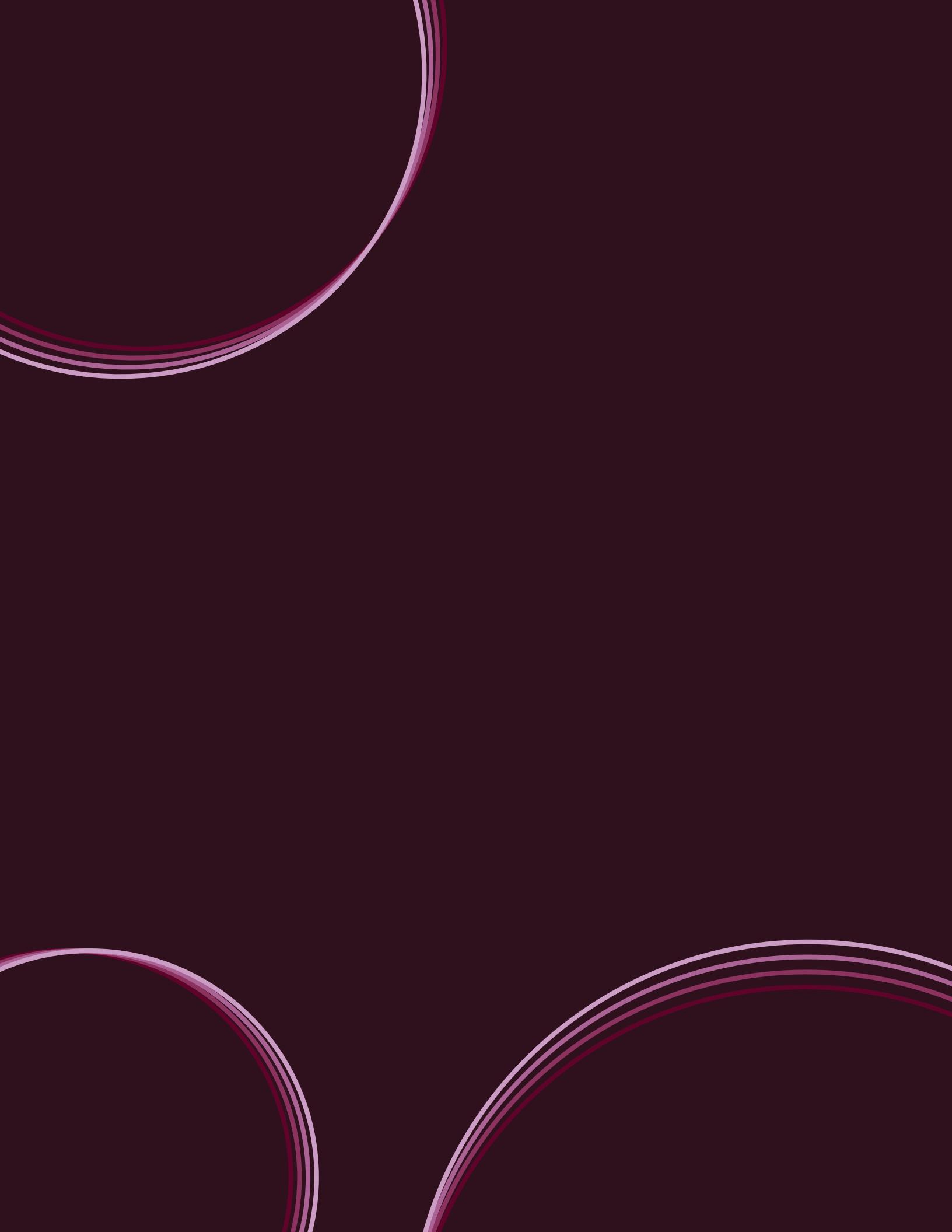




# SPOTLIGHT ON SPEECH CODES 2018

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THE STATE OF FREE SPEECH  
ON OUR NATION'S CAMPUSES



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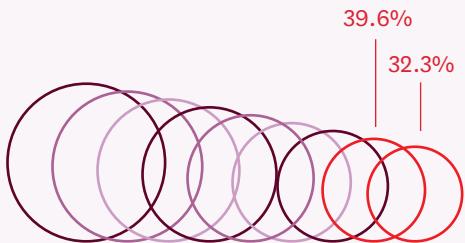
# EXECUTIVE SUMMARY

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**D**espite the critical importance of free speech on campus, too many universities – in policy and in practice – chill, censor, and punish students’ and faculty members’ expressive activity. One way that universities do this is through the use of speech codes: policies prohibiting speech that, outside the bounds of campus, would be protected by the First Amendment.

*Despite the continued decline in speech codes, however, free speech on campus remains under serious threat.*

For the tenth year in a row, the percentage of red light schools has declined.



institution. While the continued decline in red light institutions is cause for optimism, we will work in the coming years to make the number of yellow light institutions decline dramatically as well.

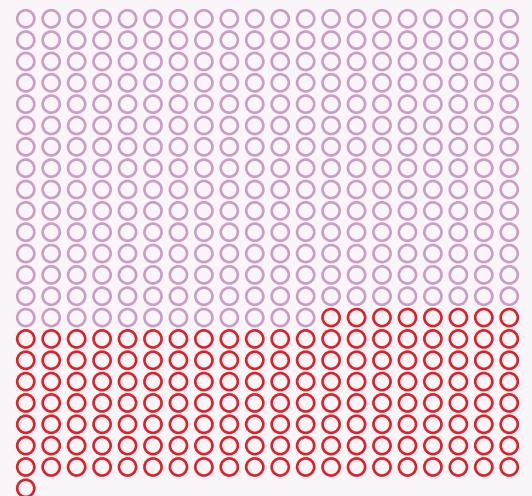
In the best news of all, an unprecedented number of schools have eliminated all of their speech codes to earn FIRE’s highest, “green light” rating: **As of September 2017, thirty-five schools received a green light rating from FIRE.** This number is up from twenty-seven schools as of last year’s

report. In addition, more schools continue to adopt statements in support of free speech modeled after the one adopted by the University of Chicago in January 2015. As of this writing, twenty-seven of the 461 schools surveyed by FIRE for this report have endorsed a version of the “Chicago Statement.”

Despite the continued decline in speech codes, however, free speech on campus remains under serious threat. Student, faculty, and administrative demands for censorship of controversial or offensive speech are common, and an unacceptable number of universities continue to punish students and faculty for constitutionally protected speech and expression.

It is imperative, therefore, that those who care about free speech on campus continue to stay vigilant. The decrease in speech codes and the proliferation of free speech policy statements are the result of the relentless work of free speech advocates. We must keep up that work to avoid losing ground amid the current of hostility towards free speech that is very much alive on campus and elsewhere.

FIRE surveyed 461 schools and found that 32.3% maintain red light policies.



# METHODOLOGY

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**F**IRE surveyed publicly available policies at 357 four-year public institutions and at 104 of the nation's largest and/or most prestigious private institutions. Our research focuses in particular on public universities because, as explained in detail below, public universities are legally bound to protect students' right to free speech and can be successfully sued in court when they do not.

FIRE rates colleges and universities as "red light," "yellow light," or "green light" based on how much, if any, protected speech their written policies restrict. FIRE defines these terms as follows:



**RED LIGHT:** A red light institution is one that has at least one policy both clearly and substantially restricting freedom of speech, or that bars public access to its speech-related policies by requiring a university login and password for access. A "clear" restriction is one that unambiguously infringes on protected expression. In other words, the threat to free speech at a red light institution is obvious on the face of the policy and does not depend on how the policy is applied. A "substantial" restriction on free speech is one that is broadly applicable to campus expression. For example, a ban on "offensive speech" would be a clear violation (in that it is unambiguous) as well as a substantial violation (in that it covers a great deal of what would be protected expression in the larger society). Such a policy would earn a university a red light.

When a university restricts access to its speech-related policies by requiring a login and password, it denies prospective students and their parents the ability to weigh this crucial information prior to matriculation. At FIRE, we consider this denial to be so deceptive and serious that it alone warrants a red light rating.



**YELLOW LIGHT:** A yellow light institution maintains policies that could be interpreted to suppress protected speech or policies that,

while clearly restricting freedom of speech, restrict relatively narrow categories of speech. For example, a policy banning "verbal abuse" has broad applicability and poses a substantial threat to free speech, but it is not a clear violation because "abuse" might refer to unprotected speech, such as threats of violence or unlawful harassment. Similarly, while a policy banning "posters promoting alcohol consumption" clearly restricts speech, it is relatively limited in scope. Yellow light policies are typically unconstitutional,<sup>1</sup> and a rating of yellow light rather than red light in no way means that FIRE condones a university's restrictions on speech. Rather, it means that in FIRE's judgment, those restrictions do not clearly and substantially restrict speech in the manner necessary to warrant a red light rating.



**GREEN LIGHT:** If FIRE finds that a university's policies do not seriously threaten campus expression, that college or university receives a green light rating. A green light rating does not necessarily indicate that a school actively supports free expression in practice; it simply means that the school's *written* policies do not pose a serious threat to free speech.



**WARNING: DOES NOT PROMISE FREE SPEECH:** FIRE believes that free speech is not only a moral imperative, but also an essential element of a college education.

However, private universities are just that — private associations — and as such, they possess their own right to free association, which allows them to prioritize other values above the right to free speech if they wish to do so. Therefore, when a private university *clearly and consistently* states that it holds a certain set of values above a commitment to freedom of speech, FIRE warns prospective students and faculty members of this fact.<sup>2</sup> Seven surveyed schools meet these criteria.<sup>3</sup>

<sup>1</sup>See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (holding that a Georgia statute prohibiting "opprobrious words or abusive language" was unconstitutional because those terms, as commonly understood, encompassed speech protected by the First Amendment).

<sup>2</sup>For example, Pepperdine University's Student Handbook provides that "[i]n keeping with Pepperdine University's Christian mission and its heritage in Churches of Christ, all members of the University community are encouraged to respect the teachings of Jesus and historic, biblical Christianity. It is expected that all students will adhere to biblical teaching regarding moral and ethical practices. Engaging in or promoting conduct or lifestyles inconsistent with biblical teaching is not permitted." *Code of Conduct*, PEPPERDINE UNIV. SEAVER COLL. OF LETTERS, ARTS, AND SCI. 2017–2018 STUDENT HANDBOOK, at 5, available at <https://www.pepperdine.edu/admission/student-life/policies/content/seaver-handbook.pdf>. It would be clear to any reasonable person reading this policy that students are not entitled to unfettered free speech at Pepperdine.

<sup>3</sup>FIRE has designated the following schools as "Warning" schools: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, Worcester Polytechnic Institute, and Yeshiva University.

# FINDINGS

<sup>4</sup>See Appendix A for a full list of schools by rating.

