

“Research & Practice” features educational research that is directly relevant to the work of classroom teachers. Here, I invited Joe Kahne and Carlos Cortés to share their research-based arguments for a more inclusive, equal, and aspirational discussion of free speech, as well as their practical advice for teachers who want to engage in such a discussion with their students.

—Patricia G. Avery, “Research and Practice” Editor, University of Minnesota

Free Speech: Time for a Different Kind of Discussion¹

Joseph Kahne and Carlos E. Cortés

A January 6, 2022, headline in the *Washington Post* trumpeted the dire news: “Most Americans support freedom of speech, but...” The article’s first line went on to proclaim that while Americans overwhelmingly support free speech, they are “deeply conflicted on what is protected, what should be restricted, by whom, and on what grounds.”² The story pointed out that “a shockingly large minority supports government restrictions on some kinds of speech under some circumstances.”³

Shocking to them, maybe, but not to us. That’s what repeated polls of high school students have been reporting for a number of years. When given the opportunity to respond in the virtue-signaling abstract, students express support for freedom of speech. However, when that broad abstraction gives way to individuals’ aspirations about how speech should function in daily life, they feel quite differently. Over and over, large majorities of students opine that some kinds of speech (especially speech that demeans social identities or signals intolerance of marginalized groups) need to be

restricted.⁴

These survey results raise all kinds of questions. What kinds of speech should be restricted? When it comes to specifics, people disagree. And how should that speech be restricted? By government? By private entities? By social pressures? By self-restraint? Once again, people disagree. Moreover, how does this all work *legally* within the constraints of the First Amendment? And how *should* it work *aspirationally* within society?

These questions have led us to an unavoidable conclusion: We need a new and very

different kind of conversation—including a different kind of classroom conversation—about free speech. The discussion should consider the legal and aspirational dimensions of free speech as well as the practice of speech in daily life.

Two other factors make this new conversation particularly urgent. First, the avalanche of social media communication, particularly the rise of digital mobs, has dramatically altered the speech environment. Second, state legislatures and school boards are taking actions that mute teacher speech about selected topics. Indeed, as of August 2022, Pen America report that 36 states had introduced 137 bills designed to restrict instruction on topics such as race, gender, sexuality and U.S. history in K-12 and higher education—a 250 percent increase from 2021 when 22 states introduced 54 similar bills.⁵



(Casey Smith/Report for America via AP)

Indiana State Teachers Association president Keith Gambill joined a coalition of civil rights, faith, and public education groups at the Statehouse, Jan. 19, 2022, in Indianapolis. The groups oppose a bill that would require classroom materials to be posted online and vetted by parent review committees, as well as place restrictions on teaching about racism and political topics. Education groups say the proposal would censor classroom instruction and place unnecessary additional workloads on educators.

In light of these challenges, we would like to propose three priorities for civic educators concerned with the issue of speech and its role in fostering a more inclusive democracy:

1. Analyze—don't merely celebrate—the First Amendment.
2. Engage students in discussions of speech-related laws, policies, and practices.
3. Involve students in developing an

aspirational vision for robust speech.

Analyze—Don't Merely Celebrate—the First Amendment

There is much to admire about the principles underlying the First Amendment. Free speech encourages what James Madison referred to as a “commerce of ideas” that enable the public to wrestle with possibilities and priorities and find common ground.⁶ Moreover, the Founders saw substantial risk associated with governmental efforts to constrain individual

expression. They feared that governmental efforts to limit or criminalize speech would often be used by those in control of the government against those not currently in control.⁷

We believe the need for careful attention to these rationales is urgent due to widespread misunderstanding of what the First Amendment does ... and does *not* do. Many Americans incorrectly believe that the Bill of Rights guarantees speech without restrictions, so that any constraints on speech are inherently anti-democratic. Indeed, as legal scholar John Palfrey, writes, “The First Amendment

is often assumed to do something that it does not: to grant an affirmative right to free expression."⁸

