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The Importance of Free Speech on College Campuses

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[AUTHENTICITY CERTIFIED: Text version below transcribed directly from audio]

Thank you very much Professor Barnett. And it is a great honor to be at Georgetown Law and the Georgetown Center for the Constitution where the exchange of ideas is indeed welcome and encouraged. And thank you for hosting me with these students today. And I thank you students for allowing me to be a part of a national conversation with you.

As you embark on another school year, you and hundreds of your peers across the campus, we hope, will continue the intellectual journey that is higher education. I love my education experience so much and I suspect you do too.

You will discover new areas of knowledge; you will engage in debates great and small; and many of the views you have will be challenged, and some of your views may even change. You will -- if your institutions follow our nation's historic and cultural, education traditions -- pursue truth while growing in mind and spirit. In short, we hope that you will take part in the -- in the right of every American: free, robust, sometimes contentious exchanges of ideas.



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As you exercise these rights, realize how precious, how rare, and how fragile they are. In most societies throughout history, and in so many that I have had an opportunity to visit -- as a member of the Armed Services Committee to the some of the most difficult on the globe -- such rights do not exist. In these places, openly criticizing the government or expressing unorthodox opinions could land you in jail or worse.

So let me tell you about one example that occurred one autumn when a few idealistic university students came together as a group to advocate for a felt political need. Wanting to recruit others to their cause, they staked out some ground on a campus walkway popular with students and approached them as they passed.

They said things like: "Do you like freedom?" Do you like "liberty?"¹ And then they offered these passersbys a document that they revered and believed represented these ideals: the United States Constitution. These young proselytizers for liberty did not block the walkway, did not disrupt surrounding activities, did not use intimidation or violence to further their cause.

Nevertheless, a govern[ment] official labeled this behavior as "provocative" and in violation of government policy. And when the young people bravely refused to stop, citing their right to free speech, the local official had them arrested, handcuffed, and jailed.

This troubling incident could have occurred under any number of tyrannies where the bedrock American ideals of freedom [of] thought and speech have no foothold whatsoever. But this incident happened right here in the United States, just last year, at a public college [Kellogg Community College] in Battle Creek, Michigan. A state official actually had students jailed for handing out copies of the United States Constitution.

Freedom of thought and speech on [the] American campus are under attack. The American university was once the center of academic freedom -- a place of robust debate, a forum for the competition of ideas. But it is transforming into an echo chamber of political correctness and homogeneous thought, a shelter for fragile egos.



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In 2017, the Foundation for Individual Rights in Education surveyed 4[49] colleges and universities across the country and found that [39.6] percent maintain speech codes that substantially infringe on constitutionally protected speech. Of the public colleges surveyed, which are bound by the First Amendment, fully one-third had written policies banning disfavored speech.

For example, at Boise State University in Idaho, the Student Code of Conduct prohibits (quote) "Conduct that a reasonable person would find offensive" (close quote).² At Clemson University, the Student Code of Conduct bans any verbal or physical act that creates (quote) "an offensive educational, work or living environment" (close quote).³

But who decides what is offensive and what is acceptable? The university is about the *search* for truth, not the *imposition* of truth by a government censor.

Speech and civility codes often violate what the late Justice Antonin Scalia rightly called (quote) "the first axiom of the First Amendment," which is that (quote), "As a general rule, the state has no power to ban speech on the basis of [its] content."⁴ In this great land, the government does not to tell you what to think or what to say.

In addition to written speech codes, many colleges now deign to "tolerate" free speech only in certain, geographically limited, "free speech zones." For example, a student recently filed suit against Pierce College in California -- public school -- alleging that it prohibited him from distributing Spanish-language copies of the United States Constitution outside the school's free speech zone.

The size of the free speech zone? Six hundred and sixteen square feet -- barely the size of two dorm rooms. These cramped zones are eerily familiar to what the Supreme Court warned against in the seminal 1969 case of *Tinker versus Des Moines*, a case about student speech. It said (quote), "Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven" (close quote).⁵

College administrations -- administrators have also silenced speech by permitting "the heckler's veto" to control who gets to speak and what messages are conveyed. In these -- In these instances, administrators discourage or prohibit speech if there is even a threat that it will be met by protest.



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In other words, ***the school favors the heckler's disruptive tactics over the speaker's First Amendment rights***. These administrators have -- seem to forget that, as the Supreme Court put it in *Watson versus City of Memphis* more than 50 years ago (quote), "constitutional rights may not be denied simply because of hostility to [their] assertion [or] exercise."⁶

This permissible [sic] attitude toward the heckler's veto has spawned a cottage industry of protestors who've learned that school administrators often will capitulate to their demands. Protestors are now routinely shutting down speeches and debates across the country in an effort to silence voices that insufficiently conform to their views.

A frightening example occurred at Middlebury College. Student protestors violently shut down a debate between an invited speaker and one of the school's own professors. As soon as the event began, the protestors shouted for 20 minutes, preventing the debate from occurring.