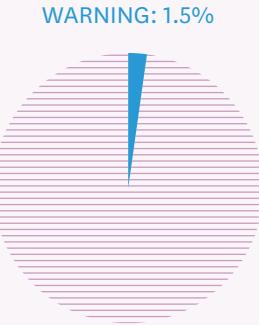
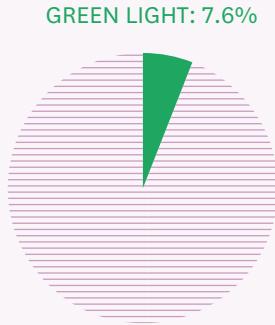
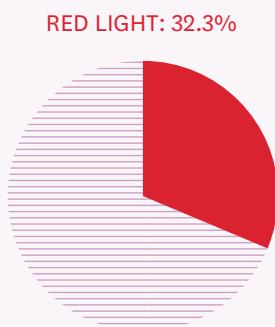
<sup>5</sup>Appalachian State University, East Carolina University, Edinboro University of Pennsylvania, Kansas State University, Michigan Technological University, North Carolina Central University, UNC Charlotte, UNC Greensboro, and UNC Wilmington all joined the ranks of green light schools this year.

**O**f the 461 schools reviewed by FIRE, 149 – or 32.3 percent – received a red light rating. 270 schools received a yellow light rating (58.6 percent), and thirty-five received a green light rating (7.6 percent). Seven schools (1.5 percent) received a warning rating.<sup>4</sup>

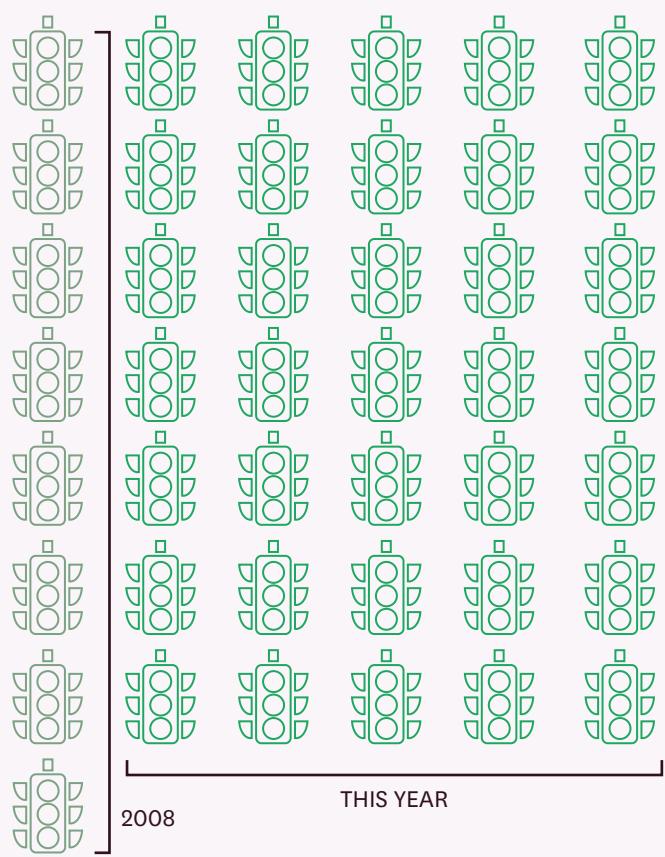
This is the tenth year in a row that the percentage of schools maintaining red light speech codes has fallen, and the findings represent a drop of more than seven percentage points from last year, when 39.6 percent of schools received a red light rating. Additionally, the number of green light institutions has more than quadrupled, from eight institutions ten years ago to thirty-five this year.<sup>5</sup>

*This is the tenth year in a row that the percentage of schools maintaining red light speech codes has fallen.*

FIRE reviewed policies at 461 colleges and universities.



The number of green light institutions has more than quadrupled, from 8 institutions in 2008 to 35 this year.



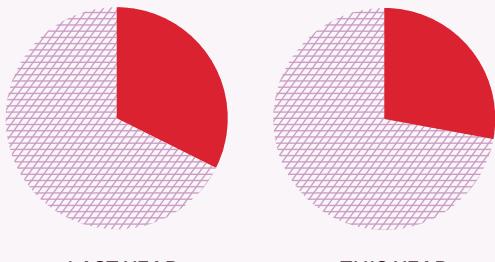
## Public Colleges and Universities

The percentage of *public* institutions with a red light rating dropped again this year, from 33.9 percent last year to **26 percent this year**. Overall, of the 357 public universities reviewed for this report, ninety-three received a red light rating (26 percent), 233 received a yellow light rating (65.3 percent), and thirty-one received a green light rating (8.7 percent).

*Since public colleges and universities are legally bound to protect their students' First Amendment rights, any speech codes — red or yellow light — are unacceptable.*

In November 2016, FIRE sent a certified mailing regarding First Amendment compliance to every public university receiving a red light rating.<sup>6</sup> FIRE's letter reminded recipient institutions of U.S. House Judiciary Committee Chairman Representative Bob Goodlatte's August 2015 letter urging administrators at red light schools to revise policies that violate the First Amendment. Further, the mailing warned that university administrators who continue to violate clearly established law with respect to expressive rights risk losing their "qualified immunity" — meaning they could be held personally liable for monetary damages in a student or faculty member's lawsuit.

Red light ratings of public schools dropped from 33.9% to 26% this year.



Since public colleges and universities are legally bound to protect their students' First Amendment rights, any speech codes — red or yellow light — are unacceptable. Much work remains to be done. This ongoing positive trend, however, is encouraging. With continued efforts by free speech advocates on and off campus, we expect this percentage will continue to drop.

## Private Colleges and Universities

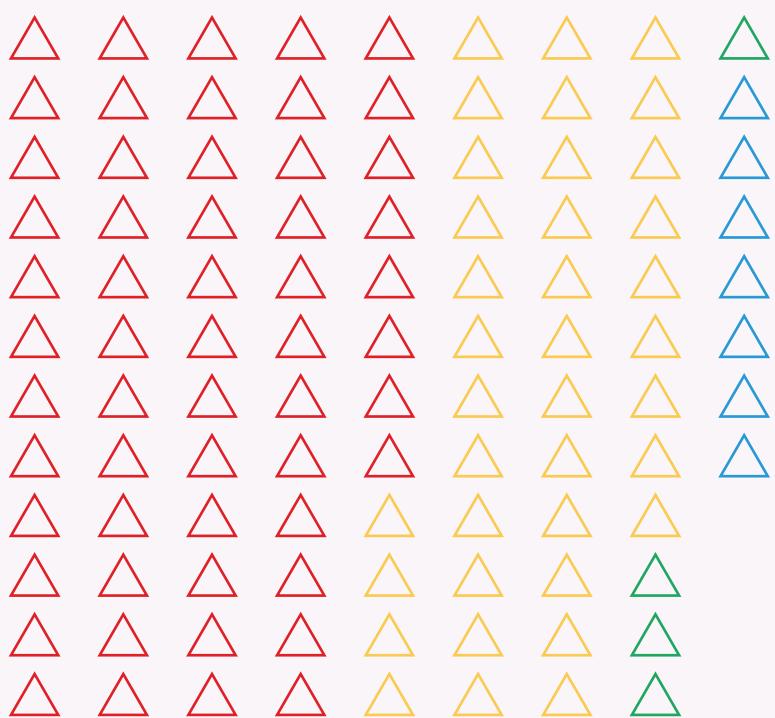
The percentage of private universities earning a red light rating, which stood at 58.7 percent last year, fell nearly five percentage points to 53.9 percent.

While private universities are not legally bound by the First Amendment — which regulates government actors — most make extensive promises of free speech to their students and faculty. When private institutions

make such promises, speech codes impermissibly violate them.

Of the 104 private colleges and universities reviewed, fifty-six (53.9 percent) received a red light rating, thirty-seven (35.6 percent) received a yellow light rating, four (3.8 percent) received a green light rating, and seven (6.7 percent) received a warning rating.

Of the 104 private schools reviewed by FIRE, 56 received a red light rating, 37 received a yellow light rating, 4 received a green light rating, and 7 received a warning rating.



<sup>6</sup>Press Release, Found. for Individual Rights in Educ., FIRE to 'Red Light' Public Universities: Revise Your Unconstitutional Speech Codes (Nov. 2, 2016), <https://www.thefire.org/fire-to-red-light-public-universities-revise-your-unconstitutional-speech-codes>.

# DISCUSSION

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## Speech Codes on Campus: Background and Legal Challenges

<sup>7</sup>Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, provides that: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

<sup>8</sup>Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 *LAW & CONTEMP. PROB.* 299 (2000).

<sup>9</sup>*Id.* at 315.

<sup>10</sup>Anthony Lewis, *Abroad at Home; Living in a Cocoon*, N.Y. TIMES, Nov. 27, 1995, <http://www.nytimes.com/1995/11/27/opinion/abroad-at-home-living-in-a-cocoon.html>.

<sup>11</sup>McCauley v. Univ. of the V.I., 618 F.3d 232 (3d Cir. 2010); DeJohn v. Temple Univ., 537 F.3d 301 (3d Cir. 2008); Dambrot v. Cent. Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); Univ. of Cincinnati Chapter of Young Am. for Liberty v. Williams, 2012 U.S. Dist. LEXIS 80967 (S.D. Ohio Jun. 12, 2012); Smith v. Tarrant Cty. Coll. Dist., 694 F. Supp. 2d 610 (N.D. Tex. 2010); Coll. Republicans at S.F. St. Univ. v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004); Bair v. Shippensburg Univ., 280 F. Supp. 2d 357 (M.D. Pa. 2003); Booher v. N. Ky. Univ. Bd. of Regents, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998); Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.); UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis., 774 F. Supp. 1163 (E.D. Wisc. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). In addition, numerous institutions have voluntarily modified their speech codes as part of settlement agreements. *See, e.g.*, Press Release, Found. for Individual Rights in Educ., Victory: Texas College Settles Free Speech Lawsuit After Telling Student that Gun Rights Sign Needs ‘Special Permission’ (May 4, 2016), <https://www.thefire.org/victory-texas-college-settles-free-speech-lawsuit-after-telling-student-that-gun-rights-sign-needs-special-permission>; Press Release, Found. for Individual Rights in Educ., Victory: Lawsuit Settlement Restores Free Speech Rights at Dixie State U. After Censorship of Bush, Obama, Che Flyers (Sept. 17, 2015), available at <https://www.thefire.org/victory-lawsuit-settlement-restores-free-speech-rights-at-dixie-state-u-after-censorship-of-bush-obama-che-flyers>.

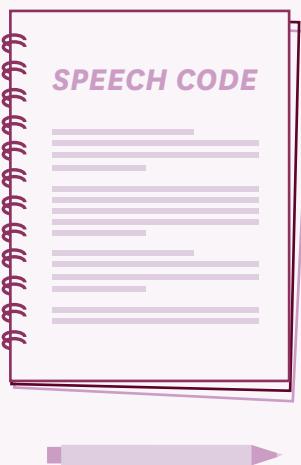
**S**peech codes — *university regulations prohibiting expression that would be constitutionally protected in society at large* — gained popularity with college administrators in the 1980s and 1990s. As discriminatory barriers to education declined, female and minority enrollment increased. Concerned that these changes would cause tension and that students who finally had full educational access would arrive at institutions only to be offended by other students hostile to their presence, college administrators enacted speech codes.

