

WRITTEN TESTIMONY of JOSEPH COHN
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Before the

**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON
EDUCATION AND THE WORKFORCE**

September 26, 2018 hearing on

Examining First Amendment Rights on Campus

September 26, 2018

Representative Virginia Foxx,
Chairwoman
Committee on Education and the Workforce
2257 Rayburn House Office Building
Washington, DC 20515

Representative Bobby Scott,
Ranking Member
Committee on Education and the Workforce

RE: September 26, 2018 hearing on Examining First Amendment Rights on Campus

Dear Chairwoman Foxx, Ranking Member Scott, and honorable members of the Committee:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

FIRE thanks the Committee for dedicating the time to address free speech on campus. To supplement the oral testimony I provided at today's hearing, this written testimony overviews the state of written policies that regulate student and faculty speech and association. It evaluates what Congress and state legislatures have done to advance those rights, and finally concludes with a discussion of potential solutions to the challenges remaining.

INTRODUCTION

It has been decades since there has been any question as to whether students at public institutions of higher education enjoy fully vested First Amendment rights on public college and university campuses. In 1957, in deciding *Sweezy v. New Hampshire*, the United States Supreme Court eloquently explained that

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to

gain new maturity and understanding; otherwise our civilization will stagnate and die.¹

In the decades since *Sweezy*, the Supreme Court has been unwavering in its support for student and faculty First Amendment rights on public college and university campuses. For example, in *Healy v. James*, the Court observed:

The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”²

These principles were confirmed again by the Court in *Papish v. Board of Curators of the University of Missouri*, when it held 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.’”³

Despite the Court’s strong support for free expression, censorship of many types persists on American college campuses today. Students, faculty, and their invited guests are too often silenced by campaigns to disinvite controversial speakers, or subjected to efforts to intentionally shut down their events if their views are deemed offensive. Although such problems are persistent on college campuses, this testimony will focus on the written policies, or speech codes, that campus administrations use to silence expression.

THE PERSISTENT PROBLEM OF SPEECH CODES

FIRE defines a “speech code” as any university regulation or policy prohibiting expression that would be protected by the First Amendment in society at large. Any policy—such as a harassment policy, a protest and demonstration policy, or an IT acceptable use policy—is a speech code if it prohibits protected speech.

FIRE reviews written policies at colleges and universities nationwide and assigns speech codes “red light,” “yellow light,” or “green light” ratings based on the extent to which the speech code restricts student expression.

A red light policy is one that both clearly and substantially restricts freedom of speech. A yellow light policy is a policy that could be interpreted to suppress protected speech or policies that, while clearly restricting freedom of speech, restrict only relatively narrow

¹ 354 U.S. 234, 250 (1957).

² 408 U.S. 169, 180 (1972).

³ 410 U.S. 667 (1973).

categories of speech. And finally, a green light rating is one that does not seriously threaten campus expression. FIRE assigns an overall rating to a school based on the lowest-rated policies, meaning that an institution with three green light policies, two yellow light policies, and two red light policies would receive an overall red light rating.

Last year, FIRE surveyed 461 colleges and universities, both public and private, for our Spotlight on Speech Codes 2018 report, and found that nearly one third (32.3 percent) received a red light rating.⁴ Of the 357 public institutions we rated, 26 percent received a red light rating, and 65.3 percent received a yellow light rating. Taken together, 91 percent of public institutions, which are bound by the First Amendment, maintain policies that restrict constitutionally protected expression.

