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Understanding the First Amendment  
and Free Speech in Higher Education

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## → Presenter information

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## → About FIRE

- FIRE's mission is to defend and sustain the individual rights of students and faculty members at America's colleges and universities.



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## How does FIRE fight for free speech?

- **Defending** students and faculty whose rights have been violated
- **Educating** students, faculty, administrators, alumni, attorneys, and the general public about threats to student and faculty civil liberties.
- **Lobbying** for legislative changes to protect campus rights

## How does FIRE fight for free speech?

- **Publicizing** rights abuses
- **Helping** university leadership reform problematic policies and implement best practices
- **Litigating** when necessary



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## Outline

- Free speech on campus
  - Institutional promises of free speech
  - First Amendment fundamentals
  - What free speech on campus look like
- Free speech controversies
  - Guest speakers, student discipline for expression, student organizational rights
  - Reputational, financial, and human consequences
- Upholding free speech on campus
  - Best policies and practices
  - Continuing education and commitment
  - Working with fraternities and sororities

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## Institutional promises of free speech

- The vast majority of universities are either public schools or make institutional promises of free speech
- Public universities are government entities — they are bound to uphold the First Amendment
- Private universities are private nonprofit corporations — they are bound by the promises made to their students

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## Institutional promises of free speech

- Syracuse University is committed to the principle that freedom of discussion is essential to the search for truth and, consequently, welcomes and encourages the expression of dissent.
- The University of Pennsylvania, as a community of scholars, affirms, supports and cherishes the concepts of freedom of thought, inquiry, speech, and lawful assembly. The freedom to experiment, to present and examine alternative data and theories; the freedom to hear, express, and debate various views; and the freedom to voice criticism of existing practices and values are fundamental rights that must be upheld and practiced by the University in a free society.

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## First Amendment fundamentals

**Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

(emphasis added)

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## First Amendment fundamentals

“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”

West Virginia State Board of Education v. Barnette (1943)

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## First Amendment fundamentals

- Applies to all government actors, including state universities
- All speech is presumptively protected (hateful speech, shouting fire in a crowded theater)
- Narrow categories of unprotected speech
  - true threats of violence
  - obscenity
  - child pornography
  - commercial fraud

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## First Amendment fundamentals

- Content restrictions vs. time, place, and manner restrictions
- Generally, the government cannot restrict, regulate, or ban expression based on the viewpoints or subject matters expressed
- Government can place reasonable restrictions on the time, place, and manner of speech

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## What free speech on campus looks like

- Student tabling, protesting, and pamphletting
- Student social media
- Student groups hosting speakers
- Student group meetings, events, and petitions

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## Free speech controversies

- University cancels, disinvites, or censors invited speaker
- Restrictions on student organizational tabling, meetings, and events
- Students punished for expressive clothing, passing out literature, or online expression

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## Fraternity and sorority free speech controversies

- 1991 George Mason University punished fraternity for holding “Ugly Women contest”
- 2013 Dixie State University forbid use of Greek alphabet in student groups names
- 2012 University of Texas at Arlington banned wearing of letters on campus
- 2016 Harvard University barred members of single-sex Greek organizations from holding campus leadership positions and attaining scholarships
- 2018 SUNY Geneseo banned fraternity from conducting any fraternal activities on or off campus

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## Consequences for violating free speech on campus

- Costly and embarrassing lawsuits
- Negative publicity
- Chilling effect on other students
- Distrust between Greek life and university administration

# Valdosta State University

S.A.V.E. - Zaccari Memorial Parking Garage



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# Bergen Community College



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## Upholding free speech on campus

- Crafting clear free speech policies — FIRE's Spotlight on Speech Codes
- Planning university response to free speech controversies
- Educating students and administrators about free speech principles
- Working with fraternities and sororities to come to a shared understanding of student free speech rights

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## Creating the best free speech policies

- Merely stating that this school values free speech is not enough
- Eliminating speech codes — university policies that clearly and substantially restrict free speech
- Crafting definitions of harassment and threats that are consistent with First Amendment standards

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## Speech codes

The University of Connecticut: “Every member of the University shall refrain from actions that intimidate, humiliate, or demean persons or groups, or that undermine their security or self-esteem”

Florida State University bans any “unwanted, unwelcome, inappropriate, or irrelevant sexual or gender-based behaviors, actions or comments”

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## More speech codes

The University of Richmond prohibits “inappropriate behavior or expression”

Wake Forest University states that all campus postings “must be in good taste” and avoid “sexist, racist, profane, or derogatory remarks”

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## University harassment policies

- Syracuse University defines harassment as “unwelcome words”
- Northern Michigan university defines sexual harassment as “[w]ritten, verbal, pictorial, or nonverbal communications of a sexual nature which do not contribute to or advance the work, service, or education activity being conducted”

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## Legal definition of peer harassment

- Davis v. Monroe County Board of Education (1999)
- **Conduct** so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities

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## FIRE Spotlight Database

- Does your university deny students the rights they are granted by the Constitution and/or by institutional promises?
- Detailed information on college speech regulations at more than 450 institutions.
- FIRE is here to help! Our Policy Reform Team stands by ready to help administrators make their schools better places for free speech — [fire@thefire.org](mailto:fire@thefire.org)

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## Addressing free speech controversies

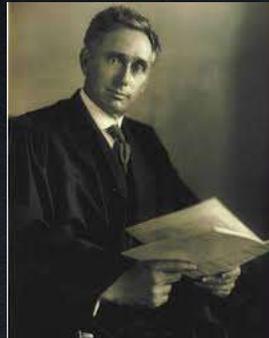
- Universities inherently experience expression that many find offensive, controversial, even hateful or derogatory
- Universities with a strong institutional commitments to free speech can fall back on their principles when challenged
- Resist the urge to censor — censorship creates negative press coverage, inflames controversy, and can lead to lawsuits

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## Putting principles into practice

- The answer to distasteful speech is more speech, not censorship
- Universities are in the best position to educate students, rather than punish them for their expression
- Punishing students for their expression sends the wrong message to the university community

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- “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.**” *Whitney v. California* (1927) (Brandies, J., concurring) (emphasis added)

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## Practicing free speech

- Pre-commit to free speech
- Choose education and more speech over punishment and censorship
- Teach free speech from day one
- Host workshops, meeting, summits, and seminars about student free speech rights
- Resist outside pressure to violate students' rights
- Defend the free speech rights of your students loudly, clearly, and early

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## Working with fraternities and sororities

- Clear rules that respect students' rights
- Specific student code sections for student organizational rights and responsibilities
- FIRE is here to help:
  - Craft and review policy drafts and proposals
  - Ensure policies are consistent with First Amendment standards
  - Create institutional commitments to uphold free speech

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## Working with fraternities and sororities

- You are the experts! You know how to best communicate with the wide array of students at your respective institutions
- FIRE is happy to work with universities to uphold free speech on campus — [fire@thefire.org](mailto:fire@thefire.org)

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## Thank you!

Website: [thefire.org](http://thefire.org)

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Questions & Answers

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Thank you for Participating