you that those with whom I have served unanimously and greatly appreciate the work you do.

### **Today's Assignment**

My assignment today is to discuss a topic I am passionate about, namely freedom of speech on college campuses. Is

freedom of expression compatible with life on the contemporary college campus? The answer, I assert, is and must be yes.

On an almost daily basis, college campuses around the country confront challenges to freedom of expression. Threats to free speech – and let’s be clear: threats to free speech are threats to academic freedom – undercut the essence of higher education. For without free and open inquiry, a college ceases to function as it should.

Yet, some claim that freedom of speech, at least as to some, especially difficult, matters, itself poses a threat to the campus community. Are they right? I trust you will agree with me that the answer is an emphatic “no.”

### **Disclaimer**

Let me pause here to give my usual disclaimer: “The comments I make here today are mine and mine alone. They are not legal advice, and should not be considered as such. Moreover,

they do not necessarily reflect the views of any group with which I am affiliated, including my law firm, Spencer Fane, LLP.” Until a couple of weeks ago, I would have added that these comments do not necessarily reflect the views of the “Oklahoma State Regents for Higher Education, the State Regents themselves, the Chancellor, or the State Regents staff.”

Nevertheless, let me be clear. The disclaimer notwithstanding, the Oklahoma State Regents for Higher Education, I believe, are committed to preserving, promoting, and protecting, on all of our college campuses, the rights of free speech, free expression, and the free exchange of ideas. These are transcendent values, vital to a complete higher education.

### **Today’s news**

Let me read to you a few recent headlines from the Chronicle of Higher Education, Inside Higher Ed, and the Wall Street Journal:

1. *The Senate Takes On Campus Censorship* (Wall Street Journal, September 26, 2019)
2. *Have Campuses Become An Ideological Echo Chamber?* (Chronicle of Higher Education, September 24, 2019)
3. *Diversity in Academe: Do Colleges Quash Conservative Views?* (Chronicle of Higher Education, September 24, 2019)
4. *Students' Attitudes Toward Controversial Speech Are Changing. Here's Why* (Chronicle of Higher Education, September 25, 2019)
5. *An Indirect Chilling of Free Speech?* (Inside Higher Ed, September 24, 2019)
6. *To Protect Free Speech, U. of Wisconsin is Poised to Double Down on Punishing Disruptive Protesters* (Chronicle of Higher Education, October 11, 2019)
7. *Speaking Up About Free Speech on Campus* (Chronicle of Higher Education, October 22, 2019)
8. *Student Newspaper Advisor Punished for Critical Coverage* (Inside Higher Ed, October 22, 2019)
9. *Georgetown Protest Blocks Homeland Official From Speaking* (Inside Higher Ed, October 8, 2019)
10. *Professor Leaves Liberty U., Citing Academic Freedom* (Inside Higher Ed, November 4, 2019)
11. *U. of Michigan Settles with Free Speech Group in Suit About Bias-Response Team* (Chronicle of Higher Education, October 30, 2019)
12. *Adios, Bias Response Team: Michigan concedes that its speech police are legally indefensible* (Wall Street Journal, October 31, 2019)

All of these headlines appeared this semester. In fact, they have

all appeared in just the last six weeks. Our topic – free speech on college campus – is as timely as can be.

### **The Search for Truth**

Why is that? I think it is because academic freedom, freedom of expression, freedom of speech, on college campuses, are timeless values. And those values, those freedoms, are the very traits that make our system of higher education the envy of the world. There are, of course, many ways to impart knowledge. But higher education in our country has included a strong commitment to the free exchange of ideas, to discerning truth from falsehood, to providing the opportunity to confront challenging ideas, and thereby to learn what is the better way.

### **Without a Commitment to Free and Open Inquiry, a College Ceases to Function as such**

Let me state my thesis clearly and concisely. Without a vibrant commitment to free and open inquiry, an institution of

higher education ceases to function as such. No college is doing its job if it is not committed to allowing and encouraging the exchange of differing ideas. To be sure, without being so committed, an institution can nonetheless transmit information or confer a credential. But even a simple, freestanding, unattended website can do that.

Higher education is and must be different. Without fostering the free exchange of ideas, an institution of higher education is not fulfilling its mission of expanding the minds of its students or teaching them how to examine new, challenging information and to test it for truth or falsity.

### **Academic Freedom – The AAUP Standard**

Academic freedom is vital for the well-being of any institution of higher education. Thus, for me, it is impossible to conceive of a college or university that is not committed to freedom of thought, freedom of speech, and freedom of inquiry.

