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Will Free Expression Confusion Continue Its Reign in 2018?

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January 3, 2018

The nation's founders created a First Amendment to give citizens the right to express themselves freely, but even at that time, there was much confusion as to how such a provision would be operationalized. All these years later, the nation still fusses over how free speech really works in America.

Now, 226 years after the Bill of Rights was ratified, a simple conclusion could be made that the First Amendment works great. The constitutional protections remain in place and the courts generally maintain a legal playing field for free expression. Beyond the technical/legal free speech world, however, exists a chaotic, "wild west" American society in which free speech suffers from extralegal and community pressures that disrupt the First Amendment's promise. As has been seen in 2017, American society too often fails to adhere to the human dignity principle on which free expression rests.

A Cato Institute survey released late last fall demonstrates the dismal atmosphere for free expression in America. Almost three quarters of respondents reported that political correctness is silencing "important discussions our society needs to have." Fifty-eight percent of citizens say "the political climate prevents me from saying what I believe."

College campuses, which should be beacons of rational discourse, have allowed the extralegal tactics to prevail against free expression, allowing some speakers to be shouted down and certain others to not even be considered for on-campus dialogue. At the University of California – Berkeley, political writer Ben Shapiro was allowed to speak in September, but the university spent well over six figures in security costs to keep protestors at bay. The President of the American Council of Trustees and Alumni, Michael Poliakoff, attended the event and later commented, "The fact that the campus had to be garrisoned is America's real issue."

In a remarkable bit of irony, a speaker from the American Civil Liberties Union was disrupted at the College of William and Mary. The ACLU, of course, has worked hard over the years to defend free expression in its many forms. It is little wonder that two thirds of Americans report in the Cato study that colleges are doing too little to teach the importance of free speech.

Nationwide, the forces of expression control operate to allow certain comments into the community dialogue while disallowing others. At Edina High School in Minnesota, some students chose to sit in protest during the national anthem at a Veterans Day assembly. Other students later took to social media to express their outrage about the protest. School administrators then disciplined the students who counter-protested through social media.

The Washington DC Area Transit Authority rejected paid Christmas messages from the Archdiocese of Washington because the ads were considered “issue-oriented.” The ads depicted shepherds at night beneath a shining star, with a script that read, “Find the perfect gift.”

The effects of stifled expression can never really be undone, even if legal proceedings later develop in favor of the stifled. That’s the case for dozens of political groups that were targeted by the Internal Revenue Service during the Obama administration. The current Justice Department made settlement agreements with many of these groups last fall, Attorney General Jeff Sessions saying the targeting “was wrong and should never have occurred.” That’s nice now, but fundamental speech rights were disrupted by the government for political reasons. That surely puts the First Amendment on its ear.

The Supreme Court will make several important rulings about free expression cases later this year. SCOTUS has already heard arguments about the wedding cake baker in Colorado who refused to bake for a gay wedding. The Court will soon hear arguments about an Illinois case involving compulsory union dues when those dues fund political causes not supported by all union workers. The justices will also hear a case out of California about whether a state can force an organization to communicate messages with which it disagrees. The Reproductive FACT Act in California forces anti-abortion adoption providers to inform clients about the availability of abortion services in the state.

SCOTUS can help referee the constitutional free speech arena, but its influence is limited to narrow corners of the free speech environment, and even then, its rulings are only reactive. The courts can’t fix a society that itself won’t endorse and live out free and open dialogue, free of fear and intimidation. That fix must come from the citizenry.