A. FREE SPEECH ZONES

Far too many universities—about one in ten, according to our most recent survey—have “free speech zones,” which limit rallies, demonstrations, distribution of literature, petition circulation, and speeches to small and/or out-of-the-way parts of campus.⁵ Some schools even require students to inform university administrators in advance that they intend to engage in expressive activity, even going so far as to require university permission for such activities. For example, Massachusetts’ Bridgewater State University maintains a policy that states:

With the approval of the chief of police or designee at least 24 hours in advance, noncommercial pamphlets, handbills, circulars, newspapers, magazines, and other written materials may be distributed on a person-to-person basis in open areas on campus that are at least 10 feet from the entrances or exits of university buildings.⁶

Such prior restraints are generally inconsistent with the First Amendment. Universities may enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and speeches from unduly interfering with the educational process. They may not, however, regulate speakers and demonstrations on the basis of content or viewpoint, nor may they maintain regulations that burden substantially more speech than is necessary to prevent a material disruption to the functioning of the institution. Restricting student speech to tiny free speech zones diminishes the quality of debate and discussion on campus by preventing expression from reaching its target audience.

⁴ FIRE, *Spotlight on Speech Codes 2018: The State of Free Speech on Our Nation’s Campuses, 2017*, available at <https://www.thefire.org/spotlight-on-speech-codes-2018>.

⁵ *Id.*

⁶ *Free Speech and Demonstration Policy*, BRIDGEWATER STATE UNIVERSITY, (Sept. 2017), http://handbook.bridgew.edu/docs/BSU_Free_Speech_and_Demonstration_Policy_Revised_2017.pdf.

The threat to student and faculty speech presented by free speech zones is often exacerbated by burdensome permitting requirements. Students are sometimes required to obtain signatures from multiple officials, a process that can take days or weeks depending on the bureaucratic process, to even use a free speech zone. In contrast, much campus speech involves spontaneous responses to recent or still-unfolding circumstances. Requiring students to remain silent until a university administrator has completed paperwork may interfere with the demonstrator's message by rendering it untimely and ineffective. Furthermore, these permitting requirements often become mechanisms for viewpoint discrimination, as university administrators may waive or expedite requirements for non-controversial events but insist on observing the procedures for a more contentious event. In short, the permitting regulations that often accompany free speech zones, in addition to being unconstitutional prior restraints on their face, are also an invitation for administrative abuse.

For example, in 2015, Modesto Junior College in California settled a lawsuit by agreeing to eliminate its restrictive "free speech zone," which was brought into the national spotlight after security officers and a campus official were video-recorded telling a student—who was also a military veteran—that he could not hand out copies of the U.S. Constitution because he was not standing in the campus's tiny "free speech zone."⁷ Ironically, this incident took place on Constitution Day, the very day Congress has designated to celebrate our Constitutional rights.

Similarly, in 2017, students at Kellogg Community College in Michigan sued the institution after they were arrested while distributing pocket-sized versions of the Constitution on campus.⁸ The students had been informed that they were violating the college's solicitation policy because they had not received advance approval from the college to distribute literature to their fellow students.

In March 2015, student Nicolas Tomas filed a First Amendment lawsuit against California State Polytechnic University, Pomona, after a campus police officer stopped Tomas from handing out pro-animal rights flyers on a campus sidewalk. The officer told Tomas he would need to have a permit and wear a badge while distributing any written material. He was told he would also be confined to Cal Poly Pomona's tiny free speech zone, which made up less than .01 percent of campus.

The continued maintenance of free speech zones is detrimental to all campus community members. Institutions risk losing lawsuits; students risk punishment for protected speech and learn the wrong lesson about their expressive rights, concluding

⁷ Tal Kopan, *Student stopped from handing out Constitutions on Constitution Day sues*, POLITICO (Oct. 10, 2013), <https://www.politico.com/blogs/under-the-radar/2013/10/student-stopped-from-handing-out-constitutions-on-constitution-day-sues-174792>.

