

# Restrictive Free Speech Zones and Student Speech Codes at Public Universities

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The University of North Carolina at Chapel Hill opened in 1795 as the first public college in the United States. Since then, free speech and the formation of independent ideas and opinions have been seen as integral parts of a student's educational experience. Unfortunately, through the categorization of public college campuses as "designated public forums" and the implementation of restrictive student conduct codes and misleadingly named free speech zones, universities are denying students the expression they deserve. While these policies were originally created to protect students, they are now leading to a rising number of student tensions, lawsuits, and constitutional arguments. Every university is unique in its ability to define campus structures and student rules, but many of these zones and codes have become overly oppressive, to the extent that their legality is being questioned. Public universities should not limit the rights of students to speak freely and openly by imposing small and unreasonable free speech zones and restrictive student conduct codes within their campus boundaries.<sup>1</sup>

Free speech itself is a confusing topic affecting all United States citizens, not just college students. As established by the Bill of Rights in the Constitution of the United States, free speech is a protected American liberty and ideal. The Founding Fathers were clear about their intention to protect every citizen's right to speak freely and openly without fear of the government. Included within the Bill of Rights is the First Amendment, which explicitly states that "Congress shall make no law...abridging the freedom of speech" (U.S. Const., Amend. I, §5). The Fourteenth Amendment extended this citizen protection to state law by affirming that "no state shall...abridge the privileges or immunities of citizens of the United States" (U.S. Const., Amend. XIV, §1). While the Fourteenth Amendment's extension to state law of its protection of the right to free speech is seemingly straightforward, it has proven difficult for courts of law to manage. Free speech has not been given a true legal definition and, as will be

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<sup>1</sup> The free speech protection of the Constitution restrains the actions of government, not the actions of private individuals and institutions. While state-supported colleges must follow the First Amendment, private institutions, including private universities, are not legally bound to do so.

discussed in the following paragraph, is more accurately defined by its boundaries and limitations.

Courts have struggled for the past century to determine what speech is protected under the First Amendment. Rather than identifying every dimension of those rights, the Supreme Court has been inclined to define the types of speech that are considered unlawful. In a list provided by legal scholar Derek Langhauser (2005), unlawful speech includes fighting words (those provoking violence) and any speech that shows a clear and present danger to the government (such as terrorist threats) (p. 493). In contrast, the First Amendment protects hate speech, which legal scholar William Kaplin (1992) describes as a statement “convey[ing] a grossly negative assessment of particular persons or groups based on their race, gender, ethnicity, religion, sexual orientation or disability” (p. 518). Hate speech is permitted in a public forum unless it leads to a “...fear of bodily harm” (*Virginia v. Black*, 538 U.S. 343 (2003) at 344). Free speech can be further classified by the distinction between “pure” speech and “symbolic” speech. Pure speech is the “direct expression of an idea,” such as shouting or verbalizing, while symbolic speech involves “non-verbal conduct or displays,” such as signs (Langhauser, 2005, p. 487). Not only can the type of speech be a determinant, but also the nature of the forum in which the speech takes place.

While the defining of free speech is a confusing topic, a singularly controversial issue surrounding free speech in both the United States as a whole and the public university setting in particular involves the Public Forum Doctrine. The Public Forum Doctrine requires “forum analysis,” categorizing government property into four different forums: a traditional public forum, a designated public forum, a limited public forum, and a non-public forum (*University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio, 2012)). The limitations on a citizen’s free speech in a public area depend on the forum categorization. This doctrine opens up the creation of free speech zones, which in particular have caused the most Supreme Court dissension and the greatest rifts in the college system.

A traditional public forum, also known as an open forum, is characterized by legal scholar Thomas Davis (2004) as any place “...traditionally used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,” such as a public street or park (p. 270). Citizens have the most First Amendment protections in these areas. In public forums, the government can regulate the time, place, and manner of the speech, but not the content (National Coalition Against Censorship). These restrictions must also stand up to the “strict scrutiny” of courts that require such laws and policies to be “content neutral, [be] narrowly tailored to serve a government interest, and leave open ample alternative channels of communication” (*Perry Education Association v. Perry Local Educators Association*, 460 U.S. 37 (1983) at 45). On the opposite end, the non-public forum is defined by Jeffery Sklar (2007), contributor to the *California Law Review*, as any government property where the state does not have to follow the content neutrality principle when ensuring that the area is “used for [its] intended purposes” (p. 646). These non-public forums, including prisons and military bases, do not fall within any of the other three categories, as people here do not have the ability to enjoy many free speech rights. However, the speech regulations in place still need to be somewhat reasonable (Davis, 2004, p. 270).