In the mid-1990s, the phenomenon of campus speech codes converged with the expansion of Title IX, the federal law prohibiting sex discrimination in educational institutions receiving federal funds.<sup>7</sup> In 1994, the Department of Education’s Office for Civil Rights (OCR) — the federal agency that oversees the implementation and enforcement of Title IX — investigated Santa Rosa Junior College after two women complained about comments made about them on an online college bulletin board that included “anatomically explicit and sexually derogatory terms.”<sup>8</sup>

In a letter to the college, OCR concluded that the offensive speech had created a “hostile educational environment” for the complainants and directed the college to adopt a policy banning, among other things, online speech that “has the purpose or effect of creating a hostile, intimidating or offensive educational environment.”<sup>9</sup> Soon thereafter, when the University of Massachusetts faced criticism over a broad new proposed harassment policy in 1995, then-chancellor David K. Scott “responded to criticism by suggesting that a code was required by Federal Department of Education regulations.”<sup>10</sup>

In enacting speech codes, administrators ignored or did not fully consider the philosophical, social, and legal ramifications of placing restrictions on speech, particularly at public universities. As a result, federal courts have overturned speech codes at numerous colleges and universities over the past two decades.<sup>11</sup>

Despite the overwhelming weight of legal authority against speech codes, a large number of institutions — including some of those that have been successfully sued on First Amendment grounds — still maintain unconstitutional speech codes. It is with this unfortunate fact in mind that we turn to a more detailed discussion of the ways in which campus speech codes violate individual rights and what can be done to challenge them.



*Federal courts have overturned speech codes at numerous colleges and universities over the past two decades.*

# DISCUSSION

## ***Public Universities vs. Private Universities***

With limited, narrowly defined exceptions, the First Amendment prohibits the government — including governmental entities such as state universities — from restricting the freedom of speech. A good rule of thumb is that if a state law would be declared unconstitutional for violating the First Amendment, a similar regulation at a state college or university is likewise unconstitutional.

The guarantees of the First Amendment generally do not apply to students at private colleges because the First Amendment regulates only government — not private — conduct.<sup>12</sup> Moreover, although acceptance of federal funding does confer some obligations upon private colleges (such as compliance with federal anti-discrimination laws), compliance with the First Amendment is not one of them.

This does not mean, however, that students and faculty at private schools are not entitled to free expression. In fact, most private universities explicitly promise freedom of speech and academic freedom. Whitman College, for example, promises students the “freedom of speech, expression, and association.”<sup>13</sup> Similarly, according to Union College’s student handbook, “free inquiry and free expression are indispensable to the objectives of a higher educational institution.”<sup>14</sup> Yet both of these institutions, along with most other private colleges and universities, maintain policies that prohibit the very speech they promise to protect.

Continuing a trend that began last year, more private schools continue to adopt statements in support of free speech modeled after the one produced in January 2015 by the Committee on Freedom of Expression at the University of

Chicago.<sup>15</sup> In February 2017, for example, Franklin & Marshall College adopted a Chicago-style Statement on Freedom of Expression into the college’s Faculty Handbook to reflect the fact that “Franklin & Marshall College is committed to the ideal of free and open inquiry in all matters.”<sup>16</sup> Georgetown University adopted a similar statement in June 2017, stating:

As an institution of higher education, one specifically committed to the Catholic and Jesuit tradition, Georgetown University is committed to free and open inquiry, deliberation and debate in all matters, and the untrammeled verbal and nonverbal expression of ideas. It is Georgetown University’s policy to provide all members of the University community, including faculty, students, and staff, the broadest possible latitude to speak, write, listen, challenge, and learn.<sup>17</sup>

Given that these and other institutions are choosing to strengthen their commitments to free speech at a time when student calls for censorship seem louder than ever, we hope this trend signals a growing understanding, among private school administrators, of the need to protect free speech in higher education quite apart from constitutional questions.



<sup>12</sup>California maintains a law that applies the protections of the First Amendment to private, nonsectarian institutions of higher education. Section 94367 of the California Education Code — the so-called “Leonard Law” — provides that “[n]o private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article I of the California Constitution.” The code further provides that “[t]his section does not apply to a private postsecondary educational institution that is controlled by a religious organization, to the extent that the application of this section would not be consistent with the religious tenets of the organization.”

<sup>13</sup>Student Rights and Responsibilities, WHITMAN COLL. STUDENT HANDBOOK, available at <https://www.whitman.edu/academics/academic-resource-center/student-handbook/student-rights-and-responsibilities>.

<sup>14</sup>Rules of Public Order, UNION COLL. STUDENT HANDBOOK, available at <https://www.union.edu/offices/dean-forms/handbook2017-2018.pdf>.

<sup>15</sup>Committee on Freedom of Expression at the University of Chicago, Report on the Committee of Freedom of Expression, available at <http://provost.uchicago.edu/FOECommitteeReport.pdf>. For a complete list of institutions that have adopted versions of the Chicago Statement, see <https://www.thefire.org/chicago-statement-university-and-faculty-body-support>.

<sup>16</sup>F&M Statement on Freedom of Expression, available at <https://www.fandm.edu/president/f-m-statement-on-freedom-of-expression>.

<sup>17</sup>Speech and Expression Policy, available at <https://studentaffairs.georgetown.edu/policies/speech-expression#General Policy>.

# DISCUSSION

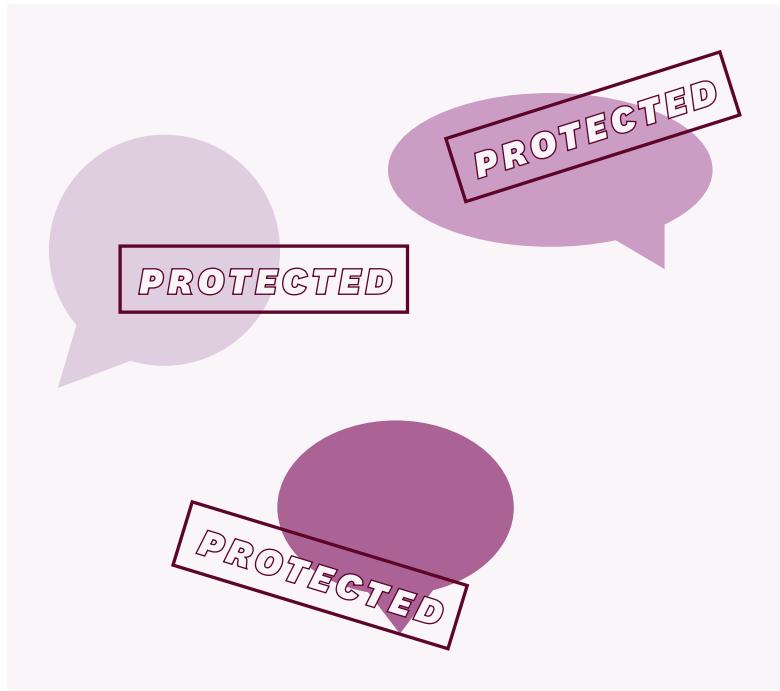
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## ***What Exactly is "Free Speech," and How do Universities Curtail it?***

What does FIRE mean when we say that a university restricts “free speech”? Do people have the right to say absolutely anything, or are certain types of expression unprotected?

Simply put, the overwhelming majority of speech is protected by the First Amendment. Over the years, the Supreme Court has carved out a limited number of narrow exceptions to the First Amendment: speech that incites reasonable people to immediate violence; so-called “fighting words” (face-to-face confrontations that lead to physical altercations); harassment; true threats and intimidation; obscenity; and defamation. If the speech in question does not fall within one of these exceptions, it most likely is protected speech.

The exceptions are often misapplied and abused by universities to punish constitutionally protected speech. There are instances where the written policy at issue may be constitutional —for example, a prohibition on “incitement” — but its application may not be. In other instances, a written policy will purport to be a legitimate ban on a category of unprotected speech like harassment or true threats, but (either deliberately or through poor drafting) will encompass protected speech as well. Therefore, it is important to understand what these narrow exceptions to free speech actually mean in order to recognize when they are being misapplied.



*Simply put, the overwhelming majority of speech is protected by the First Amendment.*

## Threats and Intimidation

The Supreme Court has defined “true threats” as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court also has defined “intimidation,” of the type not protected by the First Amendment, as a “type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Id.* at 360. Neither term would encompass, for example, a vaguely worded statement that is not directed at anyone in particular.

Nevertheless, universities frequently misapply policies prohibiting threats and intimidation so as to infringe on protected speech, citing generalized concerns about safety without regard to the actual boundaries of unprotected speech.

In February 2017, for example, a Linfield College student group invited Jordan Peterson — a psychology professor at the University of Toronto and an outspoken critic of what he perceives as political indoctrination at universities — to speak on campus. A few days in advance of his planned speech, Peterson tweeted, “I’m violating some more safe spaces soon: Linfield College, April 24.”<sup>18</sup> The next day, Vice President for Academic Affairs and Dean of Faculty Susan Agre-Kippenhan informed the campus community that Peterson would no longer be allowed to speak at Linfield, claiming his tweet constituted “the use or threat of force” and “intimidation.”<sup>19</sup>

In a letter to Linfield, FIRE reminded the college of the legal definition of a threat, and wrote that

Peterson’s tweet falls far short of this threshold. By any reasonable reading, his statement about “violat[ing]” a “safe space” reveals an intent to introduce potentially controversial ideas to a community he believes to be unwilling

to encounter them, not intent to physically harm that community. Peterson is in no way implying that he intends to use “force” against any member of the Linfield community. To pretend otherwise is disappointingly disingenuous and flatly ignores the obvious hyperbole in his tweet. If Peterson had tweeted that

he planned to “blow some minds at Linfield,” would administrators have called in a bomb squad? It would seem unlikely. Specialized legal knowledge is unnecessary to conclude that Peterson’s tweet is not a “threat.”

FIRE does not discount Linfield’s duties to maintain a safe environment for its students and respond quickly and responsibly to genuine threats. But as an institution that has committed itself to “the principles underlying constitutionally protected free expression,” Linfield has a fundamental responsibility to protect the free speech rights of its students. It cannot abandon those duties simply because a student group invited a speaker who used hyperbolic language on an online platform that awards greater attention to those who use hyperbolic language.<sup>20</sup>

*Universities frequently misapply policies prohibiting threats and intimidation so as to infringe on protected speech.*

<sup>18</sup>Jordan B Peterson (@jordanbpeterson), TWITTER (Apr. 18, 2017, 3:02 PM), <https://twitter.com/jordanbpeterson/status/854409795335598080?lang=en>.

<sup>19</sup>Letter from Ari Cohn, Senior Program Officer, Found. for Individual Rights in Educ. to Michael Schill, President, Univ. of Or. (Nov. 18, 2015), available at <https://www.thefire.org/fire-letter-to-university-of-oregon-president>.

<sup>20</sup>*Id.*



**Jordan B Peterson**  
@jordanbpeterson

I'm violating some more safe spaces soon:  
Linfield College, April 24

42 86 450

# DISCUSSION

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## Incitement

There is also a propensity among universities to restrict speech that offends other students on the basis that it constitutes “incitement.” The basic concept, as administrators too often see it, is that offensive or provocative speech will anger those who disagree with it, perhaps so much so that it moves them to violence. While preventing violence is an admirable goal, this is an impermissible misapplication of the incitement doctrine.