⁸ *Community College Agrees to Resolve Free Speech Lawsuit*, THE ASSOCIATED PRESS (Jan. 23, 2018), <https://www.usnews.com/news/best-states/michigan/articles/2018-01-23/community-college-agrees-to-resolve-free-speech-lawsuit>.

that speaking their minds is not worth the punishment. Establishing that outdoor areas on public campuses are traditional public forums will ensure that our public universities continue to be a traditional space for debate aptly and memorably recognized by the Supreme Court as “peculiarly the ‘marketplace of ideas.’”⁹

B. OVERBROAD ANTI-HARASSMENT POLICIES

Federal anti-discrimination law requires colleges and universities receiving federal funding—virtually all institutions, both public and private—to prohibit discriminatory harassment on campus. Simultaneously, public universities are required by the First Amendment to honor students’ freedom of speech. While private institutions of higher education are not bound by the First Amendment, those that explicitly promise free speech must honor that commitment.

Harassment, properly defined, is not protected by the First Amendment. The Supreme Court of the United States has set forth a clear definition of discriminatory harassment in the educational setting, a definition carefully tailored to fulfill public schools’ twin obligations to respect free speech and prevent harassment. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 651 (1999), the Supreme Court defined student-on-student harassment in the educational context as targeted, unwelcome discriminatory conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” Public colleges and universities are legally obligated to maintain policies and practices aimed at preventing this type of genuine harassment from happening on their campuses, while also honoring student and faculty First Amendment rights.

Unfortunately, institutions often inappropriately cite obligations under federal anti-discrimination laws to investigate and punish protected speech that is unequivocally not harassment. In April, 18 students, all members of Syracuse University’s Theta Tau fraternity, were removed from classes after a private video of them participating in satirical skits mocking bigoted beliefs was leaked to the public. Astonishingly, the campus administrators did not recognize the satirical nature of the skits and instead summarily suspended the students, prohibiting them from continuing to attend their classes.¹⁰ The campus cited its overbroad anti-harassment policy.

Further examples abound. Starting in April 2013, the University of Alaska Fairbanks’ student newspaper was subjected to a 10-month investigation because a professor repeatedly claimed that two articles constituted sexual harassment prohibited by Title

⁹ *Healy*, 408 U.S. at 180 (internal citation omitted).

¹⁰ Lauren del Valle, *Their fraternity is expelled. They’re removed from classes. And another disturbing Syracuse frat video surfaces*, CNN (Apr. 23, 2018), <https://www.cnn.com/2018/04/23/us/new-video-syracuse-university-theta-thau-frat/index.html>.

IX.¹¹ The two articles at issue were an April Fool’s Day article about a “building in the shape of a vagina” and a factual report about the public “UAF Confessions” Facebook page.¹² Student journalists told FIRE that this baseless investigation chilled their reporting, even making the then-editor-in-chief too apprehensive to publish an in-depth informational article about the important issue of sexual assault on campus.¹³

And perhaps most egregiously, in 2007, Indiana University-Purdue University Indianapolis student-employee Keith John Sampson was found guilty of racial harassment for merely reading the book *Notre Dame vs. The Klan: How the Fighting Irish Defeated the Ku Klux Klan* silently to himself. Only after a successful intervention by FIRE did the university reverse its racial harassment finding against Sampson.¹⁴ This case is instructive because it illustrates the fact that universities’ broad understanding of sexual harassment informs their unconstitutional policies and practices with respect to racial and other types of harassment. Often, these policies and applications bear no resemblance to the legal principles governing discriminatory harassment in the educational setting and instead reveal a general, “catch-all” understanding of the term “harassment.” The Sampson case demonstrates that when not properly cabined to the *Davis* standard, university harassment policies are routinely used to punish students and faculty, often with absurd, illiberal results.

Despite the Supreme Court’s clear guidance, far too many universities continue to maintain harassment policies that fall far short of the Court’s *Davis* standard and prohibit or threaten speech protected by the First Amendment—or, in the case of private universities, speech protected by the school’s own promises. For example, at

¹¹ Sam Friedman, *Appeal seeks re-examination of sexual harassment complaints against UAF student newspaper*, FAIRBANKS DAILY NEWS-MINER (Nov. 11, 2013), http://www.newsminer.com/news/local_news/appeal-seeks-re-examination-of-sexual-harassment-complaints-against-uaf/article_82c9309e-4ab0-11e3-b059-0019bb30f31a.html.

