



FREEDOM OF SPEECH AND ITS PROTECTION ON COLLEGE CAMPUSES

Introduction

The worst kept secret in American postsecondary education is the long-standing and pervasive degradation of First Amendment rights. Occurrences like shout downs(1), disinvitations of speakers(2), and “cancellations”(3) have become commonplace at our colleges and universities, often as a result of taxpayer dollars subsidizing culturally one-sided woke faculty(4) and administrators(5). This trend threatens both our constitutionally guaranteed rights and the purpose of a college education.

Students know campus climates are changing for the worse. According to a recent survey, 63 percent of students believe the political and social climate on their campus prevents people from freely expressing their opinions, an increase of almost 10 percent in the past two years. However, 88 percent of students felt their college should foster environments where students and professors can respectfully dialogue with people whose views differ from their own(6). Unfortunately, colleges and universities are moving in the opposite direction on free expression and thought, instead embracing cancel culture and uniformity.

Luckily, sensible public policy can push back on this plague of illiberalism. Dozens of states have already enacted legislation to protect the First Amendment rights of some postsecondary students. But progress has been slow and has not yet spread throughout the nation. To ensure this right is realized for every student, it is necessary to pass strong federal protections. This report describes the modern challenges to the first amendment rights of students and faculty and offers potential solutions to secure those rights.

-
1. <https://www.cato.org/commentary/shouting-down-speakers-regular-organized-campus-business>
 2. <https://www.usatoday.com/story/opinion/2018/06/29/universities-politically-controversial-commencement-speakers-student-protest-column/734068002/>
 3. <https://www.campusreform.org/article?id=19916>
 4. <https://freebeacon.com/campus/public-university-offers-professors-cash-to-go-woke/>
 5. <https://www.foxnews.com/politics/top-dei-staff-at-public-universities-pocket-massive-salaries-as-experts-question-motives-of-initiatives>
 6. <https://heterodoxacademy.org/wp-content/uploads/2022/02/CES-Report-2022-FINAL.pdf>

Why Free Speech is Critical to the Goals of Postsecondary Education

“If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.” – John Stuart Mill

A foundational purpose of universities is the pursuit of truth. Whether enrolled in a liberal arts college or in medical school, students present arguments and are presented with rebuttals and other arguments as they seek, discover, and explore the best ideas their peers and the world have to offer. It is often the case that there is significant disagreement about the merits of those ideas, but that is the point: “By design and by effect, it is the institution which creates discontent with the existing social arrangements and proposes new ones. In brief, a good university, like Socrates, will be upsetting(7).” The unfettered exchange of ideas is critical to that purpose.

John Stuart Mill, one of the great free speech philosophers, offered several arguments for why a “marketplace of ideas” is necessary to seek truth effectively(8):

- First, because no one knows the truth, and so censoring an idea may be censoring the truth.
- Second, because the free competition of ideas is the best way to find truth.
- Third, because no one idea is the sum of truth, even those ideas containing only a portion of the truth will help society acquire knowledge.

In other words, the robust exchange of ideas preserves individuality, restrains the tyranny of social opinion, and guides the pursuit of truth.

The Legal and Moral Responsibility of Universities to Free Speech

The Supreme Court has long established that “state colleges and universities are not enclaves immune from the sweep of the First Amendment(9).” For example, in *Rosenberger v. University of Virginia* (1995) the Court held that the university could not selectively withhold funds from student publications simply because they advocate a controversial point of view. The Court has also made clear that the government cannot prevent speech because it is likely to provoke a hostile response – otherwise known as a “heckler’s veto” – nor can it ban speech on the grounds that it is vulgar(10), that it “expresses ideas that offend,”(11) or that society itself finds the idea disagreeable(12).

For the preservation of a pluralist society, universities also have a moral duty to promote free speech. When censorship or demagoguery become the norm, existing power structures become further entrenched and mobs become commonplace, perpetually searching for heretics to burn on the altar of public opinion. Modeling the art of disagreement, persuasion, and resolution produces better students and citizens than does the coerced conformity of a campus community. Schools would do well to adopt the famous sentiment, “I detest what you write, but I would give my life to make it possible for you to continue to write.”

7. Quotation from the University of Chicago’s Kalven Report. <https://www.thefire.org/first-amendment-library/special-collections/university-of-chicago-kalven-report/>

8. Mill’s arguments can be found in Chapter 2 of his book *On Liberty*. <https://www.mtsu.edu/first-amendment/article/872/on-liberty>

9. *Healy v. James*, 408 U.S. 169 (1972); See also *Papish v. Board of Curators of the University of Missouri et al*, 410 U.S. 667 (1973) which states that *Healy* makes it clear that the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of “conventions of decency”; and *Widmar v. Vincent*, 454 U.S. 263 (1981) which states “our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”

10. *Cohen v. California*, 403 U.S. 15 (1971)

11. *Matal v. Tam*, 582 U.S. __ (2017)

12. *Texas v. Johnson*, 491 U.S. 397 (1989)

Commitment to free speech requires defending even unpopular and repulsive speech. This principled commitment is essential in postsecondary education where ideas initially considered “contrarian” can eventually change the world(13).

Simply put, public colleges and universities that participate in federal programs, and the private colleges and universities that promise free speech rights to their students, have an obligation to permit and promote robust dialogue and debate among their students and faculty.

Modern Challenges to Freedom of Speech

“Racist, sexist, anti-gay, Charles Murray go away!” went the chants of dozens of students at Middlebury College. Murray, a political scientist and scholar at the American Enterprise Institute, had been invited by a student group to lecture at the university but ended up fleeing campus after being verbally and physically accosted by an angry mob of students. Even Middlebury professor Allison Stanger, who openly disagreed with Murray but was set to moderate a discussion with him after his lecture, suffered a concussion and whiplash while fleeing from the student mob(14). Once they got in the car to leave, students pounded on the windows, jumped on the car, and attempted to barricade their exit(15).

Murray’s experience at Middlebury is a dark example of the modern challenges that free speech faces on college campuses. And it is not a singular one. Over the past two years, there have been over 100 attempts each year to silence professors from across the political spectrum, up from 30 attempts in 2015. These were not just empty threats: more than 60 percent of these incidents resulted in some sort of investigation, sanction, suspension, or even termination(16).

