

# POLICY *focus*

RECIPES FOR RATIONAL GOVERNMENT

OCTOBER 2019

## Free Speech on Campus

By Inez Stepman, Senior Policy Analyst

Jennifer C. Braceras, Director, Independent Women's Law Center

---

### What You Should Know

Freedom of speech is more than a legal concept. It's a bedrock principle that allows the great diversity of America's 330 million citizens, and their vastly different opinions, to flourish. The First Amendment protects all Americans from government suppression of speech. But a truly open society, where citizens can debate freely, requires more than parchment protections.

American universities, which once valued free inquiry and intellectual debate, are today in the midst of a free speech crisis. Today, college administrators routinely employ policies that restrict the speech of students, faculty, and invited speakers.

Although some students have successfully sued their universities for First Amendment violations, those victories have done little to change the culture of censorship that permeates college campuses and that has, unfortunately, seeped out into other aspects of American life.

Universities, particularly public universities with constitutional obligations, should be held to account for their enormous use of taxpayer dollars. Colleges and universities that suppress dissenting viewpoints should not be allowed to do so with taxpayer money. Instead, they should be made to defend the speech-chilling culture on campus, and the value of the degrees they grant, in a free market that is concerned more with the job prospects of graduates than with whether the campus provides safe spaces for the easily offended.

### IN THIS ISSUE

- 1 What You Should Know
- 2 Why You Should Care
- 2 Legal Background
- 3 A Culture that Encourages Self-Censorship
- 4 What We Can Do
- 6 What You Can Do

## Why You Should Care

Education is supposed to provide citizens with the ability to take on civic responsibilities in an informed, civil, and passionate way. Yet today, our institutions of higher learning are failing to deliver on that promise, teaching students that “offensive” or distasteful viewpoints need not be tolerated.

- **The spirit of bold inquiry is in jeopardy** at colleges and universities. There have been over 30 speaker disinvitation attempts on campuses in 2019 alone. And, sadly, nearly seven in ten students today report self-censoring. Forty percent of young people believe that offensive speech about minority groups should not be protected.
- **Many universities restrict the speech of their students and faculty** through restrictive speech “zones,” overbroad harassment policies, Orwellian bias response teams, and constraints on religious liberties.
- **Universities are not owed the enormous financial support they currently receive** through taxpayer-backed subsidies and loans. Public support for institutions of higher education ought to be contingent on universities living up to their obligation to respect one of the most fundamental American freedoms.

---

## Legal Background

The First Amendment prohibits government from “abridging the freedom of speech, or of the press.” Because public colleges and universities are instruments of government, they are constitutionally prohibited from restricting most forms of expression.

Unfortunately, college administrators often attempt to prohibit or punish offensive speech, claiming that it falls into a narrow category of unprotected threatening conduct. Time and time again, however, courts have made clear that the government cannot abridge even speech that is emotionally injurious to others unless it is so extreme that it would provoke immediate violence or cause a person to fear imminent harm. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (the government cannot punish inflammatory speech unless it intentionally and effectively provokes a crowd to immediately carry out violent and unlawful action); *Snyder v. Phelps*, 562 U.S. 443 (2011) (Westboro Baptist Church’s protest of a soldier’s funeral was protected by the First Amendment, even though the expression was intentionally inflammatory and “may have been particularly hurtful” to the family of the fallen soldier).

**Time and time again, courts have made clear that the government cannot abridge even speech that is emotionally injurious to others unless it is so extreme that it would provoke immediate violence or cause a person to fear imminent harm.**

Recently, the United States Court of Appeals for the 6th Circuit held that students have standing to challenge the University of Michigan’s use of a bias response team because the threat of consequences “objectively chills speech.” See *Speech First v. Schlissel*, No. 18-1917

(6th Cir. 2019). Although courts have made clear that public colleges and universities may not punish students for expressing controversial viewpoints, or even hate speech, campus speech codes and Bias Response Teams remain ubiquitous.