¹² Susan Kruth, *VIDEO: University of Alaska Fairbanks Newspaper Investigated for Nearly a Year for Protected Speech*, THE TORCH (Sept. 19, 2014), <https://www.thefire.org/video-university-alaska-fairbanks-newspaper-investigated-nearly-year-protected-speech>.

¹³ Sarah Kuta, *CU-Boulder: Patti Adler could teach deviance course again if it passes review*, DAILY CAMERA (Dec. 17, 2013, 12:47 PM), http://www.dailycamera.com/cu-news/ci_24738548/boulder-faculty-call-emergency-meeting-discuss-patti-adler. For more information about the Adler case, including FIRE’s correspondence with the university, please visit FIRE’s website at <http://www.thefire.org/cases/university-of-colorado-at-boulder-professor-threatened-with-harassment-investigation-forced-retirement-over-classroom-presentation> (last visited Sept. 20, 2018).

¹⁴ *University says sorry to janitor over KKK book*, ASSOCIATED PRESS (July 15, 2008), http://www.nbcnews.com/id/25680655/ns/us_news-life/t/university-says-sorry-janitor-over-kkk-book. For more information about the Sampson case, including FIRE’s correspondence with the university, please visit FIRE’s case page at <https://www.thefire.org/cases/indiana-university-purdue-university-indianapolis-student-employee-found-guilty-of-racial-harassment-for-reading-a-book> (last visited Sept. 20, 2018).

Penn State, sexual harassment is defined broadly as any “verbal or physical conduct of a sexual nature that is unwanted, inappropriate, or unconsented to.”¹⁵

Similar policies have been consistently struck down on First Amendment grounds by federal courts for over two decades, yet unconstitutional definitions of harassment remain widespread.

Even when the *Davis* decision was rendered, the Court was concerned that if educational institutions’ responsibility to address harassment was left undefined, schools would predictably cite this obligation as a rationale for censorship. The dissenting opinion in *Davis*, authored by Justice Anthony Kennedy, warned of “campus speech codes that, in the name of preventing a hostile educational environment, may infringe students’ First Amendment rights.”¹⁶ Justice Kennedy noted that “a student’s claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser’s claim that his speech, even if offensive, is protected by the First Amendment.”¹⁷ In response, Justice Sandra Day O’Connor’s majority opinion in *Davis* was very careful to “acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority.”¹⁸ Speaking precisely to Kennedy’s concerns, O’Connor reassured the dissenting justices that it would be “entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.”¹⁹ The majority’s careful, exacting standard was purposefully designed to impose what O’Connor characterized as “very real limitations” on liability, in part as recognition of the importance of protecting campus speech rights.²⁰ The *Davis* standard is stringent because the First Amendment requires it to be.

Overly broad and vague harassment and bullying policies benefit no one. Colleges risk lawsuits by chilling or punishing protected speech, while students learn the wrong lesson about their expressive rights, concluding that self-censorship is safer than risking discipline for speaking their mind. Thankfully, the fix is simple: Congress should require universities to implement anti-discriminatory harassment policies that precisely track the Supreme Court’s *Davis* standard. By simply incorporating a definition carefully crafted by the Supreme Court, such a requirement could end decades of confusion and abuse of harassment policies on campus and eliminate what has historically been the most common form of unconstitutional speech code. Precisely defining peer-on-peer harassment as no *more or less than* the requirements of *Davis* will ensure that

¹⁵ *Pennsylvania State University Policy AD85: Sexual and/or Gender-Based Harassment and Misconduct (Including Sexual Harassment, Sexual Assault, Dating Violence, Domestic Violence, Stalking and Related Inappropriate Conduct)*, available at <https://guru.psu.edu/policies/ad85.html>.

¹⁶ *Davis*, 526 U.S. at 682 (Kennedy, J., dissenting).

¹⁷ *Id.* at 683.

¹⁸ *Id.* at 649.

