October 2008

FIRE POLICY STATEMENT ON POLITICAL ACTIVITY ON CAMPUS

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INTRODUCTION

As we approach Election Day, the Foundation for Individual Rights in Education (FIRE) is concerned by the growing trend towards preemptive censorship of political expressive activity on our nation's college and university campuses.

At the University of Illinois, for instance, faculty and staff members were recently told that they could not participate in a wide variety of political activity on campus, even including wearing a pin or button in support of a political candidate or placing a partisan bumper sticker on one's car. At the University of Oklahoma, students and faculty were recently notified that they could not use their school e-mail accounts to disseminate any partisan or political speech, including political humor and commentary.

These and similar cases have demonstrated to FIRE the need to reiterate and emphasize the protections that apply to political speech on campus. In determining policy regarding political speech, colleges and universities must heed Internal Revenue Service (IRS) regulations, as well as state and federal law. However, we must remind university administrators that, correctly interpreted, none of these legal guidelines seriously conflict with the equally crucial duty to uphold the First Amendment and basic principles of free expression on campus.

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SUMMARY

Students and student groups at public colleges and universities enjoy the full protection of the First Amendment and must be free to engage in political activity, expression, and association on campus. Students and student groups at private colleges and universities are entitled to that degree of freedom of expression and association promised them in institutional handbooks, policies, and promotional materials. It is important to note that the overwhelming majority of private colleges and universities provide extensive promises of free speech in their materials, and therefore should be held to standards comparable to those required by the First Amendment.

Faculty at public colleges and universities enjoy a broad right to engage in partisan political speech when such expression occurs outside the parameters of their employment-related activities. This right allows for a wide variety of political speech, and the list of activities in which faculty at public universities may not participate is comparatively narrow and easily understood. Faculty may be prevented, for instance, from fundraising in class, making statements in support of candidates or a party on university letterhead, or otherwise offering oral or written public support for a candidate or party in a manner that could be reasonably perceived as attributable to the university.

Faculty at private colleges and universities enjoy the right to free speech as specified in their contracts with their employing institution. If freedom of expression is guaranteed, the faculty members of private institutions may engage in partisan political speech without impacting the 501(c)(3) status of their institution when such speech is not likely to be identified as representative of the views of their employing institution. As a general rule, the presumption should be that faculty are not speaking on behalf of the university. It is, however, possible to overcome this presumption. Faculty who also serve in an administrative capacity are accordingly more likely to run afoul of rules preventing the appearance of official endorsement.

Non-faculty employees of universities do not enjoy the same political speech protections as students and faculty.

Students, student groups, and faculty members do not endanger the 501(c)(3) status of private colleges and universities by engaging in partisan political speech when such speech is clearly separate and distinct from the institution's views or opinions. The presumption is that such speech does not represent the views of the university as an institution. Moreover, this presumption applies with particular vigor when speakers clearly indicate that they are not speaking for the university. The risk of appearance of institutional endorsement may be greater when the speaker is a high-level university administrator, but decreases as one moves down the chain of command to lower-level administrators. Additionally, this risk does not apply to students or student groups, or to faculty who do not hold a position as an administrator or department head.

Partisan student groups may use institutional resources and facilities for partisan political expression and activities when the use of such resources and facilities is obtained in the same way that non-partisan student groups obtain such use.

ANALYSIS

Students

By law, students at public universities enjoy the full protection of the First Amendment on campus. This protection has been affirmed by decades of Supreme Court jurisprudence. The Court has stated, for instance, that "state colleges and universities are not enclaves immune from the sweep of the First Amendment," and that there is no basis in the Court's jurisprudence for the proposition that "First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). The Court has consistently upheld the notion that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Id.*

When it comes to partisan expression, it is important to remember that one of the core motivations of the First Amendment was to protect political speech from official censorship or interference. As the Supreme Court has declared, "Whatever differences

may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Elsewhere, the Court has emphasized that "speech concerning public affairs is more than self-expression; it is the essence of self-government," reflecting "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (internal quotations omitted). Given these holdings, it becomes clear that the right to engage in partisan and political speech is unequivocally enjoyed by students at public universities.