The American Association of University Professors (AAUP) has spoken definitively on academic freedom. In its 1940 Statement of Principles on Academic Freedom and Tenure, the AAUP states that “Teachers are entitled to full freedom in research and in the publication of the results[.]” The Statement continues: “Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject.” And finally, it provides that “When [college and university teachers] speak or write as citizens, they should be free from institutional censorship or discipline[.]”

The AAUP is a voluntary organization and its standards, of course, are not mandatory. Nevertheless, they apply to virtually all institutions of higher education. So academic freedom is important at all schools, private and public. And it is especially important at public institutions, which differ significantly from

private ones in at least one important respect, something to which I will turn momentarily.

### **Rushing to an Anti-Intellectual Abyss**

Today, many see a troubling trend on college campuses around the country to stifle academic freedom. I am among those people. To put it bluntly, I am concerned higher education is rushing headlong toward an anti-intellectual abyss. Many on college campuses appear to be turning their backs on free speech.

Across America and here in Oklahoma, institutions of higher education face a serious, immediate, and, I believe, existential threat. The peril is insidious. It affects all institutions of higher education. And, whatever you do, please do not kid yourself that your college or university is immune. It is not.

It has shown up at public and private institutions. It is present on the east coast and the west coast and everywhere in between. It exists in blue states, purple states, and red states. It has appeared

in Ivy League schools and the Power Five conferences. It has found its way into large research institutions, small liberal arts schools, regional universities, and community colleges.

The threat is subtle and perfidious. It is anti-freedom, anti-intellectual, and anti-education.

Institutions of higher education, traditional bastions of free speech, are being targeted for allowing people, who might believe differently from some accepted norm, to have a forum to air their thoughts. It is happening everywhere. It has happened at Yale and Harvard, Duke and North Carolina, Michigan, UCLA, and Rutgers, to name just a few. So too, closer to home, Texas, Missouri, Kansas, Nebraska, and even institutions here in Oklahoma have experienced recent controversies challenging traditional notions of freedom of expression.

Especially troublesome is that this anti-free-thought threat is coming not from without, but from within. Sometimes faculty

members are leading the anti-free speech movement. Occasionally administrators, typically citing campus safety and security, are obstructing free speech. But what I find most disturbing, however, is the fact that students are often the ones leading the charge to exclude ideas from their campuses.

### **A Few Examples**

Imagine, if you will a professor taking a hardline stance against American immigration policy, thereby irking the institution's major benefactor, and ultimately being fired over the situation. In today's world, it hardly seems far-fetched. Indeed, it actually happened, and Professor Edward A. Ross lost his job at Stanford, at the insistence of Jane Lathrop Stanford who, along with her husband, Leland Stanford, helped found the institution.

That occurred in 1900. Unfortunately, numerous more recent examples of such college campus misconduct exist.

In the spring of 2017, students at Claremont McKenna

College prevented most of the audience from attending a lecture by Heather MacDonald. Protestors chanted, “No justice, no peace, no racist police.” School officials, afraid it would be dangerous to remove the protestors, instead moved the talk to an essentially empty room while live-streaming it elsewhere.

Ms. MacDonald’s crime? She had previously published a book called *War on Cops*, which criticized the heavy scrutiny then surrounding police shootings.

Just a month before that, students and others at Middlebury College, repeatedly shouting, “Charles Murray, go away, racist, sexist, anti-gay,” prevented Dr. Murray from speaking on campus. **[Play Clip 1.]** Middlebury tried the live-streaming alternative, too, with Professor Allison Stanger interviewing Murray. Afterwards, protestors physically assaulted the group, resulting in Professor Stanger’s hospitalization with a serious neck injury and a concussion.

It happened again at William & Mary, when a handful of individuals successfully shut down a speech by the executive director of the ACLU of Virginia chapter, who, ironically, was planning to speak on college students' First Amendment rights.

**[Play Clip 2.]**

Approximately twelve individuals kept the rest of the college community from hearing what might have been an interesting and valuable speech. This “dirty dozen” marched to the front of the auditorium and started chanting, in rather loud voices, “A-C-L-U, you protect Hitler, too,” along with several other, similarly banal slogans.

Interestingly, the ACLU speaker initially welcomed the protestors, as being a good example of how people can exercise their First Amendment rights. How mistaken she was, however, quickly became apparent. The protestors were not going to stop, were not going to let anyone else speak. Worse, the institution

was ill-prepared to do anything to protect the right of the guest speaker to speak or the right of the members of the audience to listen. The chants went on, and the speech was aborted.

I could name many, many more. And it does not have to be something overtly political. It may involve a student complaining about something someone said in a classroom. It could concern someone upset about a large gift from a major donor who somehow is controversial. Perhaps it surrounds the placement of a statue on campus grounds.