¹⁹ *Id.*

²⁰ *Id.* at 652.

institutions have the ability to meet both their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. These twin responsibilities need not be in tension.

FREEDOM OF ASSOCIATION

Another startling trend FIRE is monitoring closely is universities, both public²¹ and private,²² curtailing the fundamental freedom of association, particularly as it pertains to a student's right to join single-gender organizations, including sororities and fraternities, but occasionally also a cappella groups and intramural sports teams.

Although the institution is private, and thus not required under the First Amendment to respect the free association rights of its students, nowhere has the fight against freedom of association been more protracted or more egregious than at Harvard University. It therefore serves as a helpful example, illustrative of this new threat.

In May of 2016, Harvard's then-president, Drew Faust, announced her intention to make membership in an off-campus single-gender organization a punishable offense.²³ The reason for this, Harvard claims, is that by nature of being single-gender, the organizations' membership practices are discriminatory, and by virtue of their money and status, the male Final Clubs—which are substantially similar to fraternities—exert undue influence on the social scene at Harvard. Harvard's edict: go co-ed, dissolve, or face consequences.

Because the organizations are independent, and receive no financial or administrative support from the university, Harvard's only leverage was to deny members leadership and academic opportunities. Under the policy, those who are found to be members of unregistered single-gender social organizations lose the ability to lead official student

²¹ Ryne Weiss, *Cal Poly suspends all Greek organizations after controversies at two fraternities*, FIRE (April 26, 2018), <https://www.thefire.org/cal-poly-suspends-all-greek-organizations-after-controversies-at-two-fraternities>; Esther Honig and Abby Vesoulis, *Greek Life At Ohio State Shaken After Fraternity Suspensions*, WOSU PUBLIC MEDIA (Jan. 12, 2018), <http://radio.wosu.org/post/greek-life-ohio-state-shaken-after-fraternity-suspensions#stream/0>; Ryne Weiss, *Florida State University suspends free speech and freedom of assembly until further notice*, FIRE (Nov. 10, 2017), <https://www.thefire.org/florida-state-university-suspends-free-speech-and-freedom-of-assembly-until-further-notice>; Dan Corey, *University of Michigan Fraternity Council Cancels All Greek Life Activities*, NBC NEWS (Nov.10, 2017), <https://www.nbcnews.com/storyline/hazing-in-america/university-michigan-fraternity-council-cancels-all-greek-life-activities-n819746>; Ryne Weiss, *Louisiana State University suspends free speech and freedom of assembly "until further notice,"* FIRE (Sept. 27, 2017), <https://www.thefire.org/louisiana-state-university-suspends-free-speech-and-freedom-of-assembly-until-further-notice>.

²² Ryne Weiss, *University of Rochester may subject single gender organizations to arbitrary waiver process*, FIRE (April 11, 2018), <https://www.thefire.org/university-of-rochester-may-subject-single-gender-organizations-to-arbitrary-waiver-process>; Allie Grasgreen, *Siblings, Not Brothers or Sisters*, INSIDE HIGHER ED (Nov. 30, 2012), <https://www.insidehighered.com/news/2012/11/30/trinity-college-fraternities-sororities-ordered-go-coed>.

²³ Drew Gilpin Faust, *Letter on Single-Gender Social Organizations*, HARVARD UNIVERSITY (May 6, 2016), available at <https://www.harvard.edu/president/news/2016/letter-on-single-gender-social-organizations>.

groups and sports teams, to apply for prestigious academic awards such as the Marshall and Rhodes scholarships, and to apply for postgraduate fellowships at Harvard.²⁴

In other words, those who exercise their freedom of association in ways Harvard does not agree with will find themselves on a blacklist, deprived of equal access to certain opportunities and benefits available to other students.

Many students objected swiftly and vigorously to this blacklist policy. Hundreds of Harvard women marched in the “Hear Her, Harvard” protest.²⁵ The female students suspected that although the policy was clearly meant to address the male groups, it was they who would be disproportionately impacted by the policy.

