

The Forgotten Origins of the Constitution on Campus

Foes of hateful speech should remember how free expression was protected on campus in the first place— through the civil rights movement.

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This article appears in the Winter 2018 issue of The American Prospect magazine. Recent conflicts on campus have featured as antagonists proponents of racial justice

versus proponents of civil liberties. Many in both camps identify as liberals. A dose of recollection might help dissipate this avoidable and politically destructive strife. We should recall that in order to more militantly battle Jim Crow segregation, black high school and college student activists in the Deep South brought the federal

Constitution to campus. They initiated the lawsuits that prompted judges to recognize that students at public schools are entitled to federal constitutional rights to due process and free speech. In the history of anti-racism, their demands were not atypical. Ardent champions of racial justice have typically been ardent champions of civil liberties. The Second Reconstruction of the 1960s, for example, prompted not only the emergence of law aimed at undoing racial hierarchy; it also prompted the growth of expansive constitutional doctrines on free expression.

To protect members of the National Association for the Advancement of Colored People (NAACP) from damaging exposure by segregationists, activists moved courts to recognize organizational privacy. To shield civil rights attorneys from rules that would have crippled their ability to further their cause through lawsuits, advocates nudged the courts to acknowledge litigation as a form of political expression warranting protection under the First Amendment. To insulate news organizations from local officials who loathed publicity that put Jim Crow customs in a bad light, lawyers convinced the Supreme Court to transform the law of libel. To protect civil rights protesters against hostile authorities, advocates persuaded courts to craft rules that inhibit the squelching of massed dissent.

Student activists contributed mightily to this dual campaign for racial justice and enhanced liberties. A seminal confrontation stemmed from events on February 25, 1960, when 35 students enrolled at the all-black Alabama State College participated in a sit-in. Their target was a racially segregated grill located in the county courthouse in Montgomery. Their protest occasioned neither violence nor arrests. Still, when the governor of the state, John Patterson, heard about the demonstration, he “advised” the African American president of Alabama State, H. Council Trenholm, to consider expelling the participants. As governor, Patterson was the ex officio chair of the state Board of Education.

His advice therefore mattered greatly to Trenholm.

On March 4, after additional demonstrations and after having personally warned dissidents to desist, Trenholm sent letters to nine students informing them that they had been expelled “For Conduct Prejudicial to the School and for Conduct Unbecoming a Student or Future Teacher in Schools in Alabama, for Insubordination and Insurrection, or for Inciting Other Pupils to Like Conduct.” Six of the students challenged the legality of the expulsions in *St. John Dixon, et al. v. Alabama State Board of Education*. Their attorneys (a distinguished array that eventually included Fred Gray, Thurgood Marshall, Jack Greenberg, and Derrick Bell) argued that the punishment violated the federal Constitution. They mainly focused on the absence of any notice or hearing at which the students could contest the authorities’ allegations.



Risking Expulsion: Four Alabama State College students who participated in a sit-in at a segregated restaurant in Montgomery

The federal trial judge presiding over the case was Frank Johnson, a white Alabamian who later became renowned for safeguarding the rights of anti-racist protesters. On this occasion, however, he ruled against them. First, he maintained that “[t]he right to attend a public college or university is not in and of itself a constitutional right.” Second, he posited that “[t]he right to attend ... is

conditioned upon an individual student's compliance with the rules and regulations of the institution." A regulation imposed by the

Alabama State Board of Education declared that "[j]ust as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult." A related provision stipulated that "[a]cts of insubordination, defiance of authority, and conduct prejudicial to discipline and the welfare of the school will constitute grounds for suspension or expulsion." Judge Johnson saw these terms as having "the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution."

A splintered panel of the Fifth Circuit Court of Appeals reversed Johnson. Constituting the majority were Judge John Minor Wisdom, the most staunchly liberal of the judges on that court, and Judge Richard Taylor Rives, another strong liberal, who wrote the opinion. Judge Ben F. Cameron, a fervent segregationist, dissented.