Incitement, in the legal sense, does not refer to speech that may lead to violence on the part of those opposed to or angered by it, but rather to speech that will lead those who *agree with it* to commit immediate violence. In other words, the danger is that certain speech will convince

sympathetic, willing listeners to take immediate unlawful action. The paradigmatic example of incitement is a person standing on the steps of a courthouse in front of a torch-wielding mob and urging that mob to burn

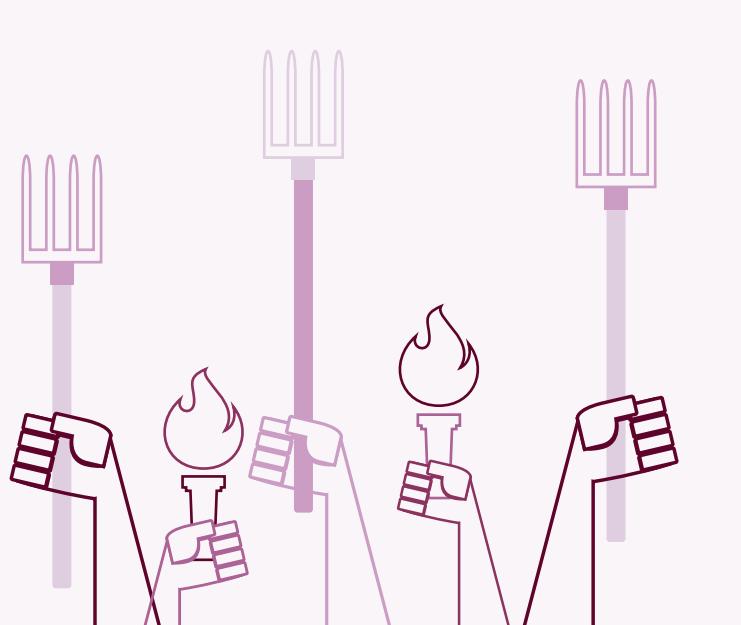
*The danger is that certain speech will convince sympathetic, willing listeners to take immediate unlawful action.*

down the courthouse immediately. To misapply the doctrine to encompass an opposing party’s reaction to speech they dislike is to convert the doctrine into an impermissible “heckler’s veto,” where violence threatened by those angry about particular speech is used as a reason to censor that speech. As the Supreme Court has made clear, speech cannot be prohibited because it “might offend a hostile mob” or because it may prove “unpopular with bottle throwers.”<sup>21</sup>

The legal standard for incitement was announced in the Supreme Court’s decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There, the Court held that the state may not “forbid or proscribe advocacy of the use of force or of law violation

except where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action.” *Id.* at 447 (emphasis in original). This is an exacting standard, as evidenced by its application in subsequent cases.

For instance, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Supreme Court held that a man who had loudly stated, “We’ll take the fucking street later” during an anti-war demonstration did not intend to incite or produce immediate lawless action. The Court found that “at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time,” and that the man was therefore not guilty under a state disorderly conduct statute. *Id.* at 108–09. The fact that the Court ruled in favor of the speaker despite the use of such strong and unequivocal language underscores the narrow construction that has traditionally been given to the incitement doctrine and its requirements of likelihood and immediacy. Nonetheless, college administrations have been all too willing to abuse or ignore this jurisprudence.



## *Obscenity*

The Supreme Court has held that obscene expression, to fall outside of the protection of the First Amendment, must “depict or describe sexual conduct” and must be “limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

This is a narrow definition applicable only to some highly graphic sexual material. It does not encompass profanity, even though profane words are often colloquially referred to as “obscenities.” In fact, the Supreme Court has explicitly held that profanity is constitutionally protected. In *Cohen v. California*, 403 U.S. 15 (1971), the defendant, Paul Robert Cohen, was convicted in California for wearing a jacket bearing the words “Fuck the Draft” in a courthouse. The Supreme Court overturned Cohen’s conviction, holding that the message on his jacket, however vulgar, was protected speech.

Similarly, in *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court determined that a student newspaper article entitled “Motherfucker Acquitted” was constitutionally protected speech. The Court wrote 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.’” *Id.* at 670. Nonetheless, many colleges erroneously believe that they may legitimately prohibit profanity and vulgar expression.

The University of New Hampshire, for example, recently removed a female student’s display

seeking to raise awareness of “street harassment” during Sexual Assault Awareness Month because the display, which listed actual examples of harassment experienced by UNH students, contained “profane” and “vulgar” language in violation of university policy.<sup>22</sup>

UNH is far from the only institution to prohibit profane or vulgar expression, particularly in posted materials. For example:

- According to Virginia State University’s *Community Living Guide*, “[p]rofanity is prohibited at Virginia State University.”<sup>23</sup>
- At Cal Poly Pomona, housing officials may remove posted materials from sight if they contain “obscenities.”<sup>24</sup>



<sup>22</sup>Letter from Adam B. Steinbaugh, Senior Program Officer, Found. for Individual Rights in Educ., to Mark W. Huddleston, President, University of New Hampshire (Apr. 6, 2017), available at <https://www.thefire.org/fire-letter-to-the-university-of-new-hampshire-april-6-2017>.

<sup>23</sup>*General Governing Policies, DEP’T OF RESIDENCE LIFE AND HOUSING CMTY. LIVING GUIDE*, available at <http://www.vsu.edu/files/docs/residential-living/living-guide.pdf>.

<sup>24</sup>*UHS 2017-18 Student Housing License Agreement*, available at <https://www.cpp.edu/~housing/forms-policies/hla-policies-and-regulations.shtml>.

# DISCUSSION

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## Harassment

Harassment, properly defined, is not protected by the First Amendment. In the educational context, the Supreme Court has defined student-on-student harassment as discriminatory, unwelcome conduct “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). This is not simply expression; it is *conduct* far beyond the protected expressive activities that are too often deemed “harassment” on today’s college campus. Harassment is extreme and usually repetitive behavior — behavior so serious that it would interfere with a reasonable person’s ability to receive his or her education. For example, in *Davis*, the conduct found by the Court to be harassment was a months-long pattern of conduct including repeated attempts to touch the victim’s breasts and genitals together with repeated sexually explicit comments directed at and about the victim.

<sup>25</sup>See Letter from Shaheena Simons and Damon Martinez, U.S. Dep’t of Justice, to Robert G. Frank, President, Univ. of N.M. (Apr. 22, 2016), available at <https://www.justice.gov/opa/file/843901/download>; Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Justice, and Gary Jackson, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Royce Engstrom, President, Univ. of Mont. and Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), available at <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

<sup>26</sup>Press Release, Found. for Individual Rights in Educ., Dear Colleague: It’s Over! Education Department Rescinds Controversial Letter (Sept. 22, 2017), available at <https://www.thefire.org/dear-colleague-its-over-education-department-rescinds-controversial-2011-letter>.

<sup>27</sup>Georgia Southern University Policy Prohibiting Sexual Harassment, available at <http://president.georgiasouthern.edu/diversity/policy-and-procedures/sexual-harassment>.

<sup>28</sup>State University of New York New Paltz Non Discrimination/Non Harassment Policy Statement and Procedures for Reporting Incidents of Harassment, Discrimination and Sexual Violence, available at [https://www.newpaltz.edu/media/academic-affairs/Non-Discrimination\\_Non-Harassment%20Policy%2002-14.pdf](https://www.newpaltz.edu/media/academic-affairs/Non-Discrimination_Non-Harassment%20Policy%2002-14.pdf).

<sup>29</sup>See, e.g., *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (holding that Temple University’s sexual harassment policy was unconstitutionally broad); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (holding that University of Michigan’s discriminatory harassment policy was unconstitutionally broad); *Booher v. N. Ky. Univ. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (holding that Northern Kentucky University’s sexual harassment policy was unconstitutionally broad).

Here are just two examples of overly broad sexual harassment policies based on OCR’s definition:

- At Georgia Southern University, “Sexual harassment is defined as unwelcome conduct of a sexual nature.”<sup>27</sup>
- At SUNY New Paltz, “Sexual Harassment in the Educational Setting is defined as: Unwelcome conduct of a sexual nature.”<sup>28</sup>



These examples, along with many others, demonstrate that colleges and universities often fail to limit themselves to the narrow definition of harassment that is outside the realm of constitutional protection. Instead, they expand the term to prohibit broad categories of speech that do not even *approach* actual harassment, despite similar policies having been struck down by federal courts years earlier.<sup>29</sup>

For decades now, however, many colleges and universities have maintained policies defining harassment too broadly and prohibiting constitutionally protected speech. And years of overly aggressive Title IX enforcement by the Department of Education’s Office for Civil Rights (OCR), including an unconstitutionally broad definition of sexual harassment promulgated by OCR,<sup>25</sup> has led numerous colleges and universities to enact more restrictive policies in an effort to avoid an OCR investigation. Although OCR has recently signaled a return to a more speech-protective approach to Title IX enforcement,<sup>26</sup> it will likely take years (if not decades) of work by free speech advocates to undo the damage caused by OCR over the past eight years.

These vague and overly broad harassment policies deprive students and faculty of their free speech and academic freedom rights. In May 2017, for example, Howard University law professor Reginald Robinson was found guilty of sexual harassment after two students complained about a test question involving a salon client who believed she might have been touched inappropriately after falling asleep during a Brazilian wax. After a 504-day investigation, administrators determined that Robinson would be required to undergo mandatory

*These vague and overly broad harassment policies deprive students and faculty of their free speech and academic freedom rights.*

# DISCUSSION

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sensitivity training and submit to classroom observation and prior administrative review of future test questions. The university also warned Robinson that any further “violations” of the university’s Title IX policies could result in his termination.

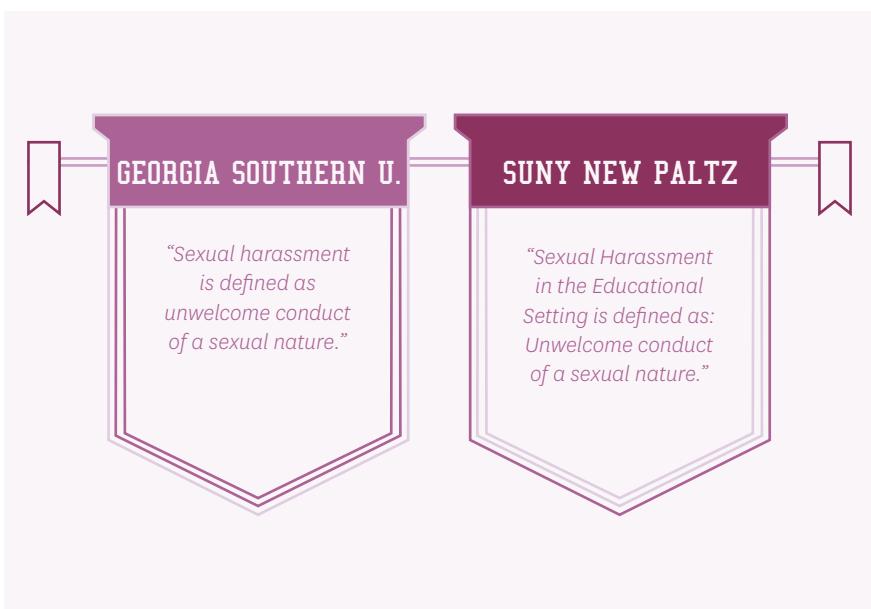
Robinson’s case has particularly distressing implications for professors’ academic freedom if you consider the nature of law school exam hypotheticals, which purposefully require law students to apply the legal principles they are learning to unusual or difficult cases. As FIRE wrote in a letter to Howard University,

All law students in the United States can expect to encounter descriptions of scenarios that involve sexual touching, even if they learn only the subjects tested on bar examinations in all jurisdictions, which include rape and other criminal infractions. The simple fact that a test question involves touching of a hypothetical individual’s genitals and the word “genitals” would not, therefore, unreasonably interfere with any law student’s education.