They turned out to be right. Interestingly, so far, most of the all men’s groups remain, while every single women’s group has chosen either to go co-ed, or to close.²⁶ Harvard, in its ostensible crusade for gender equality, now finds itself successful only at extinguishing groups for women.

The attempt to stamp out final clubs is eerily reminiscent of historical attempts by Harvard to eradicate student membership in formerly disfavored groups. In fact, this is at least the third time in its history Harvard has attempted to punish members of its community for their lawful associations. In 1920, Harvard convened a “secret court” to investigate and expel gay men and their close associates from the campus community.²⁷ In the 1950s, Harvard’s administration targeted and retaliated against faculty and graduate students accused of communist associations.²⁸

The passage of time has proven those efforts to invade the personal, extracurricular lives of students unjust and antithetical to the liberal tradition. Time will likely clarify that it is wrong still.

Although the example of Harvard illustrates the new threat to freedom of association, similar attempts to crack down on or burden single-gender organizations have taken place on public campuses. At California Polytechnic State University, pictures of members of two fraternities were leaked that community members found to be offensive, leading to the suspension of all activities in the Greek system. College

²⁴ Katie O’Dair, *Letter from Dean O’Dair Regarding Social Organization Recognition Process*, HARVARD UNIVERSITY (2018), available at <https://osl.fas.harvard.edu/deanodairpolicyletter>.

²⁵ C. Ramsey Fahs, *Hundreds of Women Protest Harvard Sanctions*, HARVARD CRIMSON (May 10, 2016), <https://www.thecrimson.com/article/2016/5/10/women-oppose-sanctions/>.

²⁶ Caroline S. Engelmayer and Michael E. Xie, *Harvard’s Last Sorority Disappears as Alpha Phi Buckles to College Pressure, Goes Co-Ed*, HARVARD CRIMSON (Aug. 19, 2018), <https://www.thecrimson.com/article/2018/8/19/last-sorority-alpha-phi-co-ed/>.

²⁷ Ryne Weiss, *Harvard’s Troubled History with Free Association: Part 1*, FIRE (Feb. 6, 2017), <https://www.thefire.org/harvards-troubled-history-with-free-association-part-1/>.

²⁸ Ryne Weiss, *Harvard’s Troubled History with Free Association: Part 2*, FIRE (Feb. 7, 2017), <https://www.thefire.org/harvards-troubled-history-with-free-association-part-2/>.

administrations at Louisiana State University and Florida State University suspended the free assembly rights of members of all Greek students after alcohol-related deaths at individual fraternities.

At a public institution of higher education, it is indisputable that participation in a single-gender club, sorority, or a cappella group on one's own time is a protected exercise of one's constitutional right to choose one's associations. At a public institution, it would be unconstitutional for an administration to close opportunities and restrict access to educational benefits to a student on account of their decision to join a constitutionally protected association.

Congress should expressly prohibit public institutions from restricting access to opportunities and benefits it offers to only those students who reject private associations the institution disfavors. Congress should also consider extending this protection to students enrolled at private institutions that accept federal funds. FIRE has attached model language here for your consideration. (See Appendix A.)

LEGISLATIVE RESPONSES

A great deal of the work to stop campus censorship will necessarily have to occur in the courts and on the campuses themselves. Indeed, in 2014, FIRE launched its Stand Up For Speech Litigation Project to bolster the core of our efforts, which focus on direct advocacy at the collegiate level to reflect that reality. Lawmakers, however, are essential to solving this problem too. Legislators and government officials have used a variety of strategies to promote free speech on college campus. This section will discuss those efforts.