Attacks on free speech can come from other students, faculty, or the university leadership itself. They can be either deliberate or inadvertent. They can be obvious or subtle. Whatever their origins and qualities, these attacks from inside the Ivory Tower are having profound effects on the minds of generations of Americans that will be responsible for the future of this country. They are a serious threat to our democracy, and policy makers must be aware of the different ways that expressive rights are hindered on college campuses.

Institutional Crackdowns

In recent years, multiple universities have been exposed for firing or otherwise punishing faculty for their expressive speech(17). Professors have lost tenure, academic positions, and had their reputation tarred and feathered because of opinions that countered the popular ideology. This threat of punishment from the university has a chilling effect on researchers and campus discourse.

13. For the crime of claiming the sun does not revolve around the earth, Galileo Galilei was hauled before the Inquisition; Ignaz Semmelweis – the man who discovered that washing hands between medical procedures led to fewer infections in patients – was originally ostracized by the scientific community for his findings; Tolstoy’s writings were censored by the Soviet government but ultimately became Russian classics.

14. <https://www.nytimes.com/2017/03/13/opinion/understanding-the-angry-mob-that-gave-me-a-concussion.html>

15. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/04/protesters-at-middlebury-college-shout-down-speaker-attack-him-and-a-professor/>

16. <https://www.thefire.org/report-at-least-111-professors-targeted-for-their-speech-in-2021/>

17. <https://www.thefire.org/research/publications/miscellaneous-publications/scholars-under-fire/scholars-under-fire-2021-year-in-review-full-text/>

Consider the case of Joshua Katz, for example. After openly criticizing a proposed Diversity, Equity, and Inclusion (DEI) policy in a 2020 Quillete piece, Princeton University began a campaign against Katz, their foremost linguist(18). Princeton also reopened a disciplinary case for which Katz had already been punished. It became even clearer as internal investigations continued that had Katz remained silent on the DEI proposal, he may not have found himself in the crosshairs of university discipline. Ultimately, one of Princeton's most celebrated scholars had his tenure revoked and was fired – not for breaking any additional school policies but for speaking his mind(19).

Students have also been the victims of crackdowns on speech. In a 2021 incident at Yale, the administration spent weeks pressuring a member of the school's Federalist Society chapter to apologize publicly for sending an email invitation to an off-campus party for the chapter and another student organization that referred to his apartment as a "trap house" a term the administration claims has "triggering associations(20)." Administrators repeatedly hinted that the student might face consequences if he didn't apologize—including trouble with the bar exam's "character and fitness" investigations which law school deans can weigh in on. After public backlash, Yale dropped the investigation and expressed "regret" for how it was conducted(21).

Yale Law School isn't the only university punishing or otherwise censoring students for constitutionally protected speech. It's happening across the country, even in Congress's own backyard. Catholic University launched an investigation and threatened a "disorderly conduct" charge for a student who posted memes on his personal Instagram account criticizing a Young Americans for Freedom chapter event(22); the University of Virginia allowed a student-run judiciary committee to rule that a student who had criticized protestors should be blocked from graduating until she completed community service, remedial education, and publicly apologize(23); and a couple of weeks before the November 2020 election, Susquehanna University in Pennsylvania mandated that students take down political campaign signs from their dorm windows citing "safety concerns(24)." Susquehanna's chapters of College Democrats, College Republicans, and the libertarian Young Americans for Liberty all joined in an open letter opposing the action. Despite the Supreme Court's repeated affirmation that speech is protected by the First Amendment, these rights remain under assault in our universities.

Institutions have also handed out punishments through the ever-increasing bias reporting systems or bias response teams(25). These teams of students or school personnel are designed to respond to, solicit, or receive reports of "bias incidents" or unwanted or disliked speech or incidents at a university. The overly broad understanding of what qualifies as an incident worthy of investigation ultimately turns these teams into censor squads for anyone who has offended anyone else (26).

18. <https://quillette.com/2020/07/08/a-declaration-of-independence-by-a-princeton-professor/>

19. <https://www.nytimes.com/2022/05/23/us/princeton-fires-joshua-katz.html>

20. <https://freebeacon.com/campus/a-yale-law-student-sent-a-lighthearted-email-inviting-classmates-to-his-trap-house-the-school-is-now-calling-him-to-account/>

21. <https://freebeacon.com/campus/yale-law-dean-admits-error-stops-short-of-apologizing-to-targeted-students/>

22. <https://www.thefire.org/catholic-university-of-america-clears-student-of-disorderly-conduct-charge-for-arthur-meme/>

23. <https://www.thefire.org/university-of-virginia-doubles-down-on-unconstitutional-punishment-of-student-for-comparing-protesters-to-speed-bumps/>

24. <https://www.thefire.org/days-before-2020-election-pennsylvanias-susquehanna-university-orders-students-to-remove-political-campaign-signs/>

25. <https://www.thefire.org/research/publications/bias-response-team-report-2017/report-on-bias-reporting-systems-2017/>

26. <http://speechfirst.org/wp-content/uploads/2022/07/SF-2022-Bias-Response-team-and-Reporting-System-Report.pdf>

Free Speech Zones

Institutions must allow for ample opportunities for speech on campus. An institution may constitutionally craft a content and viewpoint neutral process for reasonable time, place, and manner restrictions for speech activities, but the so-called “free speech zones” that exist at many universities go much farther. These oxymoronically named locations are plainly at odds with the First Amendment. While “free speech zones” have been propped up by some universities as areas where students can speak their mind and protest, they effectively prohibit free speech anywhere outside the zone. Further, “free speech zones” are often small and in an out-of-the-way area, adding more restrictions to free speech. Still worse, sometimes students can only conditionally use a “free speech zone,” often needing to comply with onerous requirements like pre-registering an event with an administrator, often days or weeks in advance, or adhere to strict time limits on expressive activities.