Any student with even the most basic understanding of the first-year topics taught almost uniformly nationwide would expect such hypothetical questions, and any law student who graduates without having encountered such a question is likely a step behind in learning the knowledge necessary to become a licensed attorney.<sup>30</sup>

Having discussed the most common ways in which universities misuse the narrow exceptions to free speech to prohibit protected expression, we now turn to university regulations that restrict free speech and expression on their face. Such restrictions are generally found in several distinct types of policies.

<sup>30</sup>Letter from Susan Kruth, Senior Program Officer, Found. for Individual Rights in Educ., to Wayne A.J. Frederick, President, Howard University (June 16, 2017), available at <https://www.thefire.org/fire-letter-to-howard-university-june-16-2017>.



# DISCUSSION

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## Anti-Bullying Policies

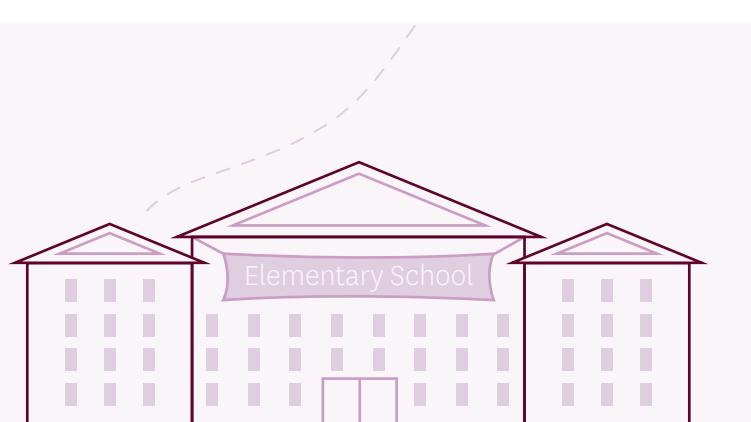
In recent years, “bullying” has garnered a great deal of media attention, bringing pressure on legislators and school administrators at both the K-12 and college levels to crack down on speech that causes emotional harm to other students. On October 26, 2010, OCR issued a letter on the topic of bullying, reminding educational institutions that they must address actionable harassment, but also acknowledging that “[s]ome conduct alleged to be harassment may implicate the First Amendment rights to free speech or expression.”<sup>31</sup> For such situations, OCR’s letter refers readers back to the 2003 “Dear Colleague” letter stating that harassment is conduct that goes far beyond merely offensive speech and expression. However, because it is primarily focused on bullying in the K-12 setting, the letter also urges an *in loco parentis*<sup>32</sup> approach that is inappropriate in the college setting, where students are overwhelmingly adults.

Court decisions and other guidance regarding K-12 speech has a way of “trickling up” to the collegiate setting, and indeed, FIRE has seen a dramatic increase in the number of university policies prohibiting bullying. Unfortunately, many of these policies infringe on or outright prohibit protected speech.

At Gettysburg College, for example, bullying is defined as “unwelcome or unreasonable behavior that demeans, offends, or humiliates people either as individuals or as a group.”<sup>33</sup> And at Idaho State

University, “[b]ullying includes harsh practical jokes, spreading rumors and gossip, teasing, taunting and using social media to humiliate and ridicule others; using aggressive communication such as insults, offensive remarks, shouting, yelling, angry outbursts, and invading others personal space; and taking intentional actions to exclude or ostracize others from a group.”<sup>34</sup>

But as courts have held in rulings spanning decades, speech cannot be prohibited simply because someone else finds it offensive, even deeply so.<sup>35</sup> Offensive speech, if it does not rise to the level of harassment or one of the other narrow categories of unprotected speech, is entitled to constitutional protection (and, accordingly, to protection at private institutions that claim to uphold the right to free speech).



# DISCUSSION

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## ***Policies on Tolerance, Respect, and Civility***

Many schools invoke laudable goals like respect and civility to justify policies that violate students' and faculty members' free speech rights. While a university has every right to promote a tolerant and respectful atmosphere on campus, a university that claims to respect free speech must not limit speech to only the inoffensive and respectful. And although pleas for civility and respect are often initially framed as requests, many schools have speech codes that effectively turn those requests into requirements.

For example:

- At Utah State University, “[a]ll interactions with faculty members, staff members, and other students shall be conducted with courtesy, civility, decency, and a concern for personal dignity.”<sup>36</sup>
- Lafayette College’s *Code of Conduct* provides that “[i]n addition to exhibiting maturity and self-control, students and student organizations are expected to so conduct themselves that they cause no physical, emotional, or mental harm to others.”<sup>37</sup>

While respect and civility may seem uncontroversial, most uncivil or disrespectful speech is protected by the First Amendment,<sup>38</sup> and is indeed sometimes of great political and social significance. Some of the expression employed in the civil rights movement of the 1950s and 60s, for example, would violate campus civility codes today. Colleges and universities may *encourage* civility, but public universities – and those private universities that purport to respect students' fundamental free speech rights – may not require it or threaten mere incivility with disciplinary action.

<sup>36</sup><sup>4</sup>“Responsibilities of Students,” *Utah State University Student Code*, available at <https://studentconduct.usu.edu/studentcode/article1>.

<sup>37</sup><sup>4</sup>“Introductory Statement,” *Code of Conduct*, LAFAYETTE COLL. STUDENT HANDBOOK, available at <https://conduct.lafayette.edu/wp-content/uploads/sites/93/2017/08/StudentHandboook-2017-18.pdf>.

<sup>38</sup>See, e.g., Coll. Republicans at S.F. St. Univ. v. Reed, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) (enjoining enforcement of university civility policy because “there is a substantial risk that the civility requirement will inhibit or deter use of the forms and means of communication that, to many speakers in circumstances of the greatest First Amendment sensitivity, will be the most valued and the most effective.”)

*A university that claims to respect free speech must not limit speech to only the inoffensive and respectful.*



**WE SHALL  
OVERCOME**

# SPOTLIGHT ON: FIRST AMENDMENT LITIGATION

<sup>1</sup>Gerlich v. Leath, No. 16-1518 (8th Cir. June 13, 2017).

<sup>2</sup>*Id.*

FIRE always aims to work amicably with college administrations to resolve concerns about students' and faculty members' free speech rights. Sometimes, however, it becomes necessary to resort to the courts to protect those rights.

In July 2014, FIRE launched our Stand Up For Speech Litigation Project, a national effort to eliminate unconstitutional speech codes through targeted First Amendment lawsuits. In June 2017, Stand Up For Speech scored its biggest victory to date when the U.S. Court of Appeals for the Eighth Circuit upheld an Iowa district court's decision to permanently bar Iowa State University from using its trademark policy to prevent an ISU student group from printing t-shirts advocating marijuana legalization.<sup>1</sup> The decision was the tenth

*“The defendants’ rejection of NORML ISU’s designs discriminated against that group on the basis of the group’s viewpoint.”*

student chapter of the National Organization for the Reform of Marijuana Laws (NORML ISU). In October 2012, NORML ISU received university approval for a group t-shirt that featured ISU mascot Cy the Cardinal's head in place of the "O" in NORML. Later that fall, however, following criticism from members of the public and state officials, the university rescinded approval for the t-shirt, and several months after that adopted new guidelines prohibiting the use of the university's trademark on designs that "suggest the promotion of" drugs or alcohol.

In upholding the district court's ruling that ISU's application of its trademark policy to NORML ISU's expression violated the First Amendment, the Eighth Circuit held that ISU had engaged in impermissible viewpoint-based discrimination. The court ruled that "[t]he defendants' rejection of NORML ISU's designs discriminated against that group on the basis of the group's viewpoint," and that the university's actions were taken "to contain the political controversy" that arose when state lawmakers criticized the t-shirts.<sup>1</sup>



consecutive victory for the Stand Up For Speech Litigation Project and the first from a federal court of appeals.

Paul Gerlich and Erin Furleigh, the plaintiffs in the lawsuit, were members of the university's

The Eighth Circuit also upheld the district court's denial of qualified immunity to the defendant ISU administrators, leaving them personally liable for monetary damages. The court held that NORML ISU's right to be free from viewpoint discrimination under the university's trademark licensing regime was clearly established at the time such that reasonable administrators should have understood the implications of their actions. According to the court, the law is clear that when a public college opens government property or offers a government benefit to all student groups, it may not discriminate in granting access based on a group's chosen message.

Meanwhile, the Stand Up For Speech Litigation

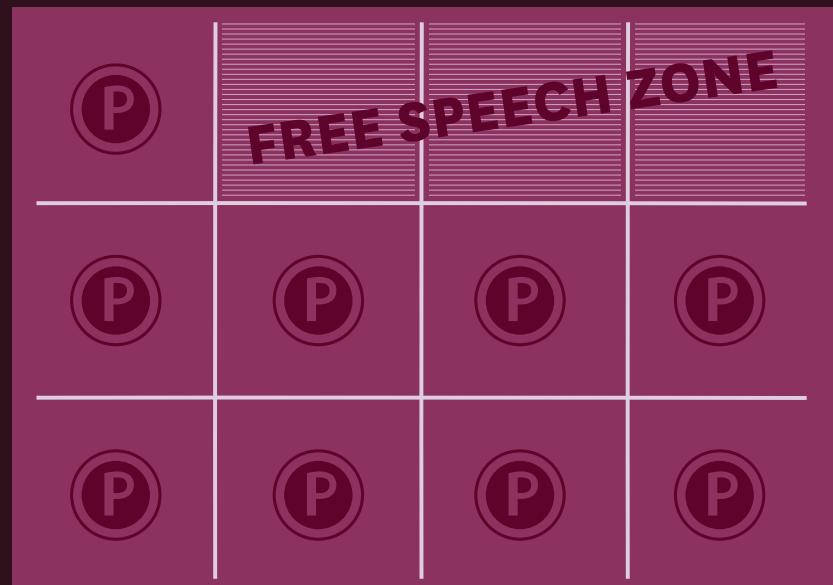
Project continues to challenge speech codes at campuses around the country, most recently with a suit against Los Angeles Pierce College.

In November 2016, Pierce student Kevin Shaw was approached by administrators while attempting to distribute Spanish-language copies of the U.S. Constitution and recruit new members for his student group, Young Americans for Liberty, along the main public walkway on campus. He was told that he could not distribute literature outside of the free speech zone — an area roughly the size of three parking spaces on Pierce’s 426-acre campus — and that he would need to apply for a permit to use the zone.