When the debaters then attempted to move to a private broadcasting location, the protestors -- many wearing masks, a common tactic used by the detestable Ku Klux Klan -- pulled fire alarms, surrounded the speakers, and began physically assaulting them. In short, Middlebury students engaged in a violent riot to ensure that neither they nor their fellow students would hear speech that they may have disagreed with.

Indeed, the crackdown on speech crosses creeds, races, issues, and religions. At Brown University, a speech to promote transgender rights was cancelled after students protested because a Jewish group cosponsored the lecture. Virginia Tech disinvited an African American speaker because he had written on race issues and they worried about protests disrupting the event.

So this is not right. This is not the great tradition of America. And, yet, school administrators have bent to this behavior. The effect is to coddle and encourage it.

Just over a week ago, after the Orwellian-named ["Antifa"] anti-fasc[ist] protestors had successfully shut down numerous campus speaker events in recent months with violent riots, Berkeley was reportedly forced to spend 600,000 dollars and have an overwhelming police presence to simply prove that the mob was not in control of their campus (the home of free speech).



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In advance, the school offered "counseling" -- in advance of the speech, they offered counseling to any students or faculty whose "sense of safety or belonging"⁷ was threatened by a speech from Ben Shapiro -- a 33-year-old Harvard-trained lawyer who has frequently been targeted by anti-Semites for his Jewish faith and who vigorously condemns hate speech from the left or the right.

Well in the end, Mr. Shapiro spoke to a packed house. And to my knowledge, no one fainted; no one was unsafe; no one needed counseling, I hope. Yet, after this small victory for free speech, a student speaking to a reporter said in reaction, "I don't think Berkley should host any controversial speakers, on either side."⁸ That, perhaps, would be the worst lesson to draw from that episode, I firmly believe.

I know that the vast majority of students like you at the Constitution Center need no lecture on the dangers of government-imposed group think. But we have seen a rash of incidents often perpetrated by small groups of those students and professors unable or unwilling to defend their own beliefs in the public forum. Unfortunately, their acts, these trends, have been tolerated by administrators and shrugged off by other students.

So, let us directly address the question: Why should we worry about free speech that may be in retreat on our universities? Of course, for publicly run institutions, the easy answer is that upholding free speech rights is not an option, but an unshakable requirement of the First Amendment. As Justice Robert Jackson once explained (quote):

If there is a[ny] fixed star in our...constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion....⁹

But even setting aside the law, the more fundamental issue is that the university is supposed to be a place where we train virtuous citizens. It's where the next generation of Americans are equipped to contribute to and live in a diverse and free society filled with many, often contrary, voices.

Our legal heritage, upon which the Founders crafted the Bill of Rights, taught that reason and knowledge produced the closest approximation of truth. And from truth -- may, hopefully often -- arises justice. But reason requires discourse and, frequently, argument.



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And that is why the free speech guarantee is found not just in the First Amendment, but it permeates our institutions, our traditions, and our Constitution in this free, unique, exceptional land.

The jury trial, the right to cross-examine witnesses, the Speech & Debate Clause, the very art and practice of lawyering -- all of these are rooted in the idea that speech, reason, and confrontation are the very bedrock of a good society. In fact, these practices are designed to ascertain what is the truth. And from that truth, good policies and actions can be founded: Federalists against the Anti-federalists; Abraham Lincoln against Stephen Douglas; Dr. Martin Luther King against George Wallace. Indeed, it was the power of Dr. King's words, his speech, that crushed segregation and overcame the violence of the segregationists. He was unrelenting in making a clear, moral argument that in the end could not be denied.

Words over violence.

At so many times in our history as a people, it was indeed speech -- and still more speech -- that led Americans to a more just and perfect union. The right to freely examine the moral and the immoral, the prudent and the foolish, the practical and the inefficient, and the right to argue for their merits or demerits remain indispensable for a healthy republic.

It has been known since the beginning of our nation.

James Madison knew this when, as part of his protest against the Alien and Sedition Acts -- the speech codes of his day -- he said that the freedom of speech is (quote) "the only effectual guardian of every other right."¹⁰

And, in a quote that I'm reminded of daily in this job, Thomas Jefferson knew this when he said in words now chiseled in his monument (quote), "I swear upon the altar of God eternal hostility against [every] form of tyranny over the mind of man."

No little matter, there.

So, soon you will be, perhaps, a professor, university president, the Attorney General of the United States, maybe President of the United States. And you will have your own pressing issues to grapple with. But I promise you that no issue will be better decided with less debate, with indifference from the audience, and with voices not listened to and unheard.



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There are those who will say that certain speech isn't deserving of protection. They will say that some speech is hurtful -- even hateful. They will point to the very speech and beliefs that we abhor as Americans. But the right of free speech does not exist only to protect the ideas upon which most of us agree at a given moment in time.