For instance, students at Modesto Junior College in California were required to request administrative permission to use the school’s free speech zone (which was nothing more than a little cement pad) at least five days in advance; each student was permitted to use the zone for a maximum of eight hours in a semester. Modesto’s unconstitutional policy was ultimately struck down in court. A similarly restrictive free speech zone at California State Polytechnic University, Pomona, prevented a student and animal rights activist from handing out flyers on campus(27). At Joliet Junior College, a student was prevented from passing out flyers for the Party for Socialism and Liberation(28). In Mississippi, a Jones College student was stopped from recruiting for the campus chapter of Young Americans for Liberty and from polling fellow students on marijuana legalization(29). All of these incidences led to lawsuits that were later settled and resulted in each college no longer restricting speech to a single designated area. In 2021, Chike Uzuegbunam was also successful in a court battle against his alma mater, Georgia Gwinnett College, for violating his First Amendment rights when campus officials stopped him for handing out pamphlets and speaking about his faith. Georgia Gwinnett College had a “free speech zone” that was 0.0015 percent of the campus, was only available to students for 10 percent of the week, and could only be used after an extensive process of reserving time and receiving approval. Even when Chike abided by the college’s process, he was still stopped from using the zone because someone complained about what he was saying(30).



“Free Speech Zone” at Modesto Junior College

27. <https://www.latimes.com/local/lanow/la-me-ln-pomona-speech-20150723-story.html>

28. <https://www.thefire.org/victory-student-detained-for-passing-out-political-flyers-settles-lawsuit-with-illinois-college/>

29 <https://www.vicksburgpost.com/2020/11/23/denying-free-speech-cost-jones-county-junior-college-thousands/>

30. <https://adfllegal.org/blog/victory-supreme-court-rules-college-student-silenced-sharing-gospel>

It's because of brave individuals like Chike and his fellow students at Modesto, California State Polytechnic, Joliet, and Jones College that institutions are thinking twice about "free speech zones" and that many state legislatures are banning these policies outright(31). Despite these victories for free speech, "free speech zones" remain on campuses across the nation(32).

These zones are clearly illegal. Our Constitution does not split the nation between "free speech zones" and "non-free speech zones." Subject to reasonable content and viewpoint neutral time, place, and manner restrictions, all public spaces in America should be free-expression areas, including our colleges and universities.

Security Fees

Even when an institution moves forward with appropriate time, place, and manner, controlled speech, sometimes institutions assess high security fees to cover the costs of maintaining campus security during the visit of a controversial speaker(33). While government actors may charge security fees for those wishing to use public facilities for expressive purposes, the Supreme Court has held that varying the amount of security fees because of the anticipated hostility to speech is unconstitutional(34). A student or student group who is being asked to pay a security fee to host a speaker cannot receive a drastically different security fee assessment than another student or student group on the basis that their event might draw protest. Institutions should remain committed to only implementing content-neutral policies, including security fee provisions.



Protestors gather in opposition to Ann Coulter's planned speech at UC Berkeley (Fox News)

31. <https://www.jamesmartin.center/2020/07/did-you-know-the-decline-of-free-speech-zones/>

32. <https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2021/>

33. <https://www.yaf.org/news/berkeley-charges-conservative-students-15k-exercise-first-amendment-rights/>

34. *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992)

Overbroad Anti-Harrassment Policies

Regulations under Title IX of the *Education Amendments of 1972 (Title IX)* define sexual harassment as a form of unlawful sexual discrimination. As a result, colleges have a legal duty to respond to all accusations of sexual harassment. The current regulations provide a clear definition of sexual harassment as actions that are so severe, pervasive, and objectively offensive that these actions will deprive victims of access to educational opportunities(35). This definition is based on the standard established by the Supreme Court in *Davis v. Monroe County Board of Education*(36). This well-established precedent protects students from harassment while providing an objective standard that protects students' free speech rights. Unfortunately, many universities define sexual harassment in ways that go beyond the legal obligation and encompass expressive conduct. These definitions are often created to avoid potential civil rights investigations and subsequent losses of federal funding. But institutions have chilled speech by simply labeling protected speech and conduct as unlawful discrimination and/or harassment under Title IX. This problem will get worse if the Biden administration finalizes its proposed revisions to Title IX's regulations. The Biden administration's proposal to replace the Supreme Court's clear and objective definition of sexual harassment with an open-ended, politically skewed definition will only diminish students' free speech rights further.

For example, the University of New Hampshire found a student guilty of sexual harassment for posting flyers in which he critiqued females for taking the elevator rather than the stairs. Even after the student released an apology for this boorish action, the university removed him from student housing(37). Incidents at other universities have been similarly distasteful, but have raised serious questions about whether excessive responses to minor incidents can chill protected speech by leaving students and faculty unsure where the line is and unsure if constitutionally protected speech will be disciplined as sexual harassment(38).

35. <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>

36. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

37. <https://www.thefire.org/university-of-new-hampshire-evicts-student-for-posting-flier/>

38. More examples of Title IX investigations chilling speech can be found here: <https://www.thefire.org/the-chilling-effect-of-investigations/>

In addition to expanding the meaning of sexual harassment, colleges often overbroadly define other forms of harassment (39). An example of this came recently, when a group of American University law students had a heated class conversation on a GroupMe chat after Supreme Court documents were leaked before the final *Dobbs v. Jackson Women's Health Organization* decision(40). Afterwards, one student, a pro-life moderate Republican, brought a harassment claim to the university's Office of Equity and Title IX asserting that messages from some of his pro-choice classmates "unreasonably interfered with [the complainant's] educational experience" because the student identified as a Greek Orthodox Christian and moderate Republican. Eight pro-choice American University law students were then under investigation because of the claim that they sent "harassing and threatening messages." At least one law student was investigated for over six weeks but was recently cleared of the allegation. In another instance, the University of Washington's (UW) computer science department recommended that it's faculty include a land acknowledgement in each course syllabus and provided an example of such an acknowledgement for each faculty member. Professor Stuart Reges complied by including an acknowledgment(41) in his syllabus, but he bucked the University's recommendation by refusing to acknowledge a local native tribe's land ownership of university land as UW had hoped he would. Instead, Reges wrote the following: "I acknowledge that by the labor theory of property the Coast Salish people can claim historical ownership of almost none of the land currently occupied by the University of Washington(42)." The school launched a harassment investigation under a university policy that allows the school to "discipline or take appropriate corrective action for any conduct that is deemed unacceptable or inappropriate, regardless of whether the conduct rises to the level of unlawful discrimination, harassment, or retaliation(43)." Professor Reges has since filed a lawsuit to challenge this overbroad policy. These two examples are just a sampling of the ways universities use expansive definitions of harassment to prosecute those who refuse to walk in lock-step with administrative preferences.