A. SHINING LIGHT ON THE PROBLEM

Leaders on both sides of the aisle have used their voices to speak out against campus censorship. In an interview with ABC News, former President Barack Obama gave a full-throated rebuttal to those on campus who would use censorship to silence their political adversaries:

[We] have these values of free speech. And it's not free speech in the abstract. The purpose of that kind of free speech is to make sure that we are forced to use argument and reason and words in making our democracy work. And, you know, you don't have to be fearful of somebody spouting bad ideas. Just out-argue them. Beat 'em. Make the case as to why they're wrong. Win over adherents. That's how things work in a democracy."²⁹

²⁹ Press Release, FIRE, President Obama: Student Protests Should Embrace Free Speech (Nov. 16, 2015), *available at* <https://www.thefire.org/president-obama-student-protests-should-embrace-free-speech/>.

On Constitution Day earlier this month, the Department of Justice and the Education Department each held events focusing on free speech on campus. At both events, the respective secretaries of those departments emphasized the critical importance of safeguarding free speech on college campuses for students across the political spectrum.

Senators Mitch McConnell and Bernie Sanders both publicly condemned campus censorship.³⁰ Representative Eleanor Holmes Norton made campus free speech a central theme of her 2017 commencement address to Georgetown University Law Center graduates, when she argued:

The law has been fundamental to change in our country, especially the First Amendment. Yet there is recent disquieting evidence on college campuses of intolerance of speech at odds with the progressive views members of your generation and I share.³¹

Speaking during an Oversight Committee joint subcommittee hearing on July 27, 2017, Chairwoman Foxx reflected on the dangers of campus censorship too:

As we all agree, free speech is fundamental to a free society. It's astonishing to me that so many young adults today are willing to throw those constitutionally protected rights out the window just because they are on a college campus and may disagree with the content of what is being said.³²

Congressional hearings like this one play an important role too, not only in educating the members of these committees on the threats to free speech that are persistent on our campuses, but also as an opportunity to shine light on the issue and explore solutions.

As Justice Louis Brandeis eloquently stated, "Sunlight is said to be the best of disinfectants." With congressional hearings like this one, institutions that are censoring their students and faculty have been put on notice that Congress is watching, and that it does not like what it sees.

³⁰ Tyler Coward, *Senators McConnell, Sanders talk about protecting free speech on campus; McConnell mentions FIRE on Senate floor*, FIRE (June 26, 2017), <https://www.thefire.org/senators-mcconnell-sanders-talk-about-protecting-free-speech-on-campus-mcconnell-mentions-fire-on-senate-floor/>.

³¹ Joe Cohn, *Rep. Holmes Norton latest policymaker to highlight importance of campus free speech*, FIRE (May 23, 2018), <https://www.thefire.org/rep-holmes-norton-latest-policymaker-to-highlight-importance-of-campus-free-speech/>.

³² Joe Cohn, *Recap: House committee holds campus free speech hearing, raises FIRE issues*, FIRE (July 31, 2017), <https://www.thefire.org/recap-house-committee-holds-campus-free-speech-hearing-raises-fire-issues/>.

B. OVERSIGHT

Shortly after the House Judiciary Committee’s Subcommittee on the Constitution and Civil Justice held a June 2, 2015 hearing on “First Amendment Protections on Public College and University Campuses,” Judiciary Committee Chairman Bob Goodlatte applied additional pressure on the 161 public institutions that at that time maintained red light speech codes. (See Appendix B.)

In his letter, Chairman Goodlatte wrote, “In FIRE’s Spotlight on Speech Codes 2015, your institution received a ‘red light’ rating. . . . We write to ask what steps your institution plans to take to promote free and open expression on its campus(es), including any steps toward bringing your speech policies in accordance with the First Amendment.” This letter, and its follow up to the 33 public institutions that didn’t respond to the original, were key factors in a dramatic decrease in red light policies. (See Appendix C). In the year that followed the letter, the percentage of public institutions maintaining red light policies dropped from 45.8% to 33.9%.³³

C. LEGISLATION

Since 2013, 11 states have passed legislation to promote free speech on campus. Six states, including Virginia, Missouri, Arizona, Colorado, Utah, and most recently Florida have passed bills aimed exclusively at prohibiting public colleges and universities from restricting students’ expressive activities with free speech zones. (See Appendix D.) Each of those bills enjoyed broad bipartisan support. In 2017, the Kentucky legislature passed a religious liberty bill that also included a section dedicated to prohibiting free speech zones. (See Appendix E.)