Designated public forums and limited public forums are sometimes considered the same. However, the legal connotations of each are slightly different. This distinction

between the final two forums has led to the most controversy within the university system. Designated public forums are public properties treated like traditional public forums even though they do not “fall into the precise parameters of tradition,” i.e., are not parks or streets (*University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969). As with open forums, restrictions here on free speech are subject to time, place, and manner regulations but must be neutral as to both content and viewpoint (Davis, 2004, p. 270). It is important to note that the government is by no means required to keep a designated forum open, but until it is closed, individuals “receive the same First Amendment protections as speech in traditional public forums” (Legal Information Institute, n.d.). Such forums include “municipal theatres and meeting rooms at state universities” (Legal Information Institute, n.d.).

Limited public forums involve more speech regulations. Law professor Norman Deutsch (2012) refers to these areas as “subcategories” of designated public forums that are “restricted to certain speakers and subjects” (p. 122). In the limited public forum, government officials can “restrict speech so long as the regulations are viewpoint neutral and merely reasonable in the light of the purpose served by the forum” (*University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio, 2012)). Essentially, content can be regulated, but viewpoints cannot. Limited forums involve officials deciding what speech fits the purpose of their property and, as can be inferred, this categorization can become debilitating for citizens’, and particularly students’, free speech rights. An example of a limited public forum includes a public school meeting room in which speakers can only conduct “school related activities” (Legal Information Institute, n.d.).

Public universities are usually considered limited public forums and, on occasion, designated forums. However, public universities have historically shared similar traits with the traditional public forum. Thomas Davis (2004) describes public universities as “places of higher learning and intellectual pursuit” (p. 275); as early as 1972, the United States Supreme Court characterized public universities as “market place[s] of ideas” (*Healy v. James*, 408 U.S. 169 (1972) at 180). In accordance with these descriptions, the Supreme Court later noted that “...the campus of a public university, at least for its students, possesses many of the characteristics of a public forum” (*Widmar v. Vincent*, 454 U.S. 263 (1981) at 267, fn.5). The *Widmar v. Vincent* issue, decided in 1981, revolved around the University of Missouri-Kansas City banning Cornerstone, a Christian student group, from using its facilities. In 1972 the University’s board of curators prohibited the usage of “any University buildings or grounds ‘for purposes of religious worship or religious teaching’” (454 U.S. 263 at 263). The Federal District Court for the Western District of Missouri sided with the university, but the Court of Appeals for the Eighth Circuit reversed the decision with the Supreme Court affirming. By allowing most other student groups to use the facilities, the university had indirectly created a designated forum. The university’s policy of not allowing Cornerstone to use its facilities was not content neutral, and was therefore unconstitutional. However, while the Supreme Court did decide with the students, and an earlier case footnote did state the similarities between public colleges and traditional public forums, the court did not legally label public universities as traditional public forums. The court also said that a public university does not have to “grant free access to all of its grounds or buildings” (454 U.S. 263 at 267, fn.5). This single line opened up the floodgates for recognizing public institutions as limited public forums.

Under this presumption of public universities being limited forums, any free speech regulations and/or zones “represent an attempt to structure the ‘marketplace of ideas’ so that [the university] functions most effectively” (Davis, 2004, p.276). The university can reasonably regulate speech if it is believed to serve the overall educational purpose. Even though it can be frustrating as applied to the university setting, the Supreme Court also declared that “the First Amendment does not guarantee access to property simply because it is owned or operated by the government” (*Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37 (1983) at 46). If an area is considered a limited forum, such as many universities, officials are allowed to regulate speech based on content. However, universities still must prove the speech regulation is necessary to further their educational purpose. Using these principles, many public universities have deemed their free speech zones to be limited forums and established very restrictive speech codes. These policies appear to honor the limitations on government without actually allowing students to openly express their ideas. The free speech zones and stringent codes are all too often not protectors of student freedom, but rather are censorship (Davis, 2004).