39. Another example is Indiana University finding a student-employee guilty of racial harassment merely for reading a scholarly book in the presence of co-workers. (<https://www.thefire.org/cases/indiana-university-purdue-university-indianapolis-student-employee-found-guilty-of-racial-harassment-for-reading-a-book/>)

40. <https://freespeechproject.georgetown.edu/tracker-entries/american-university-completes-investigation-into-alleged-group-chat-harassment-clears-pro-abortion-rights-student-of-misconduct-allegations/>

41. A land acknowledgement or territorial acknowledgement is a formal statement given to acknowledge that an event is taking place on land originally inhabited and possessed by indigenous peoples.

42. <https://reason.com/2022/07/15/professor-sues-university-of-washington-over-land-acknowledgment-investigation/>

43. https://www.thefire.org/fire_speech_codes/washington-harassment/

Political Litmus Tests

Universities also preemptively discourage dissent through use of political litmus tests. Many prospective and current students and faculty are being compelled to sign statements, provide specific statements (as in the UW land acknowledgement case), or otherwise express support for a particular position or ideology the school wishes to propagate; failure to adopt the prescribed opinion can result in academic or professional consequences for students and faculty. By pressuring the adoption of a political position or ideology, these university actions choke dissent and free inquiry.

One such document is the “Diversity Statement” that many universities and colleges now require in their faculty hiring processes. Along with a CV or resume, prospective hires must answer questions regarding their commitment to the ideology and practice of “diversity, equity, and inclusion.” Institutions use this ideological test to judge faculty candidate hires. For example, the University of California-Santa Cruz expressly asks applicants for a “Statement of Contributions to Diversity, Equity, and Inclusion,” outlines what might be included in this DEI statement, and gives a rubric outlining how the hiring review committee will evaluate a job candidate’s statement(44). Additionally, the University of Illinois at Urbana-Champaign announced(45) that, in order to meet goals aligned with its strategic plan, the university will require a mandatory personal DEI statement from candidates seeking promotion or tenure by the 2024-2025 academic year(46). This inclusion of DEI criteria in tenure standards is a rising trend across the nation. The American Association of University Professors found that over 20 percent of institutions responding to a recent survey said they include DEI criteria in their tenure standards and another almost 40 percent reported they are considering adding them(47).

These DEI statements are not simple “anti-discrimination” statements but rather are coerced commitments to a larger ideology. Conformity toward any ideology, including “anti-racism,” is directly at odds with the principles of academic freedom. A 2021 AEI report found that one out of every five American professor is hired based on his or her commitment to the principles of DEI instead of on his or her merit(48). Offices fully committed to DEI have also become a staffing priority for institutions and some of these top DEI administrators are being paid salaries as high as \$430,000(49). A recent report found that large public universities averaged 45 DEI personnel, with some institutions well surpassing that number: the University of Michigan has 163 DEI staff, the University of Virginia and the Ohio State University each have 94 DEI staff, and Virginia Tech, University of California Berkley, Stanford University, the University of Illinois, and the University of Maryland all have over 70 DEI personnel on campus(50). And this new hiring spree of DEI administrators further injures students as other important departments are understaffed by comparison. For example, the University of Michigan has roughly 14 DEI staff for every one person providing services to students with disabilities(51). This proliferation of DEI administrators and this prioritization of DEI adherence in personnel decisions places importance on adherence to a social movement rather on education and serving students. This should not be the case.

44. <https://chancellor.ucsc.edu/recruitment/diversity-equity-inclusion-contributions-statements.html>

45. <https://emails.illinois.edu/newsletter/1844739901.html>

46. <https://www.insidehighered.com/news/2022/04/01/u-illinois-require-diversity-statements-tenure>

47. https://www.aaup.org/file/2022_AAUP_Survey_of_Tenure_Practices.pdf

48. <https://www.aei.org/research-products/report/other-than-merit-the-prevalence-of-diversity-equity-and-inclusion-statements-in-university-hiring/>

49. <https://www.foxnews.com/politics/college-diversity-inclusion-officers-rake-sky-high-salaries-debt-saddled-students-face-rising-costs>

50. <https://www.heritage.org/education/report/diversity-university-dei-bloat-the-academy>

51. Ibid.

Colleges and universities are looking for every opportunity to push conformity to the forefront of a college education. In the 2021-2022 school year, 90 percent of college freshman orientation programs focused on DEI as a topic, while only around 30 percent of orientation programs reviewed free speech or viewpoint diversity(52). It is key that students and faculty be free to question, research, and argue in pursuit of what is true. Schools that use such political tests and programming to shut out varying views ensure ideological monopoly and conformity—both of which are antithetical to college education.

Social Ostracization

The threat of being “canceled,” shamed, or otherwise ostracized for playing devil’s advocate, sincerely holding a counter-vailing opinion, or even posing hypotheticals has led to over 60 percent of students worrying that their reputation could be damaged because of something they said and over 20 percent of students to self-censor(53). The National Association of Scholars maintains a Cancel Culture database that currently lists over 250 instances of academic cancellation of students and faculty(54). Issues such as abortion, gun control, law enforcement and race top the list of the most difficult subjects to discuss freely on college campuses(55). For example, when the Dobbs Supreme Court case was leaked, Yale Law students went online calling on their peers to accost their conservative classmates through “unrelenting daily confrontation(56).” While shaming and other forms of ostracism are themselves protected speech, these social threats (real and perceived) demonstrate a closed intellectual attitude not benefitting an academic campus and have a chilling effect on campus discourse as students and faculty worry whether a comment may have social repercussions. Universities should continually seek ways to foster the environment of open-mindedness and open debate rather than silencing opponents.

