

As we approach another election season, the Foundation for Individual Rights in Education (FIRE; thefire.org) remains concerned by the continuing trend towards preemptive censorship of political expressive activity on our nation's college and university campuses.

The 2008 election cycle presented several abuses of student and faculty rights with regard to political activity and expression on campus. At the University of Illinois, for instance, faculty and staff members were told that they could not participate in a wide variety of political activity on campus, including wearing a pin or button in support of a political candidate or placing a partisan bumper sticker on their cars. At the University of Oklahoma, students and faculty were notified that they could not use their school email accounts to disseminate any partisan or political speech, including political humor and commentary.

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 officially representing 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.

At public universities, 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. Similarly, students and student organizations at private institutions promising freedom of speech are not prohibited by IRS regulations from using student activity fees to engage in political speech and activity. They may also use institutional resources and facilities for such speech, again provided that (a) the resources are made available to all speakers and student groups, and (b) they follow the same procedures observed by all other student groups seeking to obtain

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 few or no rights, most colleges promise robust free speech rights in their materials. Indeed, of the 392 colleges and universities rated in FIRE’s 2012 report on campus speech codes, only seven private institutions granted so few rights as to be listed as “not rated”: Baylor University, Brigham Young University, Pepperdine University, Saint Louis University, Vassar College, 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 non-sectarian 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.

in political rallies on campus, express partisan messages outside of the classroom (for instance, by wearing political buttons), disseminate political speech via email, post political humor and comment

forget the “student” part of the student-employee equation. Students should not give up their rights to freedom of expression or association as a function of working for their college.

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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

participation or intervention in a political campaign ...

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.