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OPINION

My opinion Jim Kiser: NAU speech code unconstitutional

My opinion Jim Kiser

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Northern Arizona University is getting some unwanted publicity for its speech code that violates the U.S. Constitution.

The Foundation for Individual Rights in Education in October singled out the Flagstaff school for its ironically titled "Speech Code of the Month" award.

And a recent Goldwater Institute e-mail newsletter carried this headline: "First Amendment on Spring Break at NAU."

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I seldom agree with Goldwater, but this time the institute is right.

NAU's nine-page "Safe Working and Learning Environment Policy" states: "Prohibited harassment includes, but is not limited to, stereotyping, negative comments or jokes, explicit threats, segregation, and verbal or physical assault when any of these are based upon a person's race, sex, color, national origin, religion, age, disability, veteran status, or sexual orientation."

NAU is right to prohibit some of those behaviors, such as segregation

or physical assault. They are illegal.

But stereotyping, negative comments or jokes - as offensive as they may be - are protected speech under the First Amendment. And as a state university, NAU is obligated to respect the First Amendment.

Universities often have run afoul of free-speech protections in their efforts to create campus atmospheres that encourage discussion and learning.

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In its case, NAU's policy asserts, "Academic freedom can exist only when all are free to pursue ideas in a non-threatening, non-coercive atmosphere of mutual respect."

That statement, however, is naive and inaccurate. Public universities have the right - more likely an obligation - to encourage an atmosphere of mutual respect. But they cannot require it.

"We will defend and protect speech," Lisa Nelson, NAU's director of public affairs, said when I talked with her on the telephone. "But we will also defend the right of students and faculty to be free of prohibited harassment and discrimination."

She added, "It's an obvious balance. ... It depends on the circumstances."

That is the point. It is not a balancing act. Constitutionally protected speech cannot be prohibited, even by university administrators with the best of intentions.

The proper response to offensive speech is not proscription, but more speech. University leaders can help create the climate they want by vigorously condemning speech they think is inappropriate.

"Speech is not harassment simply because it offends someone," the Foundation for Individual Rights in Education noted in its award announcement.

In a 1999 ruling, the U.S. Supreme Court found that student-on-student harassment can be prohibited only when it "is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." NAU's policy, however, prohibits speech that falls far short of meeting that standard.

Courts consistently have struck down university speech codes as being overly broad or vague. Incorporating speech codes within harassment and discrimination policies, as NAU has done, doesn't make them any more constitutional.

I also reviewed University of Arizona and Arizona State University codes online, and they appear to have avoided NAU's free-speech problems.

NAU administrators could have saved themselves some public relations grief had they read the 1992 statement by the American Association of University Professors titled, "On Freedom of Expression and Campus Speech Codes." It would have reminded them of free speech's central role in education.

The association's statement acknowledges that campus climate is important: "Academic progress of minority and majority alike may suffer if fears, tensions, and conflicts spawned by slurs and insults create an environment inimical to learning."

But the statement concludes: "Rules that ban or punish speech based upon its content cannot be justified. An institution of higher learning fails to fulfill its mission if it asserts the power to proscribe ideas - and racial or ethnic slurs, sexist epithets, or homophobic insults almost always express ideas, however repugnant. Indeed, by proscribing any ideas, a university sets an example that profoundly disserves its academic mission."

The statement concludes with an important reminder that NAU should take to heart: "Free speech is not simply an aspect of the educational enterprise to be weighed against other desirable ends. It is the very precondition of the academic enterprise itself."

Editorial columnist Jim Kiser appears Sundays, Wednesdays and Fridays. Contact him

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