While some legally established and approved limitations to student speech are necessary, labeling unreasonably small and strictly regulated demonstration zones as limited public forums is unconstitutional. As mentioned earlier, the Public Forum Doctrine led to the creation of free speech zones on college campuses. These free speech zones, also known as demonstration zones, are usually “small and isolated” campus areas where students are allowed “expressive activities” (Foundation for Individual Rights in Education, 2013). In theory, universities create these zones to allow students a place to speak freely and openly. However, according to the nonprofit Foundation for Individual Rights in Education (FIRE),<sup>2</sup> the zones do not always serve this purpose. FIRE characterizes 59% of United States colleges as “red light institutions.” A “red light institution” is one having “at least one policy both clearly and substantially restricting freedom of speech,” as well as speech policies hidden from the public (FIRE). Many of these institutions' officials have created zones taking up less than one percent of the campus, with limited availability during the week and required pre-registration (FIRE). Outside of these zones, campus areas do not allow many free speech rights. In the past two decades, a number of federal court cases have addressed questionable free speech zones in both universities and cities. Many of the decisions have shown that both content regulations within the zones and overly small free speech zones are unconstitutional. These issues and legal decisions are seen in the cases of *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) and *The University of Cincinnati Chapter of Young Americans for Liberty v. Williams*, 2012 WL 2160969 (S.D. Ohio, 2012, unpublished).

In 1992, the white supremacist Nationalist Movement attempted to hold a demonstration opposing Martin Luther King, Jr., Day on the steps of the Forsyth County, Georgia, courthouse. Forsyth County, with its history of racial issues and expensive civil rights demonstrations, had enacted Ordinance 34 in 1987. While anyone using the designated speech zone was already required to purchase a permit, this

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<sup>2</sup> FIRE is a non-profit with a libertarian bent. Greg Lukianoff, the president and CEO of FIRE, is the recipient of Ford Hall Forum’s First Amendment Award. The foundation’s co-founder and chairman Harvey Silverglate has served for thirty years on the Board of ACLU of Massachusetts.

ordinance allowed the county “to adjust the amount to be paid...for the maintenance of public order” (*Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) at 131, fn.9). The ordinance therefore authorized county officials to make judgments based on how expensive the demonstrations might be. While the Nationalist Movement was assigned extra fees, the fees were based on the amount of time it took to obtain the permit. Nonetheless, the group refused to pay the extra fee and sued Forsyth County for violating their First Amendment rights. The Eleventh Circuit of Appeals had ruled in favor of the Nationalist Movement, holding that “[any] ordinance which charges more than a nominal fee for using public forums for public issue speech is facially unconstitutional” (505 U.S. 123 at 123). The court suspected that Forsyth County had a motivation of maintaining order, and since the ordinance on its face would have authorized a higher fee out of security concerns, the court went on to say that “listener’s reaction to speech is not a content-neutral basis for regulation” and that “speech cannot be...punished or banned, simply because it might offend a hostile mob” (505 U.S. 123 at 123, 135). The decision of this case indirectly revealed that very rarely should free speech zones actually fall within the limited forum category, and any speech regulations should remain content neutral. Although this particular case involved a county, universities are also notorious for regulating speech based on content and being opinionated over which groups are allowed to utilize free speech zones. Moreover, universities frequently make the free speech zones entirely too small and difficult to access.