One of us (Cortés), in his capacity as an inaugural fellow of the University of California's National Center for Free Speech and Civic Engagement, has noted that even strong advocates of "free" speech don't actually advocate for *unfettered* speech. Instead, they argue for *robust* speech (even while referring to it as *free*) with various types and degrees of regulation.⁹ Illustrating this point, "free" speech proponent Keith Whittington states, "Free speech can thrive only under conditions of appropriate regulation." In particular, Whittington supports "time, place, and manner" regulations that can help create conditions "for both inclusive participation and productive exchange of ideas."¹⁰ Indeed, like most free speech advocates, Whittington argues that the value of speech in a democratic society can be undermined without some structures imposed by institutions. Or, as social critic Stanley Fish cleverly put it in the title of his book, *There's No Such Thing as Free Speech and It's a Good Thing, Too*.¹¹

Educators might begin the exploration of this topic with the relevant words of the First Amendment: "Congress shall make no law ... abridging the freedom of speech." In other words, the First Amendment restricts *government* from constraining speech. However, it does not guarantee *free* speech (nor does any other part of

the Constitution) (U.S. Const. amend. I).

Limitations on the First Amendment go even further. Over the years, Congress, state legislatures, and the judiciary have carved out numerous exceptions to the First Amendment. These include laws and court decisions penalizing such acts as libel, defamation, fraud, true threats, sanctionable harassment, obscenity, and the invasion of privacy.¹² Moreover, the First Amendment addresses only government interference with speech. It does not prevent *private* entities and individuals from restraining or punishing speech. Students need to learn about both the scope and the limitations of the First Amendment. Entering the world with a misguided conception of the extent of First Amendment protections may not only lead to risky personal decisions, but it can also undermine an individual's ability to participate in an informed manner in discussions concerning speech policies and laws.

Engage in Discussions of Laws, Policies, and Practices

Along with the background knowledge discussed above, it is also important for students to apply this knowledge while engaging with important debates of the day. What speech policies are desirable in what contexts? And what actions in pursuit of desirable speech are consistent with the Constitution?

One starting point is Supreme Court Justice Louis

Brandeis's opinion in *Whitney v. California* (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."¹³ Students could consider how the astute Brandeis might have responded to the instantaneous flood of life-impinging vitriol on the internet. How might he have applied his "if there be time" caveat to the current world where digital technology has compressed time and shredded "more speech" as a safety net?

Even strong advocates of 'free' speech don't actually advocate for *unfettered* speech.

Within schools, the questions surrounding vitriolic speech also strike us as enormously important and as a key issue to discuss in the context of speech. Hate speech and hate crimes are on the rise. Vitriolic speech has become common in school settings.¹⁴

For example, in a study Kahne completed with a colleague, he heard many stories of "speech" that students viewed as harassment and harmful.¹⁵ In one school, for example, during a classroom discussion

on immigration, a white student told another student that he should “go back to Mexico.” And in a different classroom discussion at the same school, a white student taunted his immigrant classmates by talking about a recent high profile immigration enforcement action in which parents of school-aged children were taken into custody for deportation at their place of work.

To be sure, speech enables exposure to diverse views. It is essential to both individual learning and to the kind of vigorous dialogue necessary in a democratic society. At the same time, it’s also clear that unfettered speech can threaten other core values, such as humane interaction, mutual respect and personal dignity.

Let us be clear. Both of us support robust speech and recognize the importance of the First Amendment. One of us (Cortés) lived for nearly two years under a military dictatorship and has observed, up close and personal, how government power can suffocate expression and the costs of such actions.

Speech is fundamentally important when we, as a society, wrestle with issues. Speech makes it possible to challenge prevailing understandings and to consider and learn from varied views. It is also a central means through which to fight injustice. “Liberty,” wrote Frederick Douglass in 1860, “is meaningless where the right to utter one’s thoughts and opinions has ceased to exist...”¹⁶ However, support for the First

Amendment’s restraints on government differs from support for unfettered speech. In fact, unfettered speech sometimes reduces speech robustness, particularly when verbal assaults mute the speech of others, especially marginalized voices.

Indeed, when speech leads to silencing, it causes substantial harm. When speech contributes to alienation, it undermines interpersonal and intergroup learning and cooperation. When speech becomes a one-way street of speaking while listening declines, the democratic process suffers.

In short, while robust speech is vital and warrants significant protections within a democratic society, it is also important to recognize that speech can cause significant harm.¹⁷ As a result, when educators and students examine the nature and function of speech within a democracy, it should be a discussion, not a one-dimensional celebration. Rather than simply eulogizing free speech, educators and students should consider both the *value of robust speech* and the *costs of unfettered speech*.

