

Free Speech vs. Hate Speech on Campus

A talk with Nadine Strossen

- College campuses have long been bastions of free speech. UC Berkeley was the birthplace of the Free Speech Movement protesting the Vietnam War, the first instance of mass student protests at U.S. colleges. Today, by some accounts, support for free speech on campus is waning in favor of censorship of hateful, racist, or offensive speech. Nadine Strossen, former ACLU president, explores the constitutional underpinnings of students' speech rights and makes the case for allowing more rather than less speech on campus.
- First Amendment free speech
 - What is not protected: incitement, true threats, fighting words, obscenity, defamation, conduct, etc.
 - Seminal Supreme Court cases re. incitement: *Brandenburg v. Ohio* (1969) and *NAACP v. Claiborne Hardware & Skokie* (1982). Supreme Court rules that government cannot punish inflammatory speech unless it intentionally and effectively provokes a crowd to immediately carry out violent and unlawful action.
 - What is protected: purely bigoted, racist, offensive speech that does not rise to the level described above. Rule against heckler's veto.
 - Supreme Court has made clear that the government cannot prevent speech on the ground that it is likely to provoke a hostile response (rule against a heckler's veto). Without this rule, the government could justify suppressing speech by citing public safety concerns.
- First Amendment rights in schools
 - Supreme Court recognition of First Amendment rights in schools
 - *Tinker v. Des Moines Independent Community School District*¹
 - 3 students in Iowa were suspended for wearing black armbands to school to protest the Vietnam War. They filed a § 1983 claim, seeking an injunction against a school regulation that prohibited students from wearing armbands.
 - The Supreme Court sided with the students: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech of expression at the schoolhouse gate." The Court found that their form of protest was silent and not disruptive to the educational process. The school's argument that the suspension was reasonable to prevent a

¹ 393 U.S. 503 (1969), <https://www.loc.gov/item/usrep393503/>

- school disturbance was not compelling to justify suppressing the students' speech.
- Public and private university distinction
 - Public universities are government institutions and are bound by the First Amendment.
 - Although the First Amendment does not restrict private institutions, many schools elect to honor generally the same rights.
 - Universities as public forums
 - The First Amendment does not require that schools provide a public forum for speech. If it does, however, it must not discriminate on the basis of content/viewpoint. Restrictions on speech must be content neutral, e.g. time, place, or manner.
 - Schools may limit speech that creates a specific danger or would disrupt the work of the school.
 - Security costs for controversial speakers
 - Universities are grappling with astronomical security costs for controversial speakers. Who should bear the cost?
 - May schools impose higher security costs if the cost is based not on content but on likelihood of violence or property damage?
 - Some schools that have attempted to pass off these costs to the individual organizations in charge of those events have been sued. Those groups have countered that the security fees amount to heckler's veto and that they are being penalized for the threat of violence from others who oppose them.
 - Decline in support for free speech on college campuses?
 - Studies have shown the censorship inclinations are rising across the board among liberal and conservative voices.²
 - Protests of controversial speakers at schools
 - Claire Guthrie Gastañaga at William and Mary
 - In October 2017, Claire Guthrie Gastañaga, ACLU Virginia executive director, was shouted down by the Black Lives Matter chapter at the college and prevented from speaking at an event about the First Amendment.³ Members of that Black Lives Matter chapter were protesting the ACLU's representation of the

² New Campus Studies Show Dip in Free Speech Support; Support for Censorship, Violence <https://www.thefire.org/new-campus-studies-show-dip-in-free-speech-support-support-for-censorship-violence/>

³ Jeremy Bauer-Wolf, ACLU Speaker Shouted Down at William & Mary, Inside Higher Ed, October 5, 2017: <https://www.insidehighered.com/quicktakes/2017/10/05/aclu-speaker-shouted-down-william-mary>

Charlottesville white nationalist rally organizer in his suit against the city.

- Milo Yiannopoulos at University of California Berkley
 - Controversial right-wing figure Milo Yiannopoulos was scheduled to speak at UC Berkeley in February 2017. Violent protests erupted on campus, causing \$100,000 worth of damage. As a result, the University canceled that event.⁴
- Charles Murray at Middlebury College
 - In Spring 2017, Professor Allison Stanger was attacked by a group in Middlebury College while leaving a lecture event with Charles Murray, co-author of *The Bell Curve*. The event was originally scheduled to be a public lecture, but after students shouted down Murray until he couldn't speak, university officials moved the event to another location to be streamed online instead. After the event, as Stanger and Murray were leaving the location, a group surrounded them and attacked Stanger.
- A path forward
 - If not censorship, then what else?
 - Strossen promotes countering inflammatory speech not by censoring but promoting counterspeech, encouraging students to engage in debate, and giving them opportunities to confront these views for themselves. Students can express their disagreement not by shouting down and preventing others from speaking but by speaking out against hateful or offensive speech.
 - University of Chicago created a free speech policy that has since been adopted by many other institutions. Commonly called the "Chicago Principles":
 - Excerpt:

In a word, the University's fundamental commitment is to the principle that debate or deliberate may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but

⁴ Madison Park and Kyung Lah, Berkeley protests of Yiannopoulos caused \$100,000 in damage, CNN. February 2, 2017: <https://www.cnn.com/2017/02/01/us/milo-yiannopoulos-berkeley/index.html>

*by openly and vigorously contesting the ideas that they oppose.*⁵

- Administrations or faculty at over 70 schools have adopted the Chicago Principles.

⁵ University of Chicago Report of the Committee on Freedom of Expression:
<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>