When it comes to campus speakers or recognition of student groups, colleges and universities are not required to provide a platform to anyone. But public colleges and universities may not discriminate against particular speakers or groups on the basis of viewpoint. This means that if college administrators generally allow students to host lectures, panels, or other events on campus, they cannot prohibit students from inviting a speaker with “objectionable” views. And if they fund any student groups, they cannot deny funding to some groups on the basis of viewpoint.

In September 2019, a federal judge ruled that the University of Iowa acted unlawfully when it withdrew recognition from religious groups that require their leaders to subscribe to and model Christian values. Because the University of Iowa allows secular student groups to enforce leadership requirements, the court found that in punishing religious groups for enforcing their leadership requirements, the university engaged in viewpoint bias in violation of the First Amendment. The judge also ruled that, because university officials were on notice as to their First Amendment obligations, they will be personally liable for damages awarded the plaintiffs. *Intervarsity Christian Fellowship v. University of Iowa*, No. 3:18-cv-00080-SMR-SBJ (So. Dist. Iowa).

Two months earlier, the United States Court of Appeals for the 9th Circuit reversed a District Judge’s dismissal of claims by UC San Diego’s satirical student newspaper *The Koala*. Editors of the paper allege that the student government eliminated funding for all student print media in retaliation for the paper’s satirical look at “safe spaces” and “trigger warnings.” *The Koala v. Khosla*, No. 17-55380 (9th Cir. 2019). Although the decision to eliminate funding for print media was facially neutral (it applied to all newspapers, regardless of political perspective), the Court of Appeals noted that official statements by the university denouncing *The Koala* indicate that the defunding decision was motivated by viewpoint bias. See also *Minnesota Voters Alliance v. Mansky*, 585 U.S. \_\_\_\_ ; 138 S. Ct. 1876; 201 L. Ed. 2d 201 (2017) (holding that although government may choose to limit free expression in a polling place, it must “draw a reasonable line” provide “objective, workable standards” for administrators to follow.)

“  
When it comes to campus speakers, colleges and universities are not required to provide a platform to anyone. But public colleges and universities may not discriminate against particular speakers on the basis of viewpoint. This means that if college administrators generally allow students to host lectures, panels, or other events on campus, they cannot prohibit students from inviting a speaker with “objectionable” views.  
”

## A Culture that Encourages Self-Censorship

Unfortunately, while the courts can serve as a backstop against the most serious violations of students’ rights at public colleges and universities, they cannot stem the tide of a campus culture that rejects the values of free speech and free inquiry.

Unlike previous generations, many millennial and Gen Z students do not abide by Voltaire's (misattributed) aphorism about the need to defend vigorously speech with which one disagrees. In fact, more than **four in ten** students say that the First Amendment should not protect "hate speech," defined as "attacks" on the basis of race, religion, gender identity, or sexual orientation. With the consistent specter of overbroad harassment policies, bias response teams straight out of Orwell's 1984, and a climate that is generally hostile to unpopular speech, it's no wonder that fully **68 percent** of students say they are unable to express their true opinions on campus.

Clearly, our First Amendment is on life support—critically provided by federal courts—in what was once described as America's foremost "marketplace[s] of ideas."

## What We Can Do

Aside from cheering legal victories, we can press colleges and universities to enact policies that support freedom of speech.

While two thirds of Americans do not hold four-year degrees, taxpayers fund the choice of the remaining third to attend a four-year college by way of billions of dollars in direct grants and generous underwriting of over 90 percent of the student loan market. This investment is predicated upon the idea that universities produce more economically-productive graduates who will be active citizens and stewards of our democracy.

But the public understands that universities are no longer providing this value to society. The last four years have seen an **unprecedented drop** in trust and support for our public universities among voters. Just half of respondents to a recent survey think that colleges and universities are a net positive for the country, driven by a steep drop-off among Republicans and independents, who are paying particular attention to assaults on free speech on campuses across the nation.

Taxpayers should stop heavily subsidizing a university system that has become more like a training camp for the culture wars than a guardian of debate and inquiry.

A return to the pressures of the free market would ensure that universities put more effort into guaranteeing the value of their degrees and less effort into pleasing what is often a small, but vocal, minority of protestors on campus.

If federal student loan aid is to continue, however, it should be made contingent on public universities' compliance with the First Amendment.