In March 2017, Shaw filed a federal lawsuit challenging Pierce’s free speech zone and the requirement that students get permission before speaking or distributing literature on campus, as well as a system-level policy requiring Pierce and every other college in the Los Angeles Community College District to have free speech zones.<sup>2</sup> The suit is ongoing; in October 2017, the U.S. Department of Justice filed a Statement of Interest in support of Shaw, arguing that, based on the facts alleged in Shaw’s complaint, Pierce and the District’s policies and practices violate student First Amendment rights and denied Shaw “his right to engage in expressive activity in a public forum.”<sup>3</sup> Shaw’s lawsuit is the first of FIRE’s new Million Voices Campaign, which aims to free the voices of one million students by striking down unconstitutional speech codes across the country in partnership with attorneys from FIRE’s Legal Network. By building these partnerships to protect student and faculty speech rights, we hope to expand our reach to force even more universities to defend their policies in court.

*He was told that he could not distribute literature outside of the free speech zone — an area roughly the size of three parking spaces on Pierce’s 426-acre campus — and that he would need to apply for a permit to use the zone.*

<sup>2</sup>Press Release, Found. for Individual Rights in Educ., Department of Justice Files Statement of Interest in FIRE Lawsuit (Oct. 25, 2017), <https://www.thefire.org/department-of-justice-files-statement-of-interest-in-fire-lawsuit>.



# DISCUSSION

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## Internet Usage Policies

A great deal of expression now takes place online, whether over email or on sites like Facebook and Twitter. Therefore, university policies regulating online expression, while perhaps appearing to be narrow, can actually have a significant impact on students' and faculty members' free speech rights.

Examples of impermissibly restrictive internet usage policies from the 2016–2017 academic year include the following:

- At Black Hills State University in South Dakota, the university's "email system shall not to be used for the creation or distribution of any disruptive or offensive messages, including offensive comments about race, gender, hair color, disabilities, age, sexual orientation, pornography, religious beliefs and practice, political beliefs, or national origin. Employees or students who receive any emails with this content from any Black Hills State University employee or student should report the matter to the appropriate authorities immediately."<sup>39</sup>
- Dartmouth College prohibits use of the college's information technology resources to "post or transmit" content that is "offensive" or "hateful." Neither term is further defined.<sup>40</sup>



## Policies on Bias and Hate Speech

In recent years, colleges and universities around the country have instituted policies and procedures specifically aimed at eliminating "bias" and "hate speech" on campus. These sets of policies and procedures, frequently termed "Bias Reporting Protocols" or "Bias Incident Protocols," often include speech codes prohibiting extensive amounts of protected expression. While speech or expression that is based on a speaker's prejudice may be offensive, it is entirely protected unless it rises to the level of unprotected speech (harassment, threats, and so forth). The speaker's motive has no bearing on whether or not the speech is protected.

These protocols often also infringe on students' right to due process, allowing for anonymous reporting that denies students the right to confront their accusers. Moreover, universities are often heavily invested in these bias incident policies, having set up entire regulatory frameworks and response protocols devoted solely to addressing them.

While many bias incident protocols do not include a separate enforcement mechanism, the reality is that the mere threat of a bias investigation will likely be sufficient to chill protected speech on controversial issues. And when the only conduct at issue is constitutionally protected speech, even investigation alone is inappropriate.

Of the 461 colleges and universities FIRE surveyed for this report, 140 of them – 30 percent – have some form of bias response team. Bias response teams appear to be particularly popular with private universities: of the 104 private institutions surveyed, fifty-three of them – 51 percent – have a bias response team.

## **Policies Governing Speakers, Demonstrations, and Rallies**

Universities have a right to enact reasonable, narrowly tailored “time, place, and manner” restrictions that prevent demonstrations and other expressive activities 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 maintain an environment conducive to education. Policies governing speakers, demonstrations, and rallies fall into several general categories.

*Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.*

Despite the clarity of the law on this issue, the impermissible use of security fees to burden controversial speech is all too common on university campuses.

In May 2017, for example, a student group at New Mexico State University (NMSU) hosted an event featuring a keynote address by conservative writer and speaker David Horowitz. Just days before the event, NMSU informed the student group that it would be required to pay over \$300 to cover the cost of security that the NMSU Police Department deemed necessary in part due to “planned counter-protests.”

## **Security Fee Policies**

In recent years, FIRE has seen a number of colleges and universities hamper — whether intentionally or just through a misunderstanding of the law — the invitation of controversial speakers by levying additional security costs on the sponsoring student organizations.

The Supreme Court addressed exactly this issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), where it struck down an ordinance in Georgia that permitted the local government to set varying fees for events based upon how much police protection the event would need. Invalidating the ordinance, the Court wrote that “[t]he fee assessed will depend on the administrator’s measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.” *Id.* at 134. Deciding that such a determination required county administrators to “examine the content of the message that is conveyed,” the Court wrote that “[l]isteners’ reaction to speech is not a content-neutral basis for regulation. ... **Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.**” *Id.* at 134–35 (emphasis added).

As FIRE explained in a July 2017 letter to NMSU, the university’s actions “unacceptably affixed a price tag to the group’s expressive activities,” noting that

By conditioning the financial burden imposed on a student group on the anticipated reaction to the viewpoints expressed at an event, NMSU impermissibly allows for the exercise of a “heckler’s veto” by anyone wishing to impede or silence a student group engaging in controversial or unpopular expression.<sup>41</sup>

In response, NMSU’s chancellor agreed that the university would cover the student group’s security cost for the Horowitz event and would review its regulations to ensure they complied with the university’s First Amendment obligations.<sup>42</sup>

<sup>41</sup>Letter from Ari Z. Cohn, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ., to Garrey Carruthers, Chancellor, N.M. State Univ. (July 26, 2017), available at <https://www.thefire.org/letter-from-fire-to-new-mexico-state-university-president-garrey-carruthers>.

<sup>42</sup>Letter from Garrey Carruthers, Chancellor, N.M. State Univ., to Ari Z. Cohn, Dir., Individual Rights Def. Program, Found. for Individual Rights in Educ. (Aug. 3, 2017), available at <https://www.thefire.org/letter-from-new-mexico-state-university-president-garrey-carruthers-to-fire>.

# DISCUSSION

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## Prior Restraints

The Supreme Court has held that “[i]t is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible and Tract Society of NY, Inc. v. Village of Stratton*, 536 U.S. 150, 165–66 (2002). Yet many colleges and universities do just that, requiring students and student organizations to register their expressive activities well in advance and, often, to obtain administrative approval for those activities.

For example:

- At Athens State University, “[a]ll materials to be posted or distributed must be reviewed for University Policy compliance by the Office of Student Activities.”<sup>45</sup>
- Bridgewater State University requires that students and student groups obtain “the approval of the chief of police or designee at least 24 hours in advance” in order to distribute “non-commercial pamphlets, handbills, circulars, newspapers, magazines, and other written materials” on campus.<sup>46</sup>

Last year, for example, Fairmont State University administrators told a student who was gathering signatures in support of a national campus libertarian group that he could not do so without first obtaining a permit. When the student sought clarification from an administrator, he was told that Fairmont State’s decision to require a permit would rest on “a judgment call based on campus security and what they feel is soliciting.”<sup>43</sup>

FIRE wrote to Fairmont State asking the university to revise the unconstitutional solicitation policy, which not only required students to get permission from administrators to engage in basic expressive activity, but also required them to provide copies of any literature they

*“It is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”*

intended to hand out for advance approval. The university ultimately revised the policy, but many similarly unconstitutional policies remain on the books at other institutions.<sup>44</sup>



## Free Speech Zone Policies

Of the 461 schools surveyed for this report, fifty-two of them (11 percent) have “free speech zone” policies—policies limiting student demonstrations and other expressive activities to small and/or out-of-the-way areas on campus.<sup>47</sup> Despite being inconsistent with the First Amendment, free speech zones are more common at public universities than at private universities: 13.7 percent of public universities surveyed maintain free speech zones, while just 4 percent of private universities do.

Free speech zones have repeatedly been struck down by courts or voluntarily revised as part of lawsuit settlements. FIRE’s Stand Up For Speech Litigation Project has included successful challenges to free speech zone policies at six colleges and universities and includes an ongoing challenge to a free speech zone policy at Los Angeles Pierce College.<sup>48</sup>

Several state legislatures also took action this year to prohibit public colleges and universities from maintaining free speech zones. In February 2017, Utah adopted the Campus Free Expression Act, which provides that public universities in the state may not prohibit:

- (a) a member of the institution’s community or the public from spontaneously and contemporaneously assembling in an outdoor area of the institution’s campus; or
- (b) a person from freely engaging in noncommercial expressive activity in an outdoor area of the institution’s campus if the person’s conduct is lawful.<sup>49</sup>

In April 2017, Colorado Governor John Hickenlooper signed a free speech bill providing that Colorado’s public colleges and universities may not “designate an area on campus as a free speech zone or otherwise create policies implying that its students’ expressive activities are restricted to particular areas of campus.”<sup>50</sup>

And in May 2017, Tennessee Governor Bill Haslam signed into law Senate Bill 723, the Campus

Free Speech Protection Act, a comprehensive law providing some of the country’s strongest protections for student and faculty speech on public college campuses. Among other things, the law prohibits Tennessee’s public institutions from establishing free speech zones.<sup>51</sup>

Despite the unpopularity of free speech zones with judges and lawmakers, too many universities still maintain them. The University of South Dakota, for example, has just three “free speech areas” on campus, and “[a]nyone wishing to protest or demonstrate must complete a Non-Commercial Free Speech Request Form ... and make reservations at least five (5) days prior to the event.”<sup>52</sup>

<sup>47</sup>See Appendix D for a full list of schools with free speech zone policies.

<sup>48</sup>For more detailed information on this and other First Amendment lawsuits, see “Spotlight On: First Amendment Litigation,” pp. 18-19.

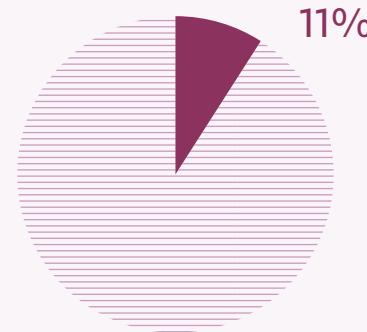
<sup>49</sup>UTAH CODE ANN. §§ 53B-27-101–53B-27-105 (2017), available at <https://le.utah.gov/-/2017/bills/static/HB0054.html>.

<sup>50</sup>COLO. REV. STAT. § 23-5-144 (2017), available at [https://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a\\_062\\_signed.pdf](https://leg.colorado.gov/sites/default/files/documents/2017A/bills/2017a_062_signed.pdf).

<sup>51</sup>Tennessee Senate Bill 723, Campus Free Speech Protection Act, available at <http://www.capitol.tn.gov/Bills/110/Amend/SA0333.pdf>.

<sup>52</sup>The University of South Dakota Non-Commercial Free Speech Policy and Reservation Form, available at <http://www.usd.edu/-/media/files/student-life/muc/freespeechregistrationpolicy.ashx?la=en>.

Of the 461 schools surveyed for this report, 11% have “free speech zone” policies.