52. http://speechfirst.org/wp-content/uploads/2022/08/SF_Freshman-Disorientation-Report_FINAL.pdf

53. https://5666503.fs1.hubspotusercontent-na1.net/hubfs/5666503/CFSR_2022_Report.pdf#Page=20

54. <https://www.nas.org/blogs/article/tracking-cancel-culture-in-higher-education#caseslist>

55. https://5666503.fs1.hubspotusercontent-na1.net/hubfs/5666503/CFSR_2022_Report.pdf#Page=16

56. <https://freebeacon.com/campus/unrelenting-daily-confrontation-after-roe-leak-yale-law-students-call-for-ostracizing-conservative-classmates-and-tossing-out-constitution/>

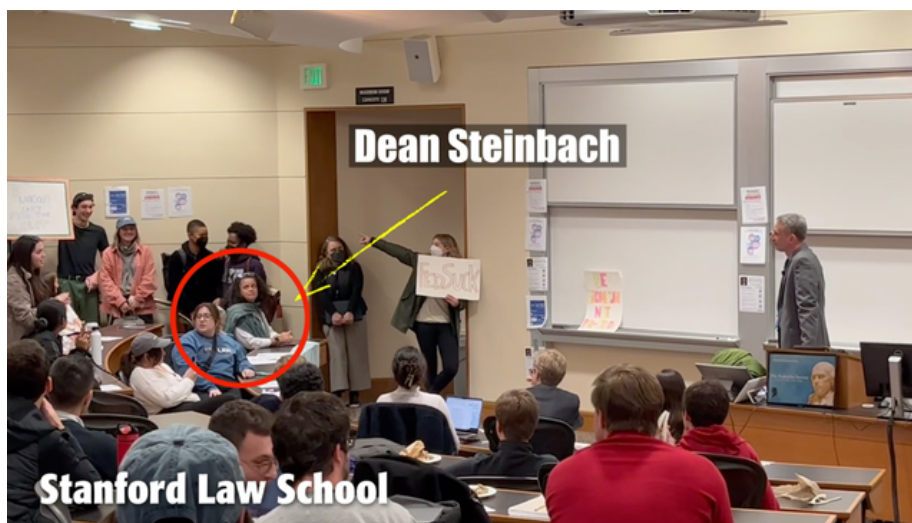
Shout Downs (the Heckler's Veto)

Deliberate shout downs occur when protesters, generally student led, attempt to disrupt or cancel a speech by yelling over the speaker, issuing threats, or even rioting. When the university fails to either stand up for the rights of the speaker or suppresses his or her speech because of the anticipated or actual reactions of opponents of the speech, a heckler's veto has occurred.

Shout downs have become increasingly common in recent years. Videos of student-led shout downs at Yale law school (57), UC Hastings(58), and elsewhere have discouraged those of good will on both sides of the political aisle. A recent survey conducted by the Foundation for Individual Rights and Expression (FIRE) and in partnership with College Pulse found that over 60 percent of college students report some level of acceptance for speaker shout downs. Even more worrisome, 20 percent consider it acceptable for people to use violence to stop speech(59). This threat of violence and campus disruption has led multiple universities to cancel appearances preemptively by potentially "offensive" speakers who simply have views that are contrary to the majority on campus.

For example, Dorian Abbot, a climate scientist at the University of Chicago, was disinvited from an invitation to speak at MIT after students and faculty members argued that his views on affirmative action and diversity programs were "infuriating, inappropriate, and oppressive(60)." Abbot's intended lecture would have been on a topic in his field of expertise and would not have touched on affirmative action, but protesters still convinced MIT to rescind their invitation. In 2022, former Secretary of Homeland Security Jeh Johnson withdrew from his invitation to give the Vassar College's 2022 commencement address after the eruption of student outrage about the former Secretary's role in opening detention centers for immigrants on the U.S.-Mexico border and enforcing border policies in the Obama administration (61).

As demonstrated above, attacks on free speech come in various forms and from both sides of the aisle. It is unfortunate that our institutions most fundamentally devoted to truth seeking and knowledge production participate in practices detrimental to that mission. Luckily, there are ways to change this.



Stanford Law students heckle 5th U.S. Circuit Judge Stuart Kyle Duncan during his planned appearance (Fox News)

57. <https://www.washingtonpost.com/opinions/2022/03/24/yale-law-school-silberman-protest/>

58. <https://reason.com/2022/03/02/ilya-shapiro-uc-hastings-law-school-students-protest-racism-supreme-court/>

59. https://5666503.fs1.hubspotusercontent-na1.net/hubfs/5666503/CFSR_2022_Report.pdf#Page=3

60. <https://www.nytimes.com/2021/10/20/us/dorian-abbot-mit.html>

61. <https://www.thecollegefix.com/obama-homeland-chief-accused-of-violence-on-marginalized-peoples-withdraws-as-grad-speaker/>

What Has Been Done and Why it is Not Enough

Acknowledging the rising assault on free speech, some legislators have attempted to protect expressive rights through public policy. Unfortunately, most states have not prioritized the issue, leaving students and faculty vulnerable to attacks on their freedom. When legislators have attempted to provide protections for free speech, the proposals fail to include strong enforcement mechanisms to ensure universities are effectively protecting the constitutional rights of their students and faculty.

At the Federal Level

More than 20 years ago, the federal government declared the importance of free speech on college campuses. The 1998 reauthorization of the *Higher Education Act (HEA)* included a Sense of Congress in support for “the free and open exchange of ideas(62).” This language received broad bipartisan support as well as support from outside groups across the political spectrum. An amendment offered by Sen. Ted Kennedy (D-MA) in the 2008 HEA reauthorization adopted even stronger pro-free speech language by condemning efforts to discriminate against students because of their speech(63). Despite these efforts, the HEA still fails to provide a strong enforcement piece that would hold universities accountable or provide a method by which aggrieved students and faculty can fight oppression.

With the degradation of expressive rights on college campuses, it’s obvious the HEA’s current language may be insufficient to hold schools accountable. More may be required from the federal government to ensure our nation’s colleges and universities are living up to their purpose of promoting a free and open exchange of ideas.

In recent years, the executive branch has also engaged in upholding fundamental rights guaranteed by the First Amendment. On September 23, 2020, the Trump administration Department of Education (ED) issued the Religious Liberty and Free Inquiry final rule regarding compliance with the First Amendment for both public and private institutions that receive grants from ED(64). Under the rule, ED would rely on a state or federal court to determine a final, non-default judgement that the institution violated the First Amendment and therefore ED grant conditions. Since private institutions are not subject to the First Amendment, the regulation holds private institutions to their own stated institutional policies regarding freedom of speech as a condition of receiving grants. A public or private institution must report any final, non-default judgement to ED no more than 45 days after the judgement is entered. ED would then be able to pursue existing remedies for an institution’s noncompliance with ED grant conditions. The Biden administration announced its review of certain aspects of the Free Inquiry Rule. To date, ED has not received any final, non-default judgments for any of its grantees, but because the rule relies on courts to make the determination of a violation it is clear that it would take time for ED to receive final judgements. Despite this, on February 22, 2023, the Biden administration published a Request for Information (RFI) asking for public comment on the portions of the rule related to institutions’ compliance(65). Additionally, ED also published a notice of proposed rulemaking (NPRM) to rescind the religious liberty component of the Free Inquiry Rule which says that public colleges and universities cannot deny any rights, privileges, or benefits to faith-based student organizations that it provides to secular student organizations(66).

