

AMERICAN BAR ASSOCIATION
MARICOPA COUNTY BAR ASSOCIATION
REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges all private and public universities
2 and colleges to adopt the following principles in furtherance of free expression on
3 university and college campuses:
4
- 5 1. Universities and colleges have a responsibility to promote freedom of debate
6 and thought, and to protect that freedom when others attempt to restrict it;
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 - 8 2. Except as necessary to comply with reasonable administrative rules applied on
9 a content-neutral basis, universities and colleges should not restrict freedom of
10 speech and debate; and
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 - 12 3. Universities and colleges should protect all members of their communities and
13 all speakers on their campuses and other locations from censorship,
14 intimidation or retaliation on the basis of their opinions or beliefs.

REPORT

Introduction

Free expression is indispensable to free thought, and therefore to achieving justice and the rule of law. From protecting minority interests to facilitating intellectual exchange, societies open to free expression foster safety, stability, and progress. Distrust and decay typically define regimes resigned to unitary ideological discourse. In England, successive monarchs spent centuries persecuting dissenting viewpoints to perpetuate their power. This generated unprecedented support in early America for intellectual inclusion, culminating in the adoption of the First Amendment. While various tyrannical regimes of the 20th century revived speech restrictions to suppress political opponents, the United States Supreme Court spent the latter part of the 20th century crafting First Amendment principles into cohesive doctrine. However, free expression is threatened, particularly on college and university campuses. From exerting pressure to disinvite an LGBT speaker at Madonna University, to preventing anti-Trump student columns at Liberty University, students and administrators alike often sacrifice First Amendment principles to advance their own policy agendas. The American Bar Association has a long history of upholding open dialogue as a core constitutional right and preferred mechanism for dispute resolution.

Section I: Expression on Campus Today

A. General

As Erwin Chemerinsky and Howard Gillman have argued, “free speech and freedom of thought are essential components of any truly diverse society. Without them, the pressure for conformity will overwhelm potential iconoclasts and outcasts, and there will be no true diversity of experiences, perspectives, or identities within the community.”¹ Today, some consider free expression a settled right and dismiss calls to protect it as alarmist remedies lacking a concrete cause. In truth, college campuses routinely limit free expression based on ideological and esteem-based concerns. These burdens on free expression originate from both student groups and administrators.

Many universities face significant backlash for permitting speech some deem offensive. At Evergreen State College, Professor Bret Weinstein suffered ostracism and widespread calls to resign when he publicly opposed calls for a “Day of Absence” in which all white people would stay away from school for a day.² Individuals close to Mr. Weinstein described him as “one of racism’s most powerful foes.”³ Yet, challenging the “Day of Absence” resulted in harassment.⁴ Protestors at the College of William & Mary shut down a First Amendment talk by ACLU director Claire Guthrie Gastañaga when they physically

¹ ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 24 (2017).

² See Bradford Richardson, *Students Berate Professor Who Refused to Participate in No-Whites ‘Day of Absence’*, WASH. TIMES (May 25, 2017).

³ *Id.*

⁴ Bari Weiss, *When the Left Turns on Its Own*, N.Y. TIMES (June 1, 2017).

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blocked the stage and chanted, “ACLU, you protect Hitler, too.”⁵ Xavier Becerra, the Democratic Attorney General of California, suffered similar treatment at Wittier College, where Trump supporters wearing “Make America Great Again” halted Becerra’s presentation by screaming insults at both Becerra and audience members.⁶ Charles Murray, a Harvard-educated sociologist, ignited violent efforts to suppress his presentation at Middlebury College due to alleged bias when protestors blocked the auditorium doorway and launched a physical assault that left Murray’s co-panelist injured.⁷ Likewise, when Heather MacDonald attempted to deliver a speech critical of the “Black Lives Matter” movement at Claremont McKenna College, student protestors “photo-shopped devil horns onto her picture,” committed to “shutting [the event] down,” and ultimately forced her to speak in an empty room.⁸ These attempts by students to silence disfavored viewpoints pose a continuing threat to free speech on college campuses.

School administrators also sacrifice free speech principles to shield their own interests. Liberty University selected Donald Trump as its 2017 commencement speaker.⁹ Thereafter, university administrators allegedly censored a student column highlighting the fact that some university students opposed Trump.¹⁰ While university officials claimed the article was canceled for being “redundant,” the very piece removed from publication had previously been guaranteed editorial space as a recurring column.¹¹ Administrators at Madonna University ceded to similar pressures when a religious group successfully lobbied them to disinvite a “pro-LGBT speaker.”¹² The group wanted the speaker silenced “so that young, impressionable Catholics are not led into sin by anti-Catholic discourse.”¹³ Princeton University canceled a speech by the Israeli Deputy Foreign Minister, Tzipi Hotovely, because a progressive group accused Hotovely of racism.¹⁴ While Princeton’s

⁵ Jeremy Bauer-Wolf, *ACLU Speaker Shouted Down at William & Mary*, INSIDE HIGHER ED (Oct. 5, 2017), insidehighered.com/quicktakes/2017/10/05/aclu-speaker-shouted-down-william-mary.

⁶ Stephen J. Wermiel & Josh Blackman, *Thwarting Speech on College Campuses*, ABA: CIVIL RIGHTS & SOCIAL JUSTICE, americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/thwarting-speech-on-college-campuses/.

⁷ See Stephanie Saul, *Dozens of Middlebury Students Are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017).

⁸ Cleve R. Wootson, Jr., *She Wanted to Criticize Black Lives Matter in a College Speech; A Protest Shut Her Down*, WASH. POST (April 10, 2017).

⁹ See, e.g., Megan Schellong, *Some Liberty University Alumni are Returning Their Diplomas to Protest Trump*, USA TODAY (Aug. 22, 2017), college.usatoday.com/2017/08/22/some-liberty-university-alumni-are-returning-their-diplomas-to-protest-trump/.

¹⁰ See Religion News Service, *Liberty president censors student newspaper over critics*, RICHMOND FREE PRESS (April 13, 2018).

¹¹ Mary Tyler March, *Censored Liberty University Columnist Steps Down from Position