# WHAT CAN BE DONE?

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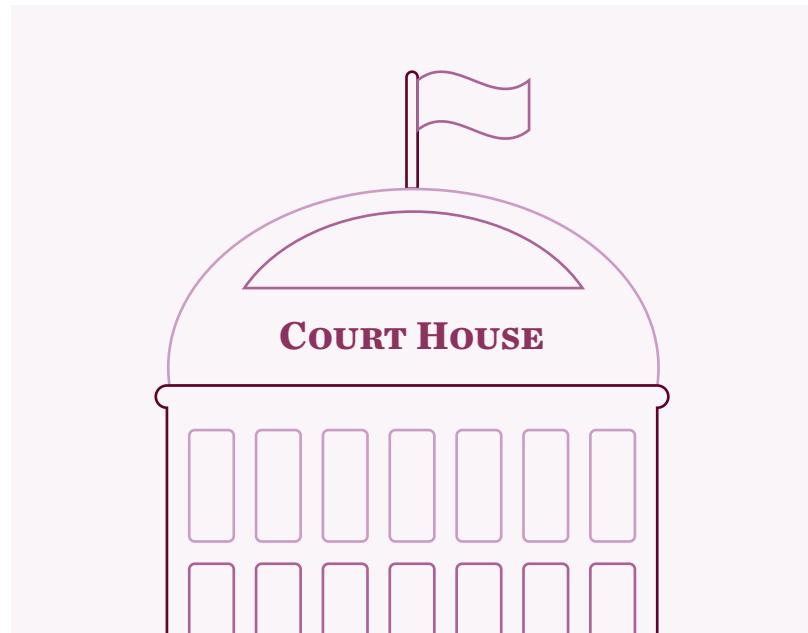
<sup>53</sup>Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDZO PUB. L., POLY & ETHICS J. 3, 515 (2010).

The good news is that the types of restrictions discussed in this report can be defeated. A student can be a tremendously effective advocate for change when he or she is aware of First Amendment rights and is willing to engage administrators in defense of them. Public exposure is also critical to defeating speech codes, since universities are often unwilling to defend their speech codes in the face of public criticism.

Unconstitutional policies also can be defeated in court, especially at public universities, where speech codes have been struck down in federal courts across the country, and yet more speech codes have been revised in favor of free speech as the result of legal settlements.

Any speech code in force at a public university is vulnerable to a constitutional challenge. Moreover, as speech codes are consistently defeated in court, administrators are losing virtually any chance of credibly arguing that they are unaware of the law, which means that they may be held personally liable when they are responsible for their schools' violations of constitutional rights.<sup>53</sup>

The suppression of free speech at American universities is a matter of great national concern. But supporters of liberty should take heart: While many colleges and universities might seem at times to believe that they exist in a vacuum, the truth is that neither our nation's courts nor its citizens look favorably upon speech codes or other restrictions on basic freedoms.



# APPENDIX A:

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## SCHOOLS BY RATING



**RED LIGHT**

American University  
Adams State University  
Alabama A&M University  
Barnard College  
Bates College  
Black Hills State University  
Boise State University  
Boston College  
Boston University  
Bryn Mawr College  
California State University, Channel Islands  
California State University, Dominguez Hills  
California State University, Fresno  
California State University, Long Beach  
California State University, Monterey Bay  
Carleton College  
Case Western Reserve University  
Cheyney University of Pennsylvania  
Chicago State University  
Clark University  
Clemson University  
Coastal Carolina University  
Colby College  
Colgate University  
College of Charleston  
College of the Holy Cross  
Colorado College  
Connecticut College  
Davidson College  
Delaware State University  
Delta State University  
DePauw University  
Dickinson College  
Drexel University  
Eastern Illinois University  
Eastern Michigan University  
Eastern Washington University  
Evergreen State College  
Florida State University  
Fordham University  
Framingham State University  
Franklin & Marshall College  
Furman University  
George Washington University  
Georgetown University



**RED LIGHT**

Georgia Southern University  
Governors State University  
Grambling State University  
Grinnell College  
Harvard University  
Howard University  
Idaho State University  
Jackson State University  
Johns Hopkins University  
Kean University  
Keene State College  
Kenyon College  
Lafayette College  
Lake Superior State University  
Lehigh University  
Lewis-Clark State College  
Lincoln University  
Louisiana State University - Baton Rouge  
Lyndon State College  
Macalester College  
Mansfield University of Pennsylvania  
Marquette University  
McNeese State University  
Middle Georgia State University  
Middle Tennessee State University  
Middlebury College  
Missouri State University  
Morehead State University  
Mount Holyoke College  
Murray State University  
New Jersey Institute of Technology  
New York University  
Northeastern Illinois University  
Northeastern University  
Northern Illinois University  
Northern Kentucky University  
Oklahoma State University - Stillwater  
Pennsylvania State University - University Park  
Princeton University  
Reed College  
Rensselaer Polytechnic Institute  
Rice University  
Sam Houston State University  
Shawnee State University



RED LIGHT

Southeastern Louisiana University  
Southern Illinois University at Carbondale  
Southern Illinois University at Edwardsville  
St. Olaf College  
State University of New York - Albany  
State University of New York - Fredonia  
State University of New York - New Paltz  
Stevens Institute of Technology  
Swarthmore College  
Syracuse University  
Tennessee State University  
The College of New Jersey  
Troy University  
Tufts University  
Tulane University  
Union College  
University of Alabama at Birmingham  
University of Alaska Anchorage  
University of Alaska Fairbanks  
University of California - Riverside  
University of Hawaii at Manoa  
University of Houston  
University of Illinois at Chicago  
University of Kansas  
University of Louisiana at Lafayette  
University of Maine at Presque Isle  
University of Massachusetts at Dartmouth  
University of Massachusetts at Lowell  
University of Miami  
University of Michigan - Ann Arbor  
University of Michigan - Dearborn  
University of Michigan - Flint  
University of Minnesota - Morris  
University of Montana  
University of New Mexico  
University of New Orleans  
University of North Georgia  
University of North Texas  
University of Notre Dame  
University of Rhode Island  
University of Richmond  
University of South Carolina Columbia  
University of South Dakota  
University of Texas at Austin  
University of Texas at Dallas  
University of Tulsa  
University of West Alabama  
University of Wisconsin - Oshkosh



RED LIGHT

University of Wyoming  
Utah State University  
Utah Valley University  
Virginia State University  
Wake Forest University  
Wellesley College  
Wesleyan University  
West Chester University of Pennsylvania  
Western Illinois University  
Whitman College  
William Paterson University  
Williams College



YELLOW  
LIGHT

Amherst College  
Alabama State University  
Alcorn State University  
Angelo State University  
Arkansas State University  
Armstrong State University  
Athens State University  
Auburn University  
Auburn University Montgomery  
Ball State University  
Bard College  
Bemidji State University  
Binghamton University, State University of New York  
Bloomsburg University of Pennsylvania  
Bowdoin College  
Bowling Green State University  
Brandeis University  
Bridgewater State University  
Brooklyn College, City University of New York  
Brown University  
Bucknell University  
California Institute of Technology  
California Maritime Academy  
California Polytechnic State University  
California State Polytechnic University, Pomona  
California State University, Bakersfield  
California State University, Chico  
California State University, East Bay  
California State University, Fullerton  
California State University, Los Angeles  
California State University, Northridge  
California State University, Sacramento  
California State University, San Bernardino  
California State University, San Marcos  
California State University, Stanislaus  
California University of Pennsylvania  
Cameron University  
Central Connecticut State University  
Central Michigan University  
Central Washington University  
Centre College  
Christopher Newport University  
Claremont McKenna College  
Clarion University of Pennsylvania  
Colorado Mesa University  
Colorado School of Mines  
Colorado State University



YELLOW  
LIGHT

Colorado State University - Pueblo  
Columbia University  
Cornell University  
Dakota State University  
Dartmouth College  
East Stroudsburg University of Pennsylvania  
East Tennessee State University  
Eastern New Mexico University  
Elizabeth City State University  
Emory University  
Fayetteville State University  
Ferris State University  
Fitchburg State University  
Florida A&M University  
Florida Atlantic University  
Florida Gulf Coast University  
Florida International University  
Fort Hays State University  
Fort Lewis College  
Frostburg State University  
Georgia Institute of Technology  
Georgia State University  
Gettysburg College  
Grand Valley State University  
Hamilton College  
Harvey Mudd College  
Haverford College  
Henderson State University  
Humboldt State University  
Illinois State University  
Indiana State University  
Indiana University - Bloomington  
Indiana University - Kokomo  
Indiana University - Purdue University Columbus  
Indiana University - Purdue University Indianapolis  
Indiana University of Pennsylvania  
Indiana University South Bend  
Indiana University, East  
Indiana University, Northwest  
Indiana University, Southeast  
Iowa State University  
Jacksonville State University  
James Madison University  
Kennesaw State University  
Kent State University  
Kentucky State University  
Kutztown University of Pennsylvania  
Lock Haven University of Pennsylvania



Longwood University  
Louisiana Tech University  
Marshall University  
Massachusetts College of Liberal Arts  
Massachusetts Institute of Technology  
Metropolitan State University  
Metropolitan State University of Denver  
Miami University of Ohio  
Michigan State University  
Millersville University of Pennsylvania  
Missouri University of Science and Technology  
Montana State University  
Montana Tech of the University of Montana  
Montclair State University  
New College of Florida  
New Mexico State University  
Nicholls State University  
Norfolk State University  
North Carolina A&T State University  
North Carolina State University  
North Dakota State University  
Northern Arizona University  
Northern Michigan University  
Northwestern Oklahoma State University  
Northwestern State University  
Northwestern University  
Oakland University  
Oberlin College  
Occidental College  
Ohio University  
Old Dominion University  
Pittsburg State University  
Pitzer College  
Pomona College  
Radford University  
Rhode Island College  
Richard Stockton College of New Jersey  
Rogers State University  
Rowan University  
Rutgers University - New Brunswick  
Saginaw Valley State University  
Saint Cloud State University  
Salem State University  
San Diego State University  
San Francisco State University  
San Jose State University  
Scripps College  
Sewanee, The University of the South



Skidmore College  
Slippery Rock University of Pennsylvania  
Smith College  
Sonoma State University  
South Dakota State University  
Southeast Missouri State University  
Southern Connecticut State University  
Southern Methodist University  
Southwest Minnesota State University  
Stanford University  
State University of New York - Oswego  
State University Of New York - University at Buffalo  
State University of New York College of Environmental Science and Forestry  
Stony Brook University  
Tarleton State University  
Temple University  
Texas A&M University - College Station  
Texas Southern University  
Texas State University - San Marcos  
Texas Tech University  
Texas Woman's University  
The City College of New York  
The Ohio State University  
The University of Virginia's College at Wise  
Towson University  
Trinity College  
University of Akron  
University of Alabama  
University of Alabama in Huntsville  
University of Alaska Southeast  
University of Arizona  
University of Arkansas  
University of California, Merced  
University of California, Berkeley  
University of California, Davis  
University of California, Irvine  
University of California, Los Angeles  
University of California, San Diego  
University of California, Santa Barbara  
University of California, Santa Cruz  
University of Central Arkansas  
University of Central Florida  
University of Central Missouri  
University of Cincinnati  
University of Colorado at Boulder  
University of Connecticut  
University of Delaware