62. P.L. 105-244

63. Section 112 of Higher Education Act (1998) which is now 20 U.S. Code § 1011a <https://www.law.cornell.edu/uscode/text/20/1011a>

64. <https://www2.ed.gov/about/offices/list/ope/factsheetreligiouslibertyandfreeinquiry09032020.pdf>

65. <https://www.federalregister.gov/documents/2023/02/22/2023-03671/request-for-information-regarding-first-amendment-and-free-inquiry-related-grant-conditions>

66. <https://www.federalregister.gov/documents/2023/02/22/2023-03670/direct-grant-programs-state-administered-formula-grant-programs> 12

At the State Level

Twenty-three states have enacted legislation to protect the First Amendment on college campuses(67). Most of these bills are versions or modifications of model legislation provided by organizations such as the Goldwater Institute, FIRE, the James G. Martin Center for Academic Renewal, and the American Legislative Exchange Council. These bills have had varying levels of success both getting through state legislatures and producing their intended impacts.

Each of these state bills includes one or more of the following elements:

- An official policy declaration from the university outlining and endorsing its commitment to free speech and academic freedom;
- Institutional disclosure requirements mandating that the university disclose its free speech policies to students through guidebooks or informational materials;
- The right to civil action for anyone whose free speech was infringed upon, or not protected adequately, by the university;
- A prohibition on abridging speech beyond reasonable time, place, and manner restrictions including the prohibition of “free speech zones,” whereby the university is not allowed to restrict the speech of either students or speakers invited to the campus;
- The creation of a university oversight body that serves as a supervisory committee on free speech;
- Disciplinary sanctions for anyone who infringes on the free speech of others, most notably through substantially disrupting others’ speech, the so-called heckler’s veto;
- A mandate of institutional neutrality, where the university commits to being neutral on contemporary public policy issues; and
- A mechanism for institutional accountability, which usually requires releasing a report on the state of free speech at the university to the public or state government.

However, these policies are only law in fewer than half of the states. Additionally, even fewer states have effective enforcement mechanisms to ensure accountability with the law. With only a minority of states protecting the expressive rights of their college students and with accountability measures still needed across the nation, the current state of free speech protections is inadequate.

The First Amendment is under threat on college campuses across the nation, and the federal government must step in and provide protection for students and faculty. Federal campus free speech legislation should include both clear standards to protect the right to free speech as well as strong enforcement mechanisms to protect that right.

67. <https://www.thefire.org/legislation/enacted-campus-free-speech-statutes/>

Potential Legislative Considerations

House Republicans have offered various proposals to further protect expressive rights on college campuses, such as Rep. Greg Murphy's (R-NC) *Campus Free Speech Restoration Act*(68) and Rep. Elise Stefanik's (R-NY) *Restoring Academic Freedom on Campus Act*(69).

These bills include various standards that universities would be obligated to meet. Those standards, and other potential policy proposals, are listed below. Congress should consider each of these proposals as it designs legislation to protect student and faculty expressive rights.

Adoption of Free Speech Statements

As evidenced throughout this report, restrictions on speech remain common at America's colleges and universities. By adopting a free speech statement, public and private universities commit themselves to protecting the free expression of their students and faculty. A great example is the "Chicago Statement"(70) which came out of the University of Chicago in 2014. The Statement is unambiguous in its support of freedom of speech: "Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. ... It is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive(71)." This Statement has since been adopted by over 80 institutions (72), but only a tiny percentage of the almost 6,000 institutions receiving Title IV funding in the nation (73). More institutions should follow Chicago's example.

Institutional Disclosure Requirements

Universities should be required to disclose their free speech policies to students and potential students through guidebooks or informational materials. Additionally, schools should include speech policies in easy to find places on their website. This would allow current students to understand their rights and would inform potential students of what they can expect at the school. It would also make it easier to identify schools with unconstitutional speech policies.

Georgia, for example, requires all public universities to publish their expressive activity policies "in their handbooks, on their websites, and through their orientation programs" and develop "materials, programs, and procedures" that educate campus administrators and other university officials on their responsibilities with regards to expressive activities on campus(74). Rep. Kevin Kiley (R-CA) introduced the *Free Speech On Campus Act* which would require institutions to provide written educational materials during college orientation to explain students' First Amendment rights and outline the policies and protocols the institution will take to protect the First Amendment. Most states do not have such a policy and campus speech codes can be hidden from prospective students and faculty. Requiring transparency encourages accountability.

68. <https://www.congress.gov/bill/117th-congress/house-bill/4007/text?r=88>

69. <https://stefanik.house.gov/press-releases?ID=9CE90188-0431-4984-84AC-3DB15F3CE821>

70. <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>

71. *Ibid*

72. Princeton University was the first to adopt the principles of the Chicago Statement in early 2015 and has since been followed by both public and private institutions including Purdue University, American University, Columbia University, Georgetown University, and the University of North Carolina at Chapel Hill, among others.

73. <https://nces.ed.gov/fastfacts/display.asp?id=1122>

74. <https://www.thefire.org/enacted-campus-free-speech-statutes-georgia/>

Prohibition of "Free Speech Zones"

Abolishing free speech zones would put an end to stifling speech unconstitutionally across campuses. Universities have an interest in establishing reasonable time, place, and manner restrictions on speech, but should be prohibited from doing anything more to restrict the speech of either students or speakers invited to campus.

Some states, including Tennessee(75), Louisiana(76), Montana(77), and North Carolina(78), have successfully ended the use of "free speech zones." As a result of this action by many states, the percentage of universities that quarantine speech has dropped in recent years(79). Rep. Greg Murphy (R-NC) introduced the *Campus Free Speech Restoration Act*, also carried by Sen. Tom Cotton (R-AR), which would prohibit institutions from limiting expressive activities to only certain areas of campus, such as a "free speech zone."