Arizona, Georgia, Louisiana, and North Carolina have all recently passed bills on campus free speech as well. (See Appendix F.) Each of those bills address free speech zones and establish broad principles that should guide institution’s commitments to free speech; however, FIRE has concerns about the bills passed in Arizona, Georgia, and Louisiana over their departure from established First Amendment jurisprudence.³⁴

Tennessee’s Campus Free Speech Protection Act, the most comprehensive bill passed to date, prohibits the use of free speech zones; includes language affirming public

³³ FIRE, *Spotlight on Speech Codes 2017, 2016*, available at <https://www.thefire.org/spotlight-on-speech-codes-2017/>.

³⁴ Tyler Coward, *Problematic Arizona campus free speech bill would allow colleges to restrict students’ rights*, FIRE (April 19, 2018), <https://www.thefire.org/problematic-arizona-campus-free-speech-bill-would-allow-colleges-to-restrict-students-rights/>; Tyler Coward, *Louisiana governor signs campus free speech bill into law; law needs technical improvement*, FIRE (June 6, 2018), <https://www.thefire.org/louisiana-governor-signs-campus-free-speech-bill-into-law-law-needs-technical-improvement/>.

institutions' obligation to protect students from harassment by their peers in a manner that is consistent with their obligations under the First Amendment by adopting the definition of student-on-student harassment set forth by the Supreme Court in *Davis*; bars institutions from rescinding invitations to speakers invited by students or faculty; prohibits viewpoint discrimination in the allocation of student fees to student organizations; and protects faculty from being punished for speech in the classroom, unless the speech is both "not reasonably germane to the subject matter of the class as broadly construed, and comprises a substantial portion of classroom instruction." (See Appendix G.) The bill received nearly unanimous support in both legislative chambers.

In May of 2017, Representative Phil Roe introduced a bipartisan resolution (H.Res. 307) that states, "free speech zones and restrictive speech codes are inherently at odds with the freedom of speech guaranteed by the First Amendment of the Constitution." (See Appendix H.) The resolution now has 43 cosponsors.

In February, Senator Orrin Hatch introduced the Free Right to Expression in Education Act (the FREE Act, S. 2394), which closely resembles the Campus Free Expression Act passed in Utah to ban the use of free speech zones to stifle student speech. (See Appendix I.) FIRE strongly supports the FREE Act and urges Congress to pass it into law.

SOLUTIONS

There is no silver bullet that will resolve every threat to free speech on campus. Congress can, however, take steps that will dramatically reduce such cases. The two most impactful steps Congress could take would be to pass Senator Hatch's FREE Act and to pass legislation codifying the Supreme Court's definition of student-on-student harassment set forth in *Davis v. Monroe County Board of Education*. This combined effort would eliminate a vast majority of speech codes on college campuses today.

To ensure that campuses respect the freedom of association, which is essential to people's ability to collectively organize around shared goals, Congress should pass legislation that prohibits educational institutions from sanctioning students or discriminating against them on account of their decisions to be part of a constitutionally protected association.

CONCLUSION

FIRE's recommendations are intended to assist Congress in defending and promoting students' free speech rights at our nation's public institutions of higher education so that they can truly fulfill their promise as our most vital marketplaces of ideas.

Thank you for your continued interest in supporting free speech at America's public institutions of higher education and for your attention to FIRE's proposals. If you are interested in discussing our suggestions further, or have any questions regarding free

speech on campus, please feel free to contact me at (215) 717-3473 or at joe@thefire.org.

Respectfully submitted,

A handwritten signature in blue ink that reads "Joseph Cohn".

Joseph Cohn
Legislative and Policy Director
Foundation for Individual Rights in Education

w/ appendices