Should a supporter of Israel be barred from speaking on campus? Should pro-Donald Trump speech be limited? Should anti-Donald Trump speech be curtailed? Or should a university heed the cacophonous clamor of a few loud-mouthed individuals and constructively disinvite a former United States Secretary of State, herself a longtime university professor, who had the temerity to serve in a Republican administration? Of course not.

And, lest you get the impression that freedom of speech is an issue for only one side of the political spectrum, note that the same institution that disinvited Condoleezza Rice also took steps to sanction a tenured professor for perceived left wing rants posted on his private Facebook page. The university's investigation said that his statements were "clearly insulting and degrading to Caucasians," and found that "he exercised astonishingly poor judgment in his choice of words."

### **Boorish Behavior Permeates a Cantankerous Culture**

Now let me stop here for a moment to note that boorish behavior is not the exclusive province of college campuses. Nor are attempts to shut down discussion and debate. This kind of conduct permeates contemporary culture. It is happening in the political world. It is happening in the mainstream media and in social media. It is happening in religious circles, in workplaces, and even in neighborhoods and among families.

But I am not here to talk about misbehavior by politicians, commentators, or even the faithful. I am here to discuss what happens on college campuses, and what those who care about the well-being of higher education should do about it. For these kinds of actions hit at the very core of what college is all about.

### **Academic Freedom and the First Amendment**

Freedom of speech, important at any college, is especially central to the mission of public higher education. This is so, because public institutions are run by the government, and special rules apply to the government.

For over 200 years, the First Amendment to the Constitution of the United States has secured the rights of Americans against government abridgements of the right of freedom of speech. The First Amendment is short, simple, and clear.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or

of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Congress, and by extension the states, may not curtail the freedom of speech.

### **Oklahoma’s “First Amendment”**

Oklahoma’s Constitution also contains its own provision protecting free speech rights. According to the first sentence of Article 2, Section 22:

Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

### **The Supreme Court and the First Amendment**

The United States Supreme Court regularly decides cases involving the First Amendment. And when it does, it often speaks in broad, aspirational tones. The First Amendment, the Court says, enshrines “[o]ur profound national commitment to the free

exchange of ideas[.]” *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686 (1989). Moreover, “the First Amendment reflects ‘a profound national commitment’ to the principle that debate on public issues should be uninhibited, robust, and wide-open.”” *Boos v. Barry*, 485 U.S. 312, 318 (1988), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The Supreme Court has stated that “the First Amendment means that government has *no power* to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (emphasis added). Or, to put it another way, “[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves.” *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 309 (2012).

## **Academic Freedom in the United States Supreme Court**

In 2006, in a seminal case involving free speech rights of public employees, the Court paused to proclaim the importance of academic freedom. That case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), involved not a university setting, but rather a prosecutor firing one of his assistants.

Nevertheless, the Court felt it was important to expound on the vital role freedom of expression on college campuses plays. It stated, “Expression related to academic scholarship or classroom instruction [may implicate] additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.” The concept of academic freedom, the Court added, may thus lead to a different analysis in “a case involving speech related to scholarship or teaching.” Or, as the Court said in a 1978 decision, the academic mission of a university is “a special concern of the First Amendment.” *Fisher*

*v. Univ. of Texas*, 570 U.S. 297, 308 (2013), quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978).

In yet another, older case, decided in early 1967, the Supreme Court noted, “Our Nation is deeply committed to safeguarding *academic freedom*[.]” This is so, the Court added, because academic freedom “*is of transcendent value to all of us, and not merely to the teachers concerned.*” *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (emphasis added).

Did you hear that? Academic freedom is not merely about academicians, though it certainly concerns them. But academic freedom involves all of us. “*That freedom,*” the Court said, “*is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.*”

### **Critical Thinking and the Free Exchange of Ideas**

Those who have devoted their lives to higher education know that the most important thing higher education does is to

develop critical thinking. And critical thinking comes about not by avoiding challenges or disagreements, but instead by encouraging free inquiry, free thought, and free debate. That is why the college campus anti-free speech trend is so corrosive.

All schools, especially our institutions of the Oklahoma State System of Higher Education, must be committed to free and open inquiry in all matters. As stated in the University of Chicago Statement on Principles of Free Expression, from which I have borrowed extensively, Oklahoma's public institutions of higher education must support the right of members of the college community to have the broadest possible latitude to speak, to write, to listen, to challenge, and to learn. Oklahoma's colleges and universities must fully respect and support the freedom of all members of their respective communities to discuss any problem that presents itself.