The question for decision, Rives declared, was "whether the students had a right to any notice or hearing whatever before being expelled." He and Wisdom concluded that they did. Rives gave short shrift to the right/privilege distinction invoked by Johnson, declaring that even if a person has no constitutional right to pursue a given activity, he does have a right to be free of governmental interference unless it is constrained by due process. The court of appeals similarly dismissed the argument that the plaintiffs had waived their rights by matriculating at Alabama State upon terms to which they had agreed. The state, Rives declared, "cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process."

Cameron grouched in dissent that the court's decision would undercut school authority, subvert student discipline, and make "federal functionaries"—judges?—into a "Gargantuan aggregation of wet nurses or baby sitters." Wisdom and Rives insisted, however, that under the federal Constitution, the student protesters were entitled to due process and that under the circumstances, due process required notice and some opportunity for a hearing prior to expulsion for misconduct.

THE *DIXON* DECISION broke with a deeply ingrained judicial tradition of deference to school authorities. Rives sought to obscure the novelty of what he and Wisdom had done. Their innovativeness, however, is highlighted by a ruling announced by another federal court of appeals five months prior to the protests that triggered

the *Dixon* expulsions. *Steier v. New York State Education Commissioner* involved a student, Arthur Steier, who wrote letters to the president of Brooklyn College complaining that the school's administration was wrongly dominating student organizations. Steier was suspended for six months under a rule requiring students to "conform to the requirements of good manners and good morals." After being readmitted and agreeing to "have a change of spirit," he helped publicize the news of his suspension and probation in the college newspaper. For this, he was expelled. Responding to Steier's assertion of a federal constitutional grievance, federal courts concluded that he had no valid claim. One judge quipped that while the plaintiff was indeed constitutionally free to say what he pleased, he was not entitled to say it as a student at Brooklyn College. After all, the judge reasoned, the student had been admitted "not as a matter of right but as a matter of grace having agreed to conform [to the school's] rules and regulations."

Steier was no outlier. When it was decided, federal case law permitted students to be disciplined, even expelled, on virtually whatever terms school officials determined. It is against that backdrop that the *Dixon* case is rightly seen as a pioneering ruling.

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Although the dissidents in *Dixon* confronted a white power structure, they simultaneously challenged a black one as well, particularly the presidency of their college. Black college presidents enjoyed powers that were rare for any African American to exercise in Jim Crow America, especially in the South. They oversaw workforces, dictated the fates of professors and students, associated with some of the nation's most affluent people, and knew, sometimes quite familiarly, major regional and national politicians. At the same time, the all-white boards of education and boards of trustees that selected and supervised black college presidents typically communicated the expectation that these educators

would toe the segregationist line on racial politics and certainly suppress rebellion on campus. Trapped by dependency on whites for financing and other essential resources, black college presidents were victimized by many of the same aggravating racial humiliations visited routinely upon "ordinary" Negroes. Although H. Councill Trenholm was, to students and peers in the world of the black college, a formidable figure, to the governor and other white officials he was but another "boy" from whom they could and did demand obedience. When Patterson got fed up with the desegregationist dissent of Lawrence D. Reddick, the chair of the

history department at Alabama State College, the governor denounced the professor as a Communist sympathizer and racial agitator, and the state board of education ordered Trenholm to dismiss him “before sundown.” Trenholm dismissed Reddick just as he expelled the dissident students.

Many observers faulted Trenholm for failing to do more to resist the segregationists. “It is indeed unfortunate,” wrote a correspondent from Chicago, as recounted by Adam Fairclough in *Teaching Equality: Black Schools in the Age of Jim Crow*, “that you have become the hatchet man for the governor of Alabama and expelled those kids.” Someone from Philadelphia complained: “The Uncle Toms are supposed to be dead. ... Does economic security mean so much? How will you face tomorrow?” An observer from Huntsville, Alabama, declared, “We must not jump every time the white man speaks.” Writing from Dayton, Ohio, Trenholm’s own cousin remarked, “You should have resigned yourself.”



AP Photo/Horace Cort

When Alabama Governor John Patterson heard about the student sit-in in Montgomery, he “advised” the African American president of Alabama State, H. Council Trenholm, to consider expelling the participants.