In 2012 the University of Cincinnati’s Chapter of Young Americans for Liberty (YAL) filed suit against the university, in particular President Gregory Williams, over its restrictive demonstration zones. The YAL representatives asserted that the University had “denied [their] right to circulate freely across the college campus” gathering signatures “...on petitions to place the Ohio Workplace Freedom Amendment on the November 2012 ballot” (*University of Cincinnati YAL* at page 1 of decision). The students were only allowed to gather signatures within the designated free speech zone, the McMiken Commons Northwest Center, which constituted less than 0.1% of the campus. If the students attempted to get signatures outside of that area, they were threatened with arrest. The university’s speech policy also included a “five to fifteen day notification requirement and prior permission” (*University of Cincinnati YAL* at 2). After only being able to interact with six students and obtain one signature, the students took this issue to court. The students claimed that the current regulations were “overly broad and facially unconstitutional,” and that the University’s burdening of “all student speech, rather than disruptive or crowd-gathering speech... is not narrowly tailored to achieve the regulatory interests that the University asserts” (2012 WL at 2). While the university attempted to characterize its free speech zone as a limited public forum, Judge Timothy S. Black ruled in favor of the plaintiffs by issuing an injunction prohibiting the university from enforcing its regulations and deeming that its policies were in fact unconstitutional. As a legal precedent, Black mentioned the decision in *Timker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which states that “undifferentiated fear or apprehension of a disturbance is not enough to overcome the right to freedom of expression on a college campus” (*Timker*, 393 U.S. at 191). Unfortunately, many schools still use such restrictive policies.

By categorizing public universities as limited public forums, university officials have established not only these small demonstration zones, but also stringent speech

codes. Overly broad and restrictive speech codes are common among public college campuses. Many believe that these stringent codes are necessary to protect students from disagreeable material, giving them a better educational experience. But colleges are meant to be diverse environments, filled with many cultures, differing ideas, and conflicting opinions. Students are meant to communicate with one another, and prohibiting certain students from sharing their viewpoints, even if distasteful, can become unconstitutional. Many colleges create speech and conduct codes that blur the line between oppression and protection, but some students have successfully fought against unreasonable speech policies.

In the case of *Doe v. University of Michigan*, 721 F. Supp. 852 (1989), the Eastern Michigan District Court deemed that an overly broad hate speech code was unconstitutional. In 1988, following years of racial tensions, a policy restricting hate speech was implemented at the University of Michigan. The policy was designed to protect students from discrimination and harassment, and to punish students who victimized others. Unallowable conduct included making jokes about gays and lesbians, racist threats/graffiti, and sexist statements, to name just a few. A psychology graduate student brought the code to court, questioning its constitutionality. He had created a presentation for his class involving “certain controversial theories” discussing the biological differences between sexes and races, and he feared it would be viewed as sexist (*Doe v. Michigan*, 721 F.Supp. at 858). The United States District Court for the Eastern District of Michigan found that the university’s speech policy was subject to opinions and overly vague. The court mandated that the university could not regulate student speech “because it disagreed with the ideas or messages sought to be conveyed” (721 F.Supp. at 863) or because the speech offended “large numbers of people” (721 F.Supp. at 863). Although this decision only applied to Michigan, it was considered a step towards better free speech policies and a win for students. The court also stated that the “the free and unfettered interplay of competing views is essential to the institution’s educational mission” (721 F.Supp. at 863). By expanding speech codes as well as free speech zones, public universities would better serve their students with a broader education.

Universities could offer better educational opportunities by implementing larger free speech zones categorized as designated forums and by loosening speech codes. Student expression is valuable and should be a focal point in higher education. Recently, a student movement has fought back against restrictive speech policies. In response, many public institutions of higher education have used settlements as a way to avoid court while still improving free speech experiences for students. Such institutions include Citrus College and Modesto Junior College, both of which have addressed such issues in the past two years; the settlements offered huge improvements for students, including revisions to codes, larger free speech zones, and monetary awards to cover students’ legal fees (New, 2015). This is evidence that free speech is becoming a higher focus for both students and universities, and that policies unfairly restricting freedom of speech may well be considered unlawful by the legal system.

Free speech in the public universities can be both confusing and complicated. Although some colleges have already addressed and attempted to resolve the issues, restrictive free speech zones and conduct codes still exist and will continue to be challenged by students. The lines between protection and oppression have become blurred, and students will continue to push for fairer limitations. While every citizen’s

and student's right to expression should have its limitations, the limitations should be fair and legally justified. In order to avoid turning into a dystopian society, the United States must continue to value free speech on public college campuses.

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