Commitment to the principle of freedom of expression lies

at the very core of our system of higher education. Naturally, the ideas of different members of a college community will often conflict. But it is not the proper role of a college to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.

To be sure, our institutions should greatly value civility. Today's college students are tomorrow's leaders, and I, for one, certainly want our future leaders to be respectful of others. We all should be humble enough to hear differing ideas, intelligent enough to evaluate them, wise enough to distinguish good ideas from bad ones, courageous enough to defend the good, and bold enough to reject the bad. But our students will not learn how to do so in the real world by claiming safe spaces or chanting simplistic slogans in the face of challenging thoughts.

All members of a college community share in the responsibility for maintaining a climate of mutual respect.

Nevertheless, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of the college community.

The freedom to debate and to discuss the merits of competing ideas does not mean that individuals may say whatever they wish, wherever or whenever they wish. Classes must go on. No one, for example, has the right to interrupt a class and seize the room to speak through a bullhorn. But exceptions to the general principle of freedom of expression are narrow, and it is vitally important that they never be used in a manner that is inconsistent with the institutional commitment to a completely free and open discussion of ideas.

The fundamental commitment of an institution of higher education must be to the principle that debate or deliberation may not be suppressed, even when the ideas put forth are thought by

some, or even most, members of a college community to be offensive, unwise, immoral, or wrong-headed. It is for individual members of the college community, not for the institution, to make those judgments for themselves. And they may act on those judgments, not by seeking to suppress speech, but by openly and vigorously contesting ideas they oppose. Indeed, fostering the ability of members of the college community to engage in debate and deliberation in an effective and responsible manner is an essential part of an institution's educational mission.

As a corollary to the commitment to protect and to promote free expression, members of the college community must also act in conformity with the principle of free expression. Although they are free to criticize and to contest views expressed on campus, and to criticize and to contest speakers who are invited to express their views on campus, members of the community may not obstruct or otherwise interfere with the freedom of others to express views

they reject or even loathe. To this end, I believe each institution has a solemn responsibility both to promote a lively and fearless freedom of debate and deliberation and to protect that freedom when others attempt to restrict it.

Colleges should adopt such policies and procedures as they deem necessary and appropriate to implement these goals. Candidly, I urge the Oklahoma State Regents for Higher Education to adopt a policy that prescribes freedom of expression, as written in the Chicago Principles, as a core “standard[] of higher education applicable to each institution” in the system. Okla. Const. Art. 13A, § 2(1). Freedom of speech, freedom of expression, academic freedom—these values are that important.

Of course, having good policies is only the first step. Once you have the policies, you must follow through. You must actually implement the policies. You must enforce them. And you must continually review them. As I am sure your institutional

lawyers will tell you, the best policies are worth little—they can even be counterproductive—if you fail to follow them.

### **The Public is Watching**

Make no mistake about it. Academic freedom is under attack. And an attack on academic freedom is a direct attack on the academy itself. This is a battle we dare not lose. For if we lose academic freedom, we lose the academy.

Institutions of higher education must be committed to free and open inquiry. Freedom of expression is central to the mission of higher education. Institutions should take steps now to promote and to protect the free exchange of ideas on our campuses.

### **Embrace Academic Freedom**

Make no mistake about it. Academic freedom is under attack. And an attack on academic freedom is a direct attack on the academy itself. This is a battle we must not lose. For if we lose academic freedom, we lose the university.

College campuses should be welcoming places for the discussion of ideas. That is why this threat to academic freedom is serious, real, and even existential. It does not matter if you are liberal or conservative, rural or urban, Democrat or Republican, religious, irreligious, or even anti-religious. If you value higher education, defend academic freedom. Now, in doing so, let us always be civil, respectful, and humble. But let us be firm in our resolve to uphold academic freedom. We should require it. Our fellow citizens should expect it. And those who love higher education – our students, our faculty, our administrators, and our constituents – should demand it.

The public is watching. If you doubt me on that, take a look at 70 O.S. § 2120, a law which just went into effect in Oklahoma and which appears to provide for personal liability, including attorney fees, against institutional employees “responsible for the violation [of First Amendment rights].” 70 O.S. §§ 2120(G)(3),

2120(H). I am absolutely convinced that our response to this challenge will dramatically affect the public's perception, and even the public's funding, of higher education.

Those of us who love higher education must be firm in our resolve to uphold freedom of expression on college campuses. We can – in my judgment, we must – make our campuses welcoming places for the civil, respectful discussion of ideas.

Thank you for working on a daily basis to make our campuses places our students can learn, mature, and thrive. And thank you for working to protect the free exchange of ideas at Oklahoma's institutions of higher education.