Students at private universities are entitled to receive that degree of freedom of expression promised them in university publications like handbooks, codes of conduct, and promotional materials. Courts have held in several cases that private universities must live up to these types of promises, based on a "contract theory." *See Tedeschi v. Wagner College*, 49 N.Y.2d 652 (Ct. App. 1980); *McConnell v. Le Moyne College*, 2006 N.Y. Slip Op. 256 (Sup. Ct. 2006); *Schaer v. Brandeis*, 432 Mass. 474 (Sup. Ct. 2000). Likewise, the Seventh Circuit has stated that "the basic legal relation between a student and private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract." *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (internal quotations omitted). Therefore, any student at a private college or university which promises speech rights to its students is entitled to engage in a wide variety of partisan and political speech.

Given that it is difficult to attract students to schools that promise them no rights, most colleges promise robust free speech rights in their materials. Indeed, of the 346 colleges and universities rated in FIRE's 2007 report on campus speech codes, only six granted so few rights as to be listed as "not rated": Bard College, Baylor University, Boston College, Brigham Young University, Worcester Polytechnic Institute, and Yeshiva University. It is FIRE's belief that students who attend private colleges that promise free speech rights should enjoy the same level of free speech protections as students at public colleges and universities.

In California, students at private universities enjoy the same First Amendment protection afforded their public university counterparts by virtue of California's "Leonard Law" (California Education Code § 94367). *See Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip opinion). Given that students at public universities enjoy the right to disseminate a broad range of partisan and political messages, private university students in California enjoy the same right by virtue of the Leonard Law.

Student Groups

Generally speaking, the freedoms afforded student groups mirror the freedoms afforded individual students. Student groups at public universities enjoy First Amendment rights

of free expression and association. Student groups at private universities enjoy those freedoms promised them by handbooks, codes of conduct, and promotional materials.

Student Groups at Public Colleges and Universities

At public universities, student groups must be able to freely express the political viewpoint of their choice. Like individual students, the speech of student groups must be limited by the very few exceptions to the First Amendment's protection of free expression (including obscenity, intimidation, true threats, incitement, and harassment—as defined by law, not by university regulation) and by reasonable content-neutral time, place, and manner regulations. This means that student groups must be allowed to publish, sponsor, advocate, denounce, or otherwise engage in political expression as they see fit.

Student groups at public universities must also be free to determine their own qualifications for membership, thus exercising their First Amendment right to freedom of association. Public universities must recognize and allow liberal groups to be liberal, libertarian groups to be libertarian, and conservative groups to be conservative. Denying a political or ideological student organization the right to associate with other students who share the group's beliefs violates the freedom of association to which all public university students are entitled by law. Student organizations at public universities and colleges are entitled to the full protections of the First Amendment, including the right to exclude students who disagree with the purpose and mission of the organization. The Supreme Court unequivocally reaffirmed its commitment to this principle in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Full freedom of association is a basic principle guaranteed by the First Amendment, and public institutions of higher learning have a moral and legal obligation to honor it.

Further, student groups at public universities may not be denied access to funds or university resources available to other groups on account of their partisan commitments. Student activity funds, when comprised of student activity fees, are not institutional resources. Rather, as the Supreme Court held in *Rosenberger v. Rector and Visitors of the University of Virginia,* 515 U.S. 819, 851–52 (1995), they are "a fund that simply belongs to the students." Therefore, activities, events, speaking engagements, and other partisan activities funded by the student activities fund are not institutional activities. When a public university decides to use student fees to fund a multiplicity of independent student groups, each student group retains its status as a private party expressing its personal viewpoint and cannot be censored by the university, nor cautioned against using allocated fees for "partisan purposes" or other political speech. If a public university denies such funding to a student organization because of its partisan message or ideology, it is engaging in unlawful viewpoint discrimination. *Id.* at 834.

Student Groups at Private Colleges and Universities

Student groups at private universities, while not protected by the First Amendment, are entitled to exercise those freedoms promised them in university materials, literature, and

policies. As is the case with individual students, the promises made by a private university regarding student groups' rights are enforceable under a contract theory. Therefore, if a private university states in its materials that student groups on campus are entitled to robust expressive and associational rights, it must live up to its promise.

As discussed below, student groups at private universities do not endanger their university's 501(c)(3) tax-exempt status by engaging in partisan speech, even when using university resources, when (a) those resources are made available to all speakers and student groups, regardless of political viewpoint, and (b) partisan student groups follow the same procedures observed by all other student groups in obtaining use of university resources.

