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Legal Sidebar

Free Speech on College Campuses: Considerations for Congress

April 2, 2020

The extent to which colleges and universities are regulating free expression on their campuses has been an issue of legal debate in recent years, with some contending that a large percentage of colleges and universities continue to implement policies that unlawfully restrict protected expression. The executive branch has increasingly expressed concern with the issue, as well. For instance, last year President Trump signed an executive order seeking to protect "free speech on college campuses" by instructing federal agencies to "ensure" that institutions that receive federal research funds comply with existing federal laws and regulations to promote "free inquiry." In response to his order, this January the Department of Education proposed new regulations specifically addressing campus speech. Additionally, the Department of Justice has filed Statements of Interest supporting free speech claims raised in several cases concerning the constitutionality of campus speech policies.

The administration's actions are not without their critics, however, with some suggesting that additional government action protecting campus speech is legally unnecessary. Others point out that colleges need flexibility to develop policies to ensure campuses promote equality and are free from discrimination and harassment. This Sidebar explores the legal questions behind the ongoing debate over free speech on campus by highlighting background principles, discussing key case law, and addressing Congress's role, particularly as it considers legislation to reauthorize the Higher Education Act of 1965 (HEA).

Campus Speech Jurisprudence

The Free Speech Clause of the First Amendment as interpreted by the Supreme Court prohibits both the federal and (through the Fourteenth Amendment) state governments from "abridging the freedom of speech. . . ." As state institutions, public colleges and universities are generally subject to the First Amendment and may not infringe students' rights of free speech. Private institutions of higher education, however, are not required to provide the same speech protections as public institutions because only state actors are bound by the First Amendment.

In regard to public colleges and universities, the Supreme Court has broadly emphasized the importance of free speech on campus, considering it necessary to encourage a "marketplace of ideas" and to "safeguard[] academic freedom." The Court has recognized that a university most resembles a "public forum," meaning that places like the university's campus are open, at least to students, for expressive

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https://crsreports.congress.gov
LSB10438

activity. In public forums, a school's ability to restrict speech is significantly limited. For example, content-based (i.e., subject matter) restrictions on speech are generally unconstitutional unless they satisfy strict scrutiny. Strict scrutiny, which is a heightened judicial standard of review, requires the government to show the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest.

There are instances, however, when the government may regulate campus speech. The Supreme Court has recognized that because of the "special characteristics of the school environment" a college or university may impose certain regulations on speech that are "reasonable" in light of the school's educational mission. According to the Court, a school is not required to make its facilities, such as its classrooms, equally available to students and nonstudents and does not have to grant free access to its facilities. However, a school may reasonably regulate speech in a nonpublic forum (or forums that have not traditionally been designed for or intentionally opened up for public speech), so long as the regulation is viewpoint neutral.

The government may also impose "reasonable" time, place, or manner restrictions in both public and nonpublic forums. These restrictions on when, where, and how speech is exercised are subject to intermediate scrutiny, a more forgiving standard than strict scrutiny. Under that standard, regulations must be "narrowly tailored to serve a significant government interest" and leave open "ample alternative channels for communication of the information." The government also may regulate so-called unprotected speech. The Supreme Court has recognized several well-defined, narrow, and limited categories of speech that may be regulated based on their content. These categories of speech include, for example, obscenity, incitement, fighting words, and types of illegal speech, such as defamation, threats, and child pornography. It is important to note, however, that "hate speech," or speech that demeans a person because of a defining characteristic such as race or religion, is generally protected under the First Amendment unless it otherwise falls under one of the categories of unprotected speech. Although the categories above are generally considered unprotected, they are not "invisible" to the First Amendment, which still places some limits on how Congress can regulate in these areas. Laws that restrict speech based on the "particular views taken by speakers on a subject," may be considered unconstitutional viewpoint-based restrictions even if they are aimed at an unprotected category of speech.

The First Amendment also prohibits overbroad or vague regulations, which may have the effect of banning protected speech. A policy is overbroad if it permissibly regulates some speech, but also substantially restricts protected speech. The government, therefore, may only regulate unprotected speech by enacting policies that are sufficiently narrow and targeted towards the prohibited speech or conduct. On the other hand, a policy is unconstitutionally vague when it is unclear what conduct is prohibited. Overbroad or vague laws may "chill" protected speech, meaning people, out of caution, may choose not to speak because of a law's scope or lack of clarity. In addition, a vague law may allow the government room to arbitrarily enforce the policy, targeting disfavored speech. To avoid vagueness, policies must instead give clear warning as to what conduct is prohibited.

Specific Campus Speech Issues

Applying these principles, courts have issued a number of opinions in recent years with respect to several campus initiatives intended to combat sexual harassment or discrimination or promote campus safety.

Discrimination & Harassment Policies

Over the years, courts have faced questions regarding the power of a college or university to discipline its students for speech that may constitute harassment under a given educational institution's policies. Federal laws such as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 generally require colleges and universities receiving federal funds to prohibit discrimination and

sexual harassment. The Supreme Court has held that requiring schools to implement anti-discrimination policies generally does not violate the First Amendment. Several courts, however, have found some campus harassment policies unconstitutional because they prohibit speech that is fully protected by the First Amendment.