This approach can help avoid some of the overuse and misuse of “free speech” rhetoric. For example, partisans from varied perspectives sometimes employ rhetoric valorizing “free” speech to justify unnecessarily degrading and offensive comments. In addition, the dominant focus on “free speech” can make the legality of speech rights the only issue. Legality questions regarding

speech are vitally important, of course, but they should not be the only concern in a government or history classroom or in society at large.

Develop an Aspirational Vision of Speech

In a nutshell, we believe that in addition to the legal/constitutional dimensions of speech, educators should also focus students’ attention on a more aspirational question: How *should we*, as a community, speak to one another, particularly when it comes to contentious issues? Related to this is a fundamental pedagogical question: How can educators support and encourage students to develop the willingness and resolve to engage in such discussions, as well as the capacity and commitment to listen to others, including those with whom they may deeply disagree?

Forming an aspirational vision for speech requires reflection and thoughtful analysis—both about how speech impacts others and about how refraining from speech can undermine the sharing of ideas. Just because we are legally allowed to say something doesn’t mean we should. Conversely, the fact that the presentation of information and ideas may make some people uncomfortable doesn’t mean we should be quiet. We believe that identifying and pursuing our aspirations when it comes to speaking and listening to others is at least as important for our daily lives, for fostering of inclusive communities, and for the health of

our democracy, as is learning what the law or the Constitution stipulates with respect to free speech.

Educators and students should consider both the *value* of *robust* speech and the costs of *unfettered* speech.

Ideas from academic scholarship may help inform students' thinking as they craft and discuss their aspirational vision of speech. For example, in 2016, philosopher Eamonn Callan detailed the paired concepts of "dignity safety" and "intellectual safety" in an effort to avoid overly simplistic notions of "safe spaces."¹⁸ In robust classroom discussions with clashing perspectives, an individual's ideas might well be critiqued. Students will not always be "intellectually" safe or secure from challenging ideas. In fact, students might experience an edifying setback (or at least might become aware that others do not find their ideas to be compelling).

However, as Callan argues, all people deserve "dignity safety," that is, the knowledge that they can participate in discussions with confidence that their value as human beings will not be attacked. They should be able

to exchange ideas without being humiliated, degraded, belittled, or demeaned as people.

Callan's formulation sets the stage for examining discourse. How might some kinds of discussions assault an individual's personhood? How can students engage in challenging intellectual engagement without assaults on personal dignity?

What Might Educators Do?

Given the numerous concerns raised regarding speech aspirations, we have found it helpful to organize our thinking around three broad imperatives for constructive conversations in a multicultural democracy: robustness, inclusivity, and reflectiveness.

- *Robustness* refers not simply to the amount of speech but also to its quality. Is it informed, both by expert knowledge and by students' lived experiences?
- *Inclusivity* has at least two important dimensions that students might consider: Openness and Dignity. First, is the classroom climate open for inquiry and deliberation?¹⁹ Do students with differing (and perhaps unpopular) views feel comfortable expressing them? Second, does classroom speech, as enacted, exclude or diminish the dignity of any individuals?

- Finally, *reflection* is essential. In order for students to formulate aspirational visions that are meaningful to them and strengthen their own speech practices, they need to reflect on the strengths and weaknesses of what they are experiencing and doing.

A range of classroom practices can advance these priorities and a given lesson may well further more than one goal. Harvard's Project Zero has identified multiple strategies to promote visible thinking routines.²⁰ Varied practices such as "Think, Pair, Share" and sentence starters such as "I used to think, now I think" provide ways to practice aspirational speech dynamics—ones that can help students practice respectful and evidence-informed ways to exchange views. Strategies such as these also aim to prompt openness both to shifting one's perspectives and to recognizing the legitimacy of varied beliefs and experiences.

Practices such as "True for Who" signal that one's views on controversial topics should not solely be based on ideas from recognized experts, authorities, or scholars. Students' personal and community-based knowledge as well as their lived experience can also provide a critical starting place for informed speech.²¹

As Nicole Mirra and Antero Garcia detail, sharing stories from students' lived experiences can be transformative for those who hear them.²² The

researchers discuss, for example, an experience in which students from vastly different parts of the country shared information about their experiences with guns. As students heard about these different realities it helped shift students' own understandings of the issue and the legitimacy they accorded to political and policy perspectives that diverged from their own.

