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The First Amendment and Free Speech on
Campus

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The difficulties that college and university administrators from California to Massachusetts have faced over the past 30 years in protecting their students from harassment, within the context of America's constitutional commitment to freedom of speech, were brought center stage once more in December of 2022 at the University of Wyoming, where a church elder was banned from the student union for harassing an LGBTQ student by name.

This most recent controversy was initiated on December 2, when Todd Schmidt, an elder with the Laramie Faith Community Church, displayed a prominent sign on a table inside the student union that stated: "God created man and woman and [student's name] is a man." The student referenced is a transgender female.

University officials asked Schmidt to remove the name of the student and he complied. Schmidt was subsequently suspended from exercising "tabling privileges" in the student union for one year. University of Wyoming President Ed Seidel said that Schmidt had violated the university's policy prohibiting discrimination and harassment.

President Seidel stated: "While freedom of expression is cherished on this campus and across this nation, a line was crossed when a student was harassed by name. This is something we will not tolerate on this campus, and this action speaks to that key principle to

which we adhere at UW. We do not tolerate harassment of any student or any university community member."

The university's policy provides that "language or actions that discriminate or harass the above (protected) groups will not be tolerated," and that "all individuals tabling, whether UW affiliated or not, are expected to bring their views in a respectful and civil manner." The UW Dean of Students informed Schmidt in a December 7 letter that his tabling privileges were being suspended because he used language "targeting a specific student in a protected class."

President Seidel's suspension of Schmidt from the student union likely violated Schmidt's First Amendment right of freedom of speech. Seidel's instinct to protect his students from harassment, however noble, conflicted with the law governing a public forum, which precludes governmental entities, including universities, from practicing viewpoint discrimination. Another problem that arises is that the policy's emphasis on language that is "respectful and civil" is likely to be viewed as unconstitutionally vague, a legal deficiency because it allows those in positions of authority too much latitude in determining the scope of the standard, thus permitting enforcement of the standard in a way that encourages viewpoint discrimination.

These problems, which led to the cratering of similar policies and codes at other distinguished universities, including Stanford, the University of Michigan and the University of Massachusetts, beginning in the 1990s, reflect good-faith intentions which, nonetheless, run afoul of legal prohibitions.

Those policies, historically speaking, have sought to protect minorities and others underrepresented in society; those, in other words, that are most vulnerable to racial epithets and various

disparaging remarks. Stanford University, for example, adopted a code that prohibited "harassment by personal vilification" when it aimed to "stigmatize an individual or small number of persons based on their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." These policies, however, have failed legal tests, which creates frustration among administrators, professors and students because, after all, a university represents a setting for students to engage in rigorous study, protected against speech and conduct that would interfere with their pursuit of learning.

Alas, colleges and universities are not simply protective sanctuaries but, indeed, resemble much of the rest of the world, where terrible beliefs, disparaging remarks, bigotry and racism are in full sprint. What is the remedy for students and others at the University of Wyoming who fundamentally disagree with what the church elder has said or, for that matter, what anyone has said?

Justice Louis Brandeis, one of America's greatest champions of freedom of speech, explained, in his landmark opinion in *Whitney v. California* (1927), the rationale for protecting obnoxious speech: "Discussion affords ordinarily adequate protection against the dissemination of noxious doctrine." The remedy for speech we don't like, he wrote, is more speech. In his words, "speech should be made to counteract speech."

Students at the University of Wyoming and other universities have learned, or shortly will learn, that freedom of speech is a powerful tool to be exercised to expose impoverished opinions and ideas with which they disagree, whether social, political or religious in nature. Offensive speech, whether delivered by a politician, minister or fellow student, is ripe for response. Students can sharpen their analytical skills by listening closely to the views and ideas that they

find objectionable, discerning the false assertions, doctrinal weaknesses, contradictions and indefensible propositions of the speaker and strengthening their own powers of persuasion in the preparation of their replies.

There is, in the availability of a public forum such as that established in the student union at the University of Wyoming, an opportunity—one to be seized by energetic students—to correct the record and promote one's own views and ideals. The answer to objectionable speech is not to silence the speaker, for that serves only to create a martyr for the principle of free speech. The far better response, as Justice Brandeis explained, is more speech: speech to counteract speech.