As Justice Brandeis eloquently stated in 1927 in concurrence in *Whitney versus California* (quote):

*If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process[es] of education, the remedy to be applied is more speech, not enforced silence.*¹¹

And let me be clear: Protecting free speech does not mean condoning violence like we saw recently in Charlottesville. Indeed, I call upon universities and all Americans to stand up against those who would silence free expression by violence or other means. But a mature society can tell the difference between violence and unpopular speech, and a truly free society stands up, speaks up for cherished rights precisely when it's most difficult to do so.

As Justice Holmes once wrote (quote):

*If there is any principle of the Constitution that more imperatively calls for [[the]] attachment than any other, it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate.*¹²

For the thought that we hate. And we must do so on our campuses. University officials and faculty must defend free expression boldly and unequivocally -- that means presidents, regents, trustees, alumni as well. **A national recommitment to free speech on campus is long overdue.** And action to ensure First Amendment rights are [sic] overdue.

Starting today, the Department of Justice will do its part in this work. We will enforce federal law, defend free speech, and protect students' free expression from whatever end of the spectrum it may come. To that end, we're filing a Statement of Interest in a campus free speech case¹³ this week and we will be filing more, I'm sure, in the weeks to come.



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This month, we marked the 230th anniversary of our Constitution. What a remarkable document, indeed -- the longest existing Constitution in the world, and it is an extraordinary thing. This month, we also marked the 54th anniversary of the 16th Street Baptist Church bombing in Birmingham. Four little girls died that day as they changed into their choir robes because the Klan wanted to silence their voices for civil rights.

But their voices were not silenced. Dr. Martin Luther King would call them "the martyred heroines of a holy crusade for freedom and human dignity."¹⁴ And I urge you -- really, urge you -- to go back and read that eulogy and consider what it had to say to each of us today. This is the true legacy and power of free speech that has been handed down to you. And you could be sure it made people uncomfortable when Martin Luther King spoke about segregation, particularly in the South.

This -- This is the heritage that you ha[ve] been given and that you must protect. So I'm here today to ask you to be involved to make your voices heard -- to defend the rights of others to do the same.

For the last 241 years, we have staked a country on the principle that robust and even contentious debate is how we discover truth and resolve the nation's most intract[able] problems.

Your generation will decide if this experiment in freedom will continue. Nothing less than the future of the Republic depends on it.

Thank you all. It's great to be with you.

Roll tide.



¹ Quotations in this first person account of the event

² Broader entry from the University of Idaho Student Code of Conduct, Section L. Disorderly Conduct: "A violation may include, but is not limited to 1. Conduct that a reasonable person would find offensive, such as lewd, indecent, obscene, or profane actions." [Source: <https://deanofstudents.boisestate.edu/student-code-of-conduct/>]



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³ Broader entry from Clemson University's Student Code of Conduct, Section IX, 11. Harassment: "No student shall commit any act, verbal or physical, which has the intent or effect of unreasonably interfering with an individual's or group's educational or work performance at Clemson University or which creates an intimidating, hostile or offensive educational, work or living environment." [Source: <https://www.clemson.edu/studentaffairs/student-handbook/code-of-conduct/>]

⁴ Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 - Supreme Court 2015. Scalia dissent at: <https://supreme.justia.com/cases/federal/us/575/13-1499/dissent6.html>

⁵ Broader quotation: "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom. [Source: <https://www.law.cornell.edu/supremecourt/text/393/503>]

⁶ Broader quotation: "The city asserted in the court below, and states here, that its good faith in attempting to comply with the requirements of the Constitution is not in issue, and contends that gradual desegregation on a facility-by-facility basis is necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil. The compelling answer to this contention is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." [Source: <https://supreme.justia.com/cases/federal/us/373/526/case.html>]

⁷ Broader quotation: "We are deeply concerned about the impact some speakers may have on individuals' sense of safety and belonging. No one should be made to feel threatened or harassed simply because of who they are or for what they believe." [Source: <http://news.berkeley.edu/campus-update-on-ben-shapiro-event/>]

⁸ Broader quotation: "I am here for school, not activism....I don't think Berkeley should host any controversial speakers, on either side. I don't want my tuition paying for security and stuff when it could be allocated for more important things like mental health treatment." [Source: <http://news.berkeley.edu/2017/09/14/shapiro-event-goes-off-with-barely-a-hitch/>]

⁹ Broader quotation: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." [Source: https://www.law.cornell.edu/supremecourt/text/319/624#ZO-319_US_624n19]

¹⁰ Madison, J. *Report of 1800*. [At: <https://founders.archives.gov/documents/Madison/01-17-02-0202>].

¹¹ Broader quotation: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom." [Source: <https://www.law.cornell.edu/supremecourt/text/274/357>]

¹² Justice Holmes dissenting opinion in *United States v. Schwimmer* may be accessed here: <http://caselaw.findlaw.com/us-supreme-court/279/644.html>

¹³ Full statement at: <https://www.documentcloud.org/documents/4060871-Uzuegbunam-vPreczweski-United-States-Statement.html>

¹⁴ King, M.L. (18 September 1963). Eulogy for the Martyred Children. Available at: http://kingencyclopedia.stanford.edu/encyclopedia/documententry/doc_eulogy_for_the_martyred_children/