Faculty

Faculty members at public colleges and universities have traditionally been accorded robust speech rights under the rubric of academic freedom. The Supreme Court stated many years ago that "[t]o impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Therefore, the Court has held that academic freedom is a "special concern of the First Amendment" and that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). In recognition of the essentiality of academic freedom, most colleges and universities—both public and private—have adopted the American Association of University Professors' (AAUP's) statements on academic freedom. This is relevant both in terms of the promises made by universities regarding professors' academic freedom and in terms of the expectations that faculty members hold.

Further, individual state constitutions and state caselaw may provide for additional protections or rights beyond those enunciated by the First Amendment or federal caselaw. Faculty members at public universities are encouraged to consult these sources when considering the scope of their speech rights on campus.

At the same time, faculty members at public colleges and universities, much like other public employees, may be restricted in what they say if their employer can demonstrate disruption to the operation of the university. Public-employee speech has traditionally been held to the standard established by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Under the two-part test established in *Pickering* and *Connick*, the first inquiry is whether the public employee was speaking about a matter of public concern, and the second inquiry is whether the employer's interest in regulating the speech in order to prevent disruption to the workplace outweighs the employee's interest in speaking.

Relative to other public employment contexts, the disruption element of *Pickering* and *Connick* should be construed conservatively in the university setting. Given the

fundamental importance of academic freedom on a university campus, the fact that free expression is vital to the unique pedagogical work of professors, and that universities are ideally continuously inundated with new and challenging ideas, an exceptional set of circumstances is required to establish disruption under the *Pickering*-*Connick* analysis in the context of professorial speech. On the other hand, the "matter of public concern" threshold should be construed liberally in the university context to cover a wide variety of subjects, in accordance with professors' academic freedom. Faculty members should be free, for instance, to speak out about issues pertaining to how the university is operated, as such issues often relate to important public policy matters.

The Supreme Court's 2006 decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006) modified the *Pickering*-*Connick* analysis by holding that "when public employees make statements pursuant to their official duties… the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. However, the Court's opinion purposefully left unresolved the specific question of whether the same holds true for the speech of university faculty, noting that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests." *Id.* at 425.

What remains clear, even after *Garcetti*, is that faculty at public colleges and universities enjoy the right to engage in a wide variety of partisan political speech. Even under a broad construction of *Garcetti*'s "pursuant to their official duties" element, faculty members are free to participate in political rallies on campus, express partisan messages outside of the classroom (for instance, by wearing political buttons), disseminate political speech via e-mail, post political humor and commentary on their office doors, and much more. Professors taking part in such activities should be understood to be speaking as citizens on matters of public import, not as faculty members acting pursuant to their job-related duties.

Moreover, the presumption must be that a professor's political speech represents his or her own views, not the views of the university as a whole. This presumption is overcome only in exceptional situations, such as when a professor implies that he or she actually is speaking on behalf of the university. Otherwise, it makes little sense to attribute every faculty member's expression to the institution, as such a diverse cacophony of voices rarely, if ever, produces a singular, coherent message. Therefore, unless a university can demonstrate that a professor's political expression threatens the proper functioning of the university and that its interest in preventing such disruption outweighs the professor's interest in speaking, he or she enjoys the right to speak, even post-*Garcetti*.

While working, faculty at private universities and colleges enjoy the right to free expression promised them in their contractual agreements with their employing institution. The extent of this right and its potential impact on the private college or university's status as a 501(c)(3) tax-exempt non-profit organization is discussed below. Of course, when not working, private university faculty members enjoy the fullest protection of the First Amendment as private citizens.

Staff

Non-faculty employees of universities do not enjoy the same political speech protections as students and faculty. Under *Garcetti*, staff at public universities making political statements pursuant to their official duties can presumptively be disciplined for engaging in political speech. Again, individual state constitutions and state caselaw may provide for additional protections or rights beyond those enunciated by the First Amendment or federal caselaw. Staff members at public universities are encouraged to consult these sources when considering the scope of their speech rights on campus.

Staff at private universities must follow their employer's regulations.

It is important to note that student-employees at both public and private schools should be accorded the same speech rights in their capacities as students as their peers. Too often, colleges forget the "student" part of the student-employee equation. Students should not have to give up their rights to freedom of expression or association by working for their college.