**A return to the pressures of the free market would ensure that universities put more effort into guaranteeing the value of their degrees and less effort into pleasing what is often a small, but vocal, minority of protestors on campus.**

**If federal student loan aid is to continue, however, it should be made contingent on public universities' compliance with the First Amendment.**

President Trump has taken the first step towards holding universities accountable with an Executive Order signed earlier this year. The order potentially jeopardizes a small amount of research funding for public institutions that do not take proper action to safeguard the First Amendment rights of their students. The EO was broadly popular, garnering a 73-percent approval rating in **surveys**, including a 71-percent approval rating from Democrats.

Regrettably, the number of settlements paid out by universities shows that administrations are often more worried about offending far-left students than they are about money that is not operationally necessary. And they will be unlikely to reform their ways over relatively minor sums of federal money.

Threatening the federal dollars that are the lifeblood of nearly every college and university in the country is likely to produce a far larger reaction from university presidents and spur them to protect the First Amendment rights of students and faculty. The money that universities depend on flows through students, in the form of federally-backed student loans.

Currently, the vast majority of the \$1.6 trillion in student debt is underwritten by the federal government, while direct grants total in the vicinity of \$75 billion. Furthermore, having the federal government in the student loan game has permitted colleges and universities to raise their prices well above the rate of inflation, causing a worsening debt crisis for students, and tying university budgets to the continuous infusion of federal dollars. Simply put, government intrusion into the free market in student loans has financed university largess for decades.

The Higher Education Act already reiterates the responsibility of public universities to uphold the First Amendment on campus, but Congress could put teeth into those obligations by **tying** them to eligibility to receive federally-backed loans with an amendment added upon reauthorization of the Act.

Colleges and universities will continue to ignore pleas to protect speech on campus unless they fear losing serious money and students. If universities are determined to silence speakers and students in a way that prevents open inquiry, American taxpayers are right to question the value of continuing the enormous subsidies to higher education at the expense of other compelling avenues to success.

Universities should either shape up and uphold their obligations under the Constitution and federal law or forfeit the taxpayer support delivered by citizens who expect them to be guardians, not enemies, of the American free speech tradition.

**“Threatening the federal dollars that are the lifeblood of nearly every college and university in the country is likely to produce a far larger reaction from university presidents and spur them to protect the First Amendment rights of students and faculty. The money that universities depend on flows through students, in the form of federally-backed student loans.”**

# What You Can Do

## Get Informed

Learn more about free speech on campus:

- Foundation for Individual Rights in Education's **Guide to Free Speech on Campus**
- **Speech First**, a membership organization fighting for students' First Amendment rights on campus
- *Campus Insanity is Migrating to Society. Stop it Before It's Too Late.*

## Talk to Your Friends

Help your friends and family understand these important issues. Tell them about what's going on and encourage them to join you in getting involved.

## Become a Leader in the Community

Get a group together each month to talk about a political/policy issue (it will be fun!). Write a letter to the editor. Show up at local government meetings and make your opinions known. Go to rallies. Better yet, organize rallies! A few motivated people can change the world.

## Remain Engaged Politically

Too many good citizens see election time as the only time they need to pay attention to politics. We need everyone to pay attention and hold elected officials accountable. Let your Representatives know your opinions. After all, they are supposed to work for you!

## CONNECT WITH IWF! FOLLOW US ON:

### ABOUT INDEPENDENT WOMEN'S FORUM

Independent Women's Forum (IWF) is dedicated to building support for free markets, limited government, and individual responsibility.

IWF, a non-partisan, 501(c)(3) research and educational institution, seeks to combat the too-common presumption that women want and benefit from big government, and build awareness of the ways that women are better served by greater economic freedom. By aggressively seeking earned media, providing easy-to-read, timely publications and commentary, and reaching out to the public, we seek to cultivate support for these important principles and encourage women to join us in working to return the country to limited, Constitutional government.

**We rely on  
the support  
of people  
like you!**

Please visit us  
on our website  
[iwf.org](http://iwf.org) to get more  
information and  
consider making a  
donation to IWF.