YELLOW  
LIGHT

University of Denver  
University of Georgia  
University of Hawaii at Hilo  
University of Idaho  
University of Illinois at Springfield  
University of Illinois at Urbana-Champaign  
University of Iowa  
University of Kentucky  
University of Louisville  
University of Maine  
University of Maine at Fort Kent  
University of Mary Washington  
University of Massachusetts Amherst  
University of Massachusetts Boston  
University of Memphis  
University of Minnesota - Twin Cities  
University of Missouri - Columbia  
University of Missouri at Kansas City  
University of Missouri at St. Louis  
University of Montana Western  
University of Montevallo  
University of Nebraska - Lincoln  
University of Nevada, Las Vegas  
University of Nevada, Reno  
University of New Hampshire  
University of North Alabama  
University of North Carolina at Asheville  
University of North Carolina at Pembroke  
University of North Carolina School of the Arts  
University of North Dakota  
University of Northern Colorado  
University of Northern Iowa  
University of Oklahoma  
University of Oregon  
University of Pittsburgh  
University of Rochester  
University of South Alabama  
University of South Florida  
University of South Florida at Saint Petersburg  
University of Southern California  
University of Southern Indiana  
University of Southern Maine  
University of Southern Mississippi  
University of Texas at Arlington  
University of Texas at El Paso  
University of Texas at San Antonio  
University of Texas at Tyler  
University of Toledo



YELLOW  
LIGHT

University of Utah  
University of Vermont  
University of Washington  
University of West Florida  
University of West Georgia  
University of Wisconsin - Eau Claire  
University of Wisconsin - Green Bay  
University of Wisconsin - La Crosse  
University of Wisconsin - Madison  
University of Wisconsin - Stout  
Valdosta State University  
Vanderbilt University  
Virginia Commonwealth University  
Virginia Polytechnic Institute and State University  
Washington & Lee University  
Washington State University  
Washington University in St. Louis  
Wayne State University  
Weber State University  
West Virginia University  
Western Carolina University  
Western Kentucky University  
Western Michigan University  
Western Oregon University  
Westfield State University  
Wichita State University  
Winona State University  
Winston Salem State University  
Worcester State University  
Wright State University  
Yale University  
Youngstown State University



**GREEN  
LIGHT**

Appalachian State University  
Arizona State University  
Carnegie Mellon University  
Cleveland State University  
Duke University  
East Carolina University  
Eastern Kentucky University  
Edinboro University of Pennsylvania  
George Mason University  
Indiana University - Purdue University Fort Wayne  
Kansas State University  
Michigan Technological University  
Mississippi State University  
North Carolina Central University  
Oregon State University  
Plymouth State University  
Purdue University  
Purdue University Northwest  
Shippensburg University of Pennsylvania  
State University of New York - Brockport  
State University of New York - Plattsburgh  
The College of William and Mary  
University of Chicago  
University of Florida  
University of Maryland - College Park  
University of Mississippi  
University of North Carolina at Chapel Hill  
University of North Carolina at Charlotte  
University of North Carolina at Greensboro  
University of North Carolina at Wilmington  
University of North Florida  
University of Pennsylvania  
University of Tennessee  
University of Virginia  
Western State Colorado University



**WARNING  
SCHOOLS**

Baylor University  
Brigham Young University  
Pepperdine University  
Saint Louis University  
Vassar College  
Worcester Polytechnic Institute  
Yeshiva University

# APPENDIX B:

## RATING CHANGES, 2016–2017 ACADEMIC YEAR

| SCHOOL NAME                                     | 2015–2016 RATING | 2016–2017 RATING |
|---|------------------|------------------|
| Appalachian State University                    | Yellow           | Green            |
| Armstrong State University                      | Red              | Yellow           |
| Athens State University                         | Red              | Yellow           |
| Black Hills State University                    | Green            | Red              |
| California State Polytechnic University, Pomona | Red              | Yellow           |
| California State University, Sacramento         | Red              | Yellow           |
| California University of Pennsylvania           | Red              | Yellow           |
| Central Michigan University                     | Red              | Yellow           |
| Columbia University                             | Red              | Yellow           |
| Edinboro University of Pennsylvania             | Yellow           | Green            |
| East Carolina University                        | Yellow           | Green            |
| Emory University                                | Red              | Yellow           |
| Gettysburg College                              | Red              | Yellow           |
| Iowa State University                           | Red              | Yellow           |
| Jacksonville State University                   | Red              | Yellow           |
| Kansas State University                         | Yellow           | Green            |
| Lewis-Clark State College                       | Yellow           | Red              |
| Michigan Technological University               | Yellow           | Green            |
| North Carolina Central University               | Yellow           | Green            |
| Northeastern Illinois University                | Yellow           | Red              |
| Northern Arizona University                     | Red              | Yellow           |
| Northwestern Oklahoma State University          | Red              | Yellow           |
| Salem State University                          | Red              | Yellow           |
| Smith College                                   | Red              | Yellow           |
| SUNY Buffalo                                    | Red              | Yellow           |

| SCHOOL NAME                                     | 2015–2016 RATING | 2016–2017 RATING |
|---|------------------|------------------|
| SUNY Plattsburgh                                | ● Red            | ● Green          |
| Texas Woman's University                        | ● Red            | ● Yellow         |
| University of Alaska Fairbanks                  | ● Yellow         | ● Red            |
| University of California, Merced                | ● Red            | ● Yellow         |
| University of Central Florida                   | ● Red            | ● Yellow         |
| University of Georgia                           | ● Red            | ● Yellow         |
| University of Idaho                             | ● Red            | ● Yellow         |
| University of Missouri St. Louis                | ● Red            | ● Yellow         |
| University of North Carolina at Charlotte       | ● Yellow         | ● Green          |
| University of North Carolina at Greensboro      | ● Red            | ● Green          |
| University of North Carolina at Wilmington      | ● Yellow         | ● Green          |
| University of North Carolina School of the Arts | ● Red            | ● Yellow         |
| University of Oregon                            | ● Red            | ● Yellow         |
| University of Southern Indiana                  | ● Red            | ● Yellow         |
| University of Utah                              | ● Green          | ● Yellow         |
| University of West Florida                      | ● Red            | ● Yellow         |
| Valdosta State University                       | ● Red            | ● Yellow         |
| Virginia State University                       | ● Yellow         | ● Red            |
| Wayne State University                          | ● Red            | ● Yellow         |
| Western Michigan University                     | ● Red            | ● Yellow         |
| Winston Salem State University                  | ● Red            | ● Yellow         |

# APPENDIX C:

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## SCHOOLS AT WHICH A FACULTY OR ADMINISTRATIVE BODY HAS ADOPTED A VERSION OF THE ‘CHICAGO PRINCIPLES’

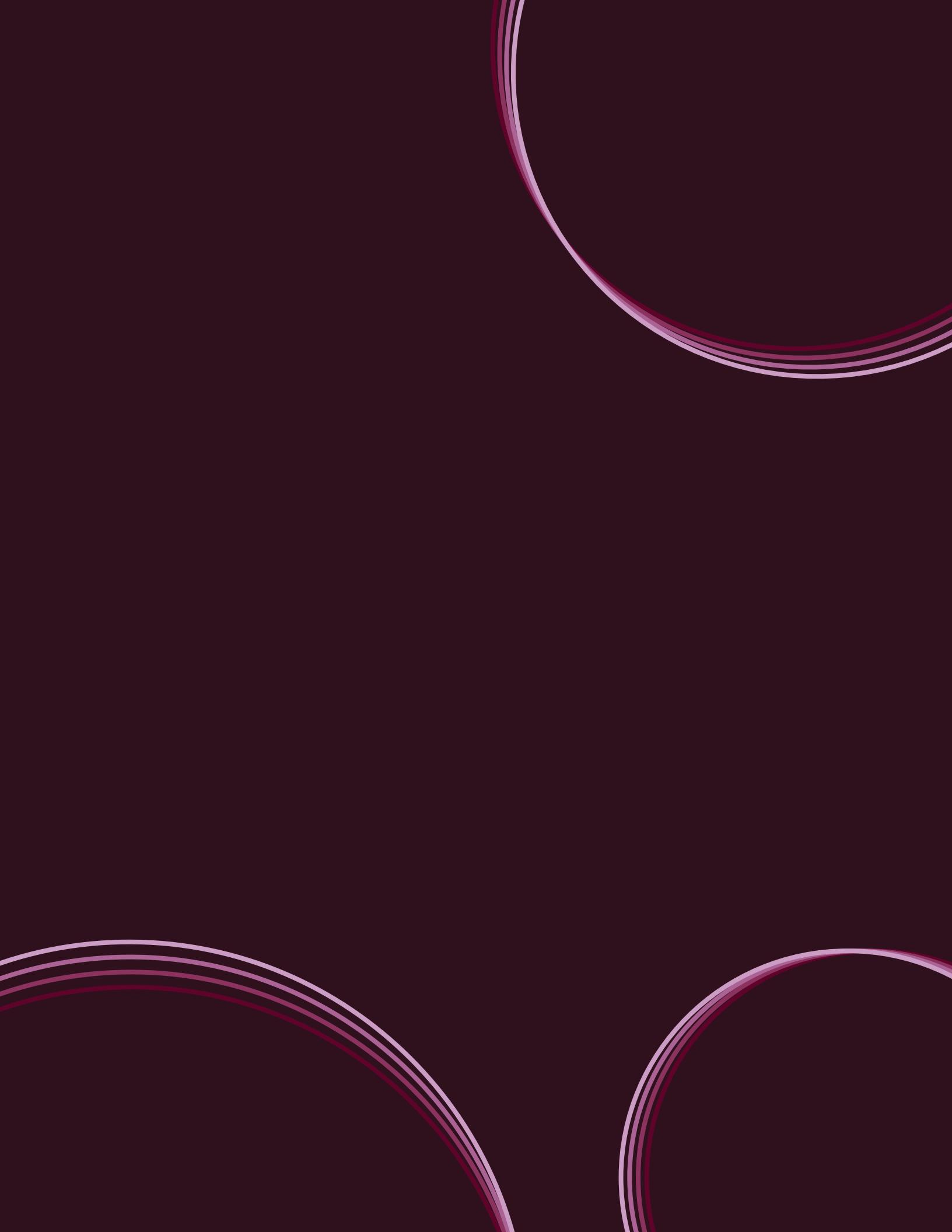
American University  
Amherst College  
Appalachian State University  
City University of New York  
Claremont McKenna College  
Columbia University  
Franklin & Marshall College  
Georgetown University  
Johns Hopkins University  
Kansas State University  
Kenyon College  
Louisiana State University  
Michigan State University  
Northern Illinois University  
Princeton University  
Purdue University  
SUNY Buffalo  
University of Denver  
University of Montana  
University of Minnesota  
University of Missouri System  
University of Southern Indiana  
University of Virginia College at Wise  
University of Wisconsin System  
Vanderbilt University  
Washington University in St. Louis  
Winston-Salem State University

# APPENDIX D:

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## SCHOOLS WITH 'FREE SPEECH ZONES'

American University  
Amherst College  
Appalachian State University  
City University of New York  
Claremont McKenna College  
Columbia University  
Franklin & Marshall College  
Georgetown University  
Johns Hopkins University  
Kansas State University  
Kenyon College  
Louisiana State University  
Michigan State University  
Northern Illinois University  
Princeton University  
Purdue University  
SUNY Buffalo  
University of Denver  
University of Montana  
University of Minnesota  
University of Missouri System  
University of Southern Indiana  
University of Virginia College at Wise  
University of Wisconsin System  
Vanderbilt University  
Washington University in St. Louis  
Winston-Salem State University





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Rights in Education

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