Private Colleges and Universities as 501(c)(3) Organizations: Political Activity

In FIRE's experience, private colleges and universities often cite their tax-exempt status as justification for banning political activity. Accordingly, it is important to clarify exactly what political activity is and is not prohibited by the Internal Revenue Code, and how to know the difference.

Background

Private colleges and universities usually operate as 501(c)(3) non-profit organizations. This means that, as non-profit institutions incorporated exclusively for educational purposes, they are exempt from paying federal income tax under United States Internal Revenue Code 26 U.S.C. § 501(c)(3). (As government instrumentalities, public colleges and universities are also exempt from federal income tax, but are granted that status under section 115 of the Internal Revenue Code.)

Section 501(c)(3) also restricts qualifying non-profit organizations from engaging in certain political activity. Specifically, 501(c)(3) organizations cannot "participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of (or in opposition to) any candidate for public office." In a 2006 statement, the IRS defined prohibited political intervention as "any and all activities that favor or oppose one or more candidates for public office," including but not limited to "[d]istributing statements prepared by others that favor or oppose any candidate," "[a]llowing a candidate to use an organization's assets or facilities…if other candidates are not given an equivalent opportunity," "[c]oordinating institutional fund-raising with fund-raising of a candidate for public office," and "[s]ponsoring events to advance the candidacy of particular candidates."

Whether or not a 501(c)(3) organization has engaged in prohibited political activity is an *ad hoc* determination contingent upon examination of "all of the facts and circumstances of each case." However, in the campus context, the IRS has interpreted the restriction on political activity differently in light of the educational mission of colleges and universities, allowing certain activities (such as a political science class that requires students to work on a campaign, as long as the student, not the instructor, is allowed to choose the campaign, or political editorials in favor of candidates in a student newspaper) that would otherwise likely constitute prohibited activity.

Application

Despite the seeming severity of the restrictions on political activity at private colleges and universities imposed by the requirements of section 501(c)(3), however, it is extremely important to note that these prohibitions apply to the institution itself and those reasonably perceived to be speaking on its behalf, not to individual students, faculty, or staff engaged in clearly individual, unaffiliated activity. In a 1994 statement, the IRS made clear that "[i]n order to constitute participation or intervention in a political campaign…the political activity must be that of the college or university and not the individual activity of its faculty, staff or students."

There is a greater risk that an individual's political activity may be attributed to the university as a whole when that individual is a high-level administrator, but this risk diminishes greatly when one moves down the chain of command to lower-level administrators, and almost disappears completely when one reaches the political activity of students and faculty members who do not also serve as administrators or department heads. As such, many of the fears expressed by administrators at private colleges and universities about partisan student and faculty political activity impacting the university's tax-exempt status are unfounded.

In determining the potential impact of student and faculty political activity on a private university's tax-exempt status, some important guidelines should be remembered. First, the political activity of students and faculty, unless reasonably perceived as communicating an official institutional position, generally does not impact tax-exempt status. Second, the use of institutional resources and facilities by established student groups for partisan purposes is allowable as long as the groups pay the normal fee (if any) and obtain the use of the resources and facilities through the same process used by all student groups.

To be clear: As long as partisan political activity on campus by students and student groups is neither privileged nor hindered by the institution, and as long as partisan political speech by students and faculty does not overcome the strong presumption that they do not speak for the institution, then the tax-exempt status of universities and colleges should not be affected.

CONCLUSION

Students, student groups, and faculty at public and private universities should enjoy a robust right to engage in political expression on campus—and they generally do, as we have documented here. This is as it should be; political speech is a unique and vital component of democratic participation in the United States. Accordingly, the abilities to create, engage, support, critique, refute, and verify the content of speech are necessary civic skills crucial to the health of our democracy. As the Supreme Court has observed: "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." *Sweezy*, 354 U.S. at 250.

But too often—and particularly in election years—FIRE confronts censorship of political expression on campus. The proffered administrative rationales vary from case to case but usually revolve around profoundly mistaken ideas about the university's legal obligations. As we have described in this statement, the law tends to encourage more speech on campus, and interpretations that circumvent the function of a university as a "marketplace of ideas" are usually wrong.

Whenever students, student groups, and faculty members are prohibited from engaging in the political issues of the day, our democracy suffers. FIRE urges universities and colleges to carefully consider the unique function our institutions of higher education play in fostering debate and discussion on the most important issues of our time, and to greet with suspicion any legal interpretation or contrivance that would undermine this crucial role.