Schools should help students learn to speak, listen, and reflect in a world without “intellectual safety” while at the same time respecting “dignity safety.”

In addition, there are a variety of approaches such as Socratic Seminars, Structured Academic Controversies,²³ and Argumentative Discourse²⁴ that are designed to model desirable forms of speech and discussion. Often these models prompt robust evidence-based analysis. After using such approaches in considering a societal issue, reflection activities can be designed so that students are asked to consider the nature of the speech that occurred. How well, for example, did these structures/

practices enable students to participate, liberate them to express deeply felt beliefs, and create a propitious climate for divergent opinions? Students might also reflect on how speech dynamics during those discussions compare to the dynamics during other discussions of controversial issues outside of school.

While structuring discussions through the kinds of approaches detailed above is frequently helpful, educators should note that some efforts to improve speech dynamics can have unintended consequences. Consider what Sigal Ben-Porath refers to as “civility regimes.”²⁵ Civility regimes are contexts in which priority is given to such speech norms as reason giving, politeness, and order. These practices may exclude or mute deeply felt emotions or perspectives from those with high personal stakes in a conversation on the grounds that they are being “uncivil.” Moreover, such regimes may privilege “civility” and “rationality” in form, while ignoring the harm that can still result from dignity-undermining ideas being communicated politely and with evidence. Harm may also occur if those with strong emotions on a topic are either explicitly or implicitly told not to express them because they may detract from “reasoned” argument.²⁶

Relatedly, even well-structured learning experiences do not always foster equitable learning environments. Paula McAvoy and Arine Lowery found, for example, that girls

are more likely than boys to feel that they have heard something offensive in carefully implemented deliberative spaces—though they did find levels of participation among boys and girls in such contexts was more equal than in less structured formats where boys dominated the discussions.²⁷ Thus, pedagogical and curricular strategies for structuring discussions can help substantially, but like the establishment of classroom norms, they do not “solve” the problem. Speech can still cause harm and undermine inclusivity.

Addressing Student Discomfort

We are in an era where state legislatures and local school districts are increasingly restricting classroom speech on grounds that it may cause student discomfort and contribute to divisiveness. In 2021, at least 35 percent of all students in the United States were in districts that were impacted by local efforts to limit teaching about such diversity-related themes as race, racism, sexual orientation, and gender identity. There are signs that these local efforts, combined with state legislative efforts, may well lead large numbers of educational leaders and classroom teachers to avoid discussing varied issues and topics with students.²⁸

However, we firmly believe that greater harm is caused when educators avoid topics merely because they *might* cause discomfort to some students or *may* contribute to divisions. That very avoidance ultimately sends the

message that students should not be expected to encounter uncomfortable ideas. Quite the contrary. Civic educators should aspire to helping students engage with difficult topics and to do so *without* ad hominem attacks or other speech dynamics that unnecessarily further divisions or cause harm.

Schools remain one of the few institutions where professionals can help facilitate discussions and help promote capacities for the kinds of speech practices that can respond to challenging societal contexts. Based on Callan's formulation, schools should help students learn

to speak, listen, and reflect in a world without "intellectual safety" while at the same time respecting "dignity safety."

Conclusion

It is vital that schools help foster a deeper and different discussion regarding speech. These efforts must attend both to debates over the legal dimensions of government's relationship to speech and to the development of an aspirational vision of speech. What are the benefits and costs of "free" speech? What are ways to foster robust discussions—not divisive shouting

matches—about controversial issues? How can we increase the possibilities of students contributing to a healthier democracy through discussions that are simultaneously robust, inclusive, and reflective?

By providing curricular contexts that model respectful and thoughtful exchange and by helping youth think more fully about the ways others may hear what they say, educators can help young people develop both the skills and the desire to exercise their speech rights in ways that advance a diverse society and foster a healthier and more inclusive democracy. ■

Notes

1. The authors thank Paula McAvoy, Mary Ellen Daneels, and John Rogers for input on this paper. (They are not responsible, of course, for its deficits.)
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