Many students, however, recognized Trenholm’s vulnerable position and the agonizing compromises that attended it. The same day that Trenholm warned activists to desist from further protest, one of them sent a remarkable petition addressed to the governor—the figure whom they correctly saw as the real power behind the repression. This student,

Bernard Lee, was expelled, became a plaintiff in *Dixon*, and subsequently emerged as a key aide to Martin Luther King Jr. Lee’s petition reflects the idealism, poise, and boldness that suffused the sit-in movement of the early 1960s:

To the Honorable Governor John Patterson.

We have taken cognizance of your mandate to President H. Council Trenholm of Alabama State College to dismiss from the School those students who participated in the sit-down strike at the County Court House snack-bar, Thursday, February 25, 1960.

We, a united group of students of said college, humbly request that you reconsider your order to President Trenholm. This decision is out of tune with the spirit of Americanism. The snack-bar at the Court House is a symbol of injustice to a part of the citizens of Montgomery. It is a flagrant contradiction of the Christian and Democratic ideals of our nation.

We went to the snack-bar not as hoodlums, but in the same manner and spirit in which other college and university students have done in other parts of the country. Our purpose was to express our resentment of a scheme that fails to recognize its responsibility to decent and orderly persons of all creeds, color or nationalities. ...

Our cause is just. We are asking that you study it with an open mind and give President Trenholm the authority to settle this issue

with us.

We are reasonable and considerate. We may be crushed, but we shall not bow to tyranny.

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Although Lee and the other expelled students won their lawsuit, none of them re-enrolled. Eventually, though, their sacrifice did receive a bit of recognition. In 2010, Alabama State College reinstated the nine and conferred upon them honorary degrees.

DIXON INVOLVED COLLEGE students. What about federal constitutional rights for high school students? The most famous case recognizing a right to freedom of expression for high school students is *Tinker v. Des Moines District*, decided by the Supreme Court in 1969. In the *Tinker* case, a principal suspended junior high school students who refused to remove black armbands symbolizing protest against the Vietnam War. Noting the absence of any evidence that the students' symbolic protest caused any disruption or posed a threat of substantially interfering with the work of the school, the Court ruled that the principal had violated the young dissidents' First Amendment rights. Writing for the Court, Justice Abe Fortas declared that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." As is usual, however, the judgment of the Supreme Court represented a ratification rather than the initiation of a legal proposition. As Fortas acknowledged, courts in the Deep South had previously grappled with the issue of constitutionally protected rights to freedom of expression for secondary school students.

In one of these key disputes, *Burnside v. Byars*, the black principal

of the black Booker T. Washington High School in Philadelphia, Mississippi, forbade students from wearing “freedom buttons” to school. Emblazoned on these buttons were “One Man One Vote” and “SNCC,” the abbreviation, of course, for the Student Non-Violent Coordinating Committee. Students who refused to remove the buttons were suspended. Three challenged the constitutionality of this punishment. They argued that it wrongfully encroached upon constitutionally protected freedom of speech. The state contended that the prohibition should be permitted under the circumstances because it assisted in the

maintenance of proper discipline. Allowing students to wear political buttons would inevitably result in distraction, thereby undercutting the school’s educational mission.

AP Photo

Constitutional Pioneer: Bernard Lee was expelled for demanding free speech, and later served with MLK.

The plaintiffs lost the first round when a U.S. district judge declined to issue a preliminary injunction against the suspensions. On appeal, however, the plaintiffs prevailed. In the *Burnside* decision, the Fifth Circuit Court of Appeals bestowed upon high school students a right protected by the First Amendment to express themselves



unobtrusively even against the wishes of school authorities. The Fifth Circuit thus anticipated by three years the Supreme Court's *Tinker* decision. A third case stemming from events at South Carolina State College in Orangeburg, South Carolina, revealed an especially protracted episode of intra-racial conflict over civil liberties. The president of the college was Benner C. Turner. Born into an affluent family in Columbus, Georgia, Turner attended Phillips Academy in Andover, Massachusetts, before attending

Harvard College and Harvard Law School. He served as the dean of the South Carolina State law school before being selected in 1950 as the president of South Carolina State College by Governor Strom Thurmond and an all-white board of trustees.