Codifying Supreme Court Precedent of Sexual Harassment

To eliminate overbroad sexual harassment policies, Congress should codify the Supreme Court's standard for student-on-student harassment. In *Davis v. Monroe County Board of Education* (1999), the Court determined that, in the educational context, sexual harassment is targeted, discriminatory conduct "that 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 (80)." By addressing extreme and usually repetitive behavior that would prevent a student from receiving his or her education, the Davis standard ensures that campuses can effectively address harassing conduct without infringing on free speech rights.

Mandated Institutional Neutrality

Mandated institutional neutrality would prohibit universities from making statements on contemporary public policy or social issues. When universities or their presidents take official political and social positions, even when simultaneously reaffirming the right of students and faculty to disagree, undue pressure is placed on campus discourse. This can have a chilling effect on dissent. Requiring neutrality would ensure that students and faculty at public universities do not feel pressured to adopt a policy or ideological position of their institution or its leaders.

75. <https://www.capitol.tn.gov/Bills/110/Amend/SA0333.pdf>

76. <http://www.legis.la.gov/Legis/ViewDocument.aspx?d=1098606>

77. [https://s3.amazonaws.com/fn-document-service/file-by-](https://s3.amazonaws.com/fn-document-service/file-by-sha384/cd11317c8ee9c3e1f8f08f7880c391389d81bdc84aed2c30187911da5157c76d6e81cbbb59531b5365895a4038893800)

[sha384/cd11317c8ee9c3e1f8f08f7880c391389d81bdc84aed2c30187911da5157c76d6e81cbbb59531b5365895a4038893800](https://s3.amazonaws.com/fn-document-service/file-by-sha384/cd11317c8ee9c3e1f8f08f7880c391389d81bdc84aed2c30187911da5157c76d6e81cbbb59531b5365895a4038893800)

78. <https://www.ncleg.gov/BillLookup/2017/H527>

79. <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2021/10/13114547/FIRE-20-21-Annual-Report.pdf>

80. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999)

The gold standard for university neutrality is found in the University of Chicago's Kalven Report:

"The university is the home and sponsor of critics; it is not itself the critic... To perform its mission in the society, a university must sustain an extraordinary environment of freedom of inquiry and maintain an independence from political fashions, passions, and pressures. A university, if it is to be true to its faith in intellectual inquiry, must embrace, be hospitable to, and encourage the widest diversity of views within its own community. It is a community but only for the limited, albeit great, purposes of teaching and research(81)." According to the Kalven Report, there are very few instances in which universities should take public positions. Chief among them are instances when measures threaten the university's truth-seeking mission or its values of free inquiry. In such an instance, Universities should publicly defend their mission but should refrain from adopting institutional positions on matters of public debate.

To the celebration of free speech advocates, the University of North Carolina at Chapel Hill, along with other schools, have already adopted the Kalven Report and a policy of institutional neutrality(82). But they remain in the minority.

It is important to note that institutional neutrality should only apply to public universities because private colleges, particularly religious schools with an established theological or ideological mission, may have an interest in promoting certain values, beliefs, or ideologies beyond the general academic values of truth-seeking and free inquiry.

Prohibition of the Use of Political Tests

Congress should also prohibit any form of political litmus test in admissions, hiring, or promotion decisions. For example, Congress can ban colleges from requiring potential faculty hires to pledge or make a statement of personal belief in any ideology or movement that promotes a specific partisan, political, or ideological set of beliefs, including DEI. The same protections could also be provided to students.

Statements of faith and codes of conduct used by religious universities should be exempted from this policy because their use is fundamental to the ecclesiastical mission of these schools.

Rep. Elise Stefanik's (R-NY) the *Restoring Academic Freedom on Campus Act* would require all Title IV-funded schools to end the use of political tests in admission, hiring, and promotion processes. The bill provides a private right of action that enables aggrieved students and faculty to seek appropriate remedies from a court. Additionally, if a judge finds an institution in violation for using a political test, the institution must revoke the practice or could face losing eligibility for Title IV funding. The bill exempts the use of statements of faith and codes of conduct for religious institutions. Similarly, Rep. Greg Murphy introduced a resolution that condemned universities compelling students to believe in certain political or social ideologies during the admission process or faculty hiring.

81. https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt_0.pdf

82. https://twitter.com/jarobinson1/status/1552422838266744840?s=20&t=Yd9VUFWDL_w5Z7K-BUTQCw

Enforcement Mechanisms

Free speech standards mean little if compliance is not enforced. Lawmakers must consider how to use the government's power appropriately to protect free speech while not infringing on other rights or enlarging already bloated bureaucracies.

The federal government has various "sticks" available to incentivize compliance, including funding under Title IV of the HEA. Congress must consider the proper enforcement mechanisms to protect constitutionally guaranteed rights effectively.

Oversight by the Department of Education

In June 2021, Rep. Greg Murphy (R-NC) introduced the *Campus Free Speech Restoration Act*, also carried by Sen. Tom Cotton, with the purpose of protecting free expression by both students and student groups. The bill designates an employee at ED to receive complaints by students or student organizations that they have been treated in a manner that violates the bill. Complaints go through a multi-step investigation process, including rounds of agency review, appeal, and opportunities to fix the problem before the institution loses student aid eligibility under Title IV.

Oversight by ED could be structured in other ways as well. One idea is to require institutions to submit a Certificate of Compliance in addition to a school's Program Participation Agreement with ED, which could be signed by a school administrator and notarized annually. This would hold administrators responsible, pushing institutions to maintain compliance with any free speech policies at the federal level.

However, there are a few unresolved questions about depending on ED or another executive agency to adjudicate potential violations of campus free speech.

First, an ED finding of noncompliance may be reviewable by a court, thereby imposing an extra bureaucratic layer on complainants. Also, in de novo review, courts may find agency interpretations influential, amplifying the possibility of the injection of one administration's political considerations into the process.

Second, led by political appointees, ED may follow the policies of the current administration and not enforce the legislation as intended.

Third, schools may be unwilling to challenge ED regulatory interpretations no matter how unreasonable they may be because of the threat of losing all federal funding under Title IV. Institutions rely heavily on federal student aid, and threatening its loss creates a chilling effect on any potential overreach by ED.

Accreditor Standards

Accreditors influence university actions through the standards they require.