For example, in 1989 in *Doe v. University of Michigan*, a federal district court held that the University of Michigan's discriminatory harassment policy that prohibited behavior that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex . . . ." was unconstitutionally overbroad and vague. The court determined that the policy punished protected speech because the terms "stigmatize" and "victimize" were not precisely defined. Similarly, in 1993 in *Dambrot v. Central Michigan University*, the Sixth Circuit held that the university's discriminatory harassment policy which proscribed "any . . . behavior that subjects an individual to an intimidating, hostile or offensive . . . environment by . . .using symbols, epitaphs or slogans that infer negative connotations about an individual's racial or ethnic affiliation," was unconstitutionally overbroad and vague. According to the court, the terms "negative" and "offensive" in the policy were too subjective because "different people find different things offensive."

Courts have also invalidated campus sexual harassment policies on overbreadth or vagueness grounds. For instance, in 2008 in *DeJohn v. Temple University*, a student challenged the university's sexual harassment policy, which prohibited all forms of sexual harassment "including . . . expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment." The Third Circuit determined that, among other reasons, terms such as "offensive," "hostile," and "gender-motivated" rendered the policy overbroad and too subjective in that it could proscribe, for example, protected political or religious speech.

Recently, in *Speech First v. Schlissel*, the Sixth Circuit reviewed a challenge to the University of Michigan's Bias Response Team initiative, which was created to support students who experienced "bias incidents," or incidents involving discriminatory conduct, on campus. Because the Bias Response team had the power to refer cases to the police or the Office of Student Conflict Resolution (OSCR), which could sanction students for violations of campus policy, the plaintiff argued that the initiative could lead to the chilling of protected speech. On appeal on a procedural issue, the Sixth Circuit did not offer a definitive opinion as to whether the Bias Response Team initiative was unconstitutional, but did mention that the Response Team's ability to make referrals to the OSCR or the police could have the effect of chilling speech. The parties eventually reached a settlement in which the University agreed to disband the Bias Response Teams.

Campus Safety

Since 2017, several incidents involving high profile, controversial speakers on college campuses have made headlines. These incidents have prompted university administrators to implement proactive security measures regarding on-campus speakers, many of which have been challenged under the First Amendment. For example, after protests and counter-protests in response to white nationalist Richard Spencer's "Unite the Right" rally in Charlottesville, Virginia turned violent, several universities declined Spencer's requests to hold on-campus events or cancelled previously scheduled events citing security concerns. But one federal court found that absent evidence that Spencer's speech would incite violence (i.e., be unprotected speech), a university's refusal to host Spencer amounted to content-based discrimination in a public forum.

A university's decision to move a speaker to a different campus venue may also raise First Amendment issues. For example, in 2017 the University of California, Berkley cancelled a speech by Milo Yiannopoulos after protests turned violent. Berkley officials then instituted a policy for major events, placing time and place restrictions on "high profile" speakers. A federal court determined that some of Berkley's policies may have been unconstitutional before Berkley settled the lawsuit. More recently,

various conservative groups sued the University of Minnesota after the university moved commentator Ben Shapiro's speech to a smaller, more inconveniently located venue. A federal court held that the university's actions may have amounted to unconstitutional viewpoint discrimination.

And attempts by colleges and universities to confine speech to designated areas on campus have been successfully challenged as unconstitutional under the First Amendment. According to some reports, several college campuses still enforce "free speech zone" policies, or policies that limit where expressive activities or demonstrations can occur on campus. Free speech zone policies are often challenged as unreasonable time, place, or manner restrictions. In a 2017 case, *Shaw v. Burke*, a student challenged Los Angeles Pierce College's "Free Speech Areas" policy, which limited expressive activity to an area that amounted to approximately .003% of the total area of the campus. The district court agreed that the policy raised constitutional concerns, noting that while the college had an interest in avoiding disruption on campus, there was no justification for reserving such a small percentage of the campus for free speech.

Considerations for Congress

These recent cases exist in the context of a broader debate about whether both public and private universities are sufficiently allowing freedom of speech on campus. While Congress has already expressed its general support for campus speech through a sense of Congress provision in the HEA, Congress could—to the extent it agrees with the critics of the current free speech policies in post-secondary schools—take further legislative action on the issue.

Thus far, individual states have been at the center of legislating on campus speech issues. For example, at least 17 states have passed legislation banning free speech zones on campuses by, for example, deeming common outdoor areas on campuses as traditional public forums and permitting any person to engage in expressive activities in those areas so long as the person is not disruptive or breaking the law. Federalism principles may limit the extent to which Congress can act to impose direct commands on state governments to similarly change campus free speech regulations. Congress, however, may have more flexibility in using its spending powers to encourage free speech on campus by imposing restrictions on funds granted to colleges and universities. Importantly, because HEA funds extend to both public and private institutions of higher education, conditions on HEA funds related to campus speech policies could be a means to impose broader speech protections than those required by the First Amendment.

Members of Congress have, in the recent past, attempted to expressly condition HEA funds on compliance with speech-related mandates. The PROSPER Act, for example, which was introduced as an HEA reauthorization measure in the 115th Congress, would have conditioned the receipt of HEA funds on colleges disclosing campus speech policies and would have provided a federal complaint process should a college fail to disclose or attempt to enforce an undisclosed speech policy. And in the 116th Congress, the Free Right to Expression in Education Act would condition funds under Title IV of the HEA on public colleges and universities allowing expressive activities in outdoor areas on campus.

Even without express legislative action on this issue, the Department of Education has recently proposed regulations that include campus speech-related provisions, citing the sense of Congress expressed in the HEA as justification for these proposed regulations. The proposed regulations would require public institutions of higher education to abide by the First Amendment as a material condition of accepting a Department of Education grant. A private institution would also be required to comply with any of its existing speech-related policies as a material condition of accepting a grant.

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