Like other African American presidents of black, segregated public institutions, Turner occupied a precarious position. He served at the pleasure of a political regime committed to the maintenance of white supremacy. Annually, he had to beg an all-white, segregationist legislature for funding. He had to wrest support from lawmakers who openly and unapologetically favored white schools over black schools. He had to contend with influential arbiters of white public opinion who maintained that, under segregation, race relations were harmonious and that blacks ought to be satisfied with what they had received. "The Negro," *The Times and Democrat* newspaper announced in August 1955, "has much for which to thank the white race. He has been given, through public monies, a splendid educational establishment in this state."

Under Turner, South Carolina State gained important educational accreditation. He oversaw the building of dormitories, housing for faculty, classroom facilities, a football stadium, and the elevation of faculty salaries and qualifications. In 1950, only two members of the faculty had earned doctorates; by 1967, the number had risen to 27. At the same time, Turner ran South Carolina State autocratically. According to historian William C. Hine, he "segregated himself from most black people. He had little interest in social activities. He took no part in church, lodge, or fraternity affairs. To some people, he resembled the overseer of a plantation."

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Turner's rule.

The suppression of students and employees of the college, including professors, was a salient feature of Turner's rule. Some contend that his authoritarianism should be understood as a technique that he perceived as needed to protect his institution. He sought, it can be argued, to preempt white extremists who were all too eager to shutter the school by seizing upon provocations—including mere demands for equal treatment—that would alienate segregationists. There is something to that defense. Turner undoubtedly viewed cracking down on anti-segregationist dissent as a price worth paying for the survival of an institution that contributed significantly to the advancement of blacks. It would be unrealistic, however, to portray Turner's dictatorial ways as stratagems focused solely on the well-being of the college. Turner liked exercising power and disliked being contradicted by those he viewed as subordinates. He suppressed dissidents not only because he saw them as threats to his institution; he suppressed them, too, because he abhorred being challenged, especially by other black people.

In 1956, when the student government president, Fred H. Moore, called a strike to protest against threats to send law enforcement personnel onto campus to quell anti-segregationist activism, Turner (with the board of trustees) retaliated harshly. He expelled Moore summarily and notified 14 other students that they would be excluded from campus after the end of the school year. Several professors were also sent packing, including the faculty adviser to the student newspaper. Her offense? She had failed, in Turner's view, to be sufficiently rigorous in excluding from the newspaper objectionable commentary. Turner took decisive steps to foreclose that from happening again; he put into his own hands the authority to pre-clear what was published. "While it is not forbidden that comments on controversial matters be printed in the college paper," he announced, "final authority as to what shall be printed

must rest in the President's office and not in the faculty adviser."

On February 24, 1967, three students—Joseph Hammond, John Stroman, and Benjamin F. Bryant Jr.—received notice that college officials had suspended them for three years for having violated college Regulation 1: "The student body ... is not to celebrate, parade, or demonstrate on the campus at any time without the approval of the Office of the President." An unauthorized protest had voiced disapproval of Turner's dictatorial streak. Previously, his censorship had been resented but not legally challenged. This time, students took South Carolina State College to court and prevailed. Striking down

Regulation 1 as an illicit prior restraint on speech and assembly, U.S. District Judge Robert Hemphill maintained that "[a]cademic progress and academic freedom demand their share of Constitutional protection." That same year, Turner resigned.

Because of the efforts of activists who demanded rights of due process and freedom of expression as they fought to dismantle Jim Crow pigmentocracy, *all* students and teachers at public institutions came to enjoy an elevated legal status. In 1950, they had been subject to the dictates of authorities uninhibited by federal constitutional restraints. By 1970, they had won judicially recognized rights. Here, as elsewhere, brave souls committed to battling racial oppression widened the circle of freedoms to which all in America can properly lay claim.

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