Not all accrediting agencies require a commitment to free speech or academic freedom. Among these, few require more than an undefined and general commitment to “implement[ing] appropriate policies and procedures for preserving and protecting academic freedom(83).” However, some may be skeptical of accreditors’ willingness to promote free speech since accreditors have been found to push university DEI requirements that faculty are then unable to object to without putting their program in danger of failing to meet accreditation requirements(84). This is why Rep. Burgess Owens (R-UT) introduced legislation to ban litmus tests in the accreditation process. The *Accreditation for College Excellence (ACE) Act* would prohibit accreditors from compelling the colleges they accredit to meet any political litmus tests, such as requiring adherence to DEI standards, as a condition of accreditation.

Private Right of Action

A private right of action enables aggrieved students and faculty to sue their universities, whether public or private, for non-compliance with free speech standards. Proper design of the private right of action can lower the cost of going to court and can increase the potential monetary risk to non-complying schools. A private right of action can provide swifter justice to the aggrieved individual, and the mere threat of a lawsuit can be an excellent deterrent to prevent schools from infringing on free speech.

A private right of action must include timelines that do not allow a school to wait out a student’s graduation. Without these time limits, a case could linger long enough that the student will have graduated before receiving any form of remedy from the courts.

Various states have included a private right of action in their free speech bills. Despite its inclusion in state law, the right has only been used a few times, which may suggest that a private right of action is a deterrent against campus censorship. For private universities that are not obligated to follow the First Amendment, these institutions could be contractually obligated to follow their own stated institutional policies to protect the rights of students and faculty, similar to the structure of the Free Inquiry Rule. This allows students and faculty to seek legal remedies for having their First Amendment rights violated.

Colleges have continued to allow students and faculty to be censored, punished, or compelled to affirm beliefs, and there seems to be no end in sight. As Congress contemplates how to restore open mindedness and open conversation onto campuses, there are a variety of policies and enforcement mechanisms that can be considered. Combining several policies and enforcement mechanisms could help to tackle the disregard for First Amendment rights and would provide a way to get ahead of future attempts to silence students and faculty.

83. This example is from Section 6.4 of the Southern Association of College and School’s accreditation packet. Can be accessed here:

https://sacscoc.org/app/uploads/2019/07/Accreditation_Committee_Report_Form.2018.docx

84. <https://www.city-journal.org/medical-school-accreditation-body-solicits-dei-initiatives>

Counter Arguments to Expect

As the debate around what is and is not protected speech has increased over the years, it is important to acknowledge that issues surrounding free speech can be tricky and cause debate about free speech itself. There may be a number of counter arguments to the ideas presented in this report, but each has an answer which will demonstrate that further action to protect free speech on campus is needed.

“There is no real free speech issue on college campuses.”

Numbers don't lie. A 2023 report⁽⁸⁵⁾ by the Heterodox Academy found that the percentage of students who believe that the campus climate prevents some people from saying things they believe increased from 54.7 percent in 2019 to 63.2 percent in 2022⁽⁸⁶⁾. The issue is not lost on every-day Americans, either. A new national poll commissioned by The New York Times and Siena College found that only 34 percent of Americans believe freedom of speech is adequately protected⁽⁸⁷⁾.

Examples abound. There are hundreds of anecdotes from students and faculty who have been attacked, fired, or otherwise punished for their speech. For every violation that makes the press, there are likely dozens more that are never reported.

“Some ideas or speech are not worthy of student's ears. Where is the line?”

It is almost impossible to be an unbiased arbiter of what speech is “important,” “worthless,” or “offensive.” Humans tend to shut down those they disagree with. Organizations such as universities are equally susceptible to quashing voices that go against the mainstream. When the authority to censor is assumed by universities, contrary opinions become endangered species and university administrators illegal poachers. No one person or university department is omniscient and entirely capable of judging speech by its contents, even if that speech is generally considered repulsive or offensive. The Supreme Court has defined very narrow exceptions to the First Amendment that receive strict scrutiny⁽⁸⁸⁾; the narrowness of those exceptions reaffirms one key idea: that generally restricting the rights of one group or individual jeopardizes everyone's rights.

“It is draconian to have the federal government involved in campus speech issues.”

It is no accident that the expressive rights of speech and association come first among all the individual rights protected by the Constitution. The federal government has a responsibility to ensure those freedoms are protected. The Founders understood the vital nature of these rights in establishing a vibrant, pluralistic society, and so should we.

85. <https://heterodoxacademy.org/announcements/heterodox-academy-releases-new-campus-expression-survey-results/>

86. <https://heterodoxacademy.org/reports/campus-expression-survey-understanding-campus-expression-climate-general-audiences/>

87. <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html>

88. <https://crsreports.congress.gov/product/pdf/IF/IF11072>

“This is merely a political attack on universities and progressive ideologies.”

Protecting free speech is inherently a pro-university cause. By protecting the free exchange of ideas on college campuses, students and faculty are enabled in their pursuit of truth and knowledge.

Furthermore, promoting an open exchange of ideas protects the free expression rights of all students and faculty, no matter their political persuasion. Policies protecting free speech, like our constitutionally enshrined First Amendment, are content neutral and should be a non-partisan issue. There is American policy more important than to protect the fundamental freedoms paid for by the blood of the revolution.

“Without limits on speech, the well-being of minorities and marginalized persons will be threatened.”

The right of free speech protects all people, especially the most vulnerable. When we grant the government, or its universities, the power to suppress controversial ideas, we are all subject to censorship by the state. When we enforce orthodoxy or politically correct speech, minority rights become beholden to whomever is in power. Freedom of speech is ultimately pro-minority; without it, no one person or minority group can be guaranteed safety from a majoritarian mob.

Conclusion

Freedom of speech is a vital ingredient to American postsecondary education. Without it, our universities lose their purpose as truth seeking institutions and become pseudo-indoctrination camps where all truth trickles down from the top of bloated administrations. Sadly, many schools have policies and practices that unconstitutionally regulate the marketplace of ideas on their campuses.

Luckily, public policy can provide a helpful hand to university students and faculty. Twenty-three states have already enacted free speech protections and Congress should consider following their lead. Federal enforcement can secure the truth-seeking mission of postsecondary education and the expressive rights of students and faculty. This report, and the policy options it outlines, should serve as a guide to those who rightly heed Benjamin Franklin’s warning: “Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech(89).”

89. <https://founders.archives.gov/documents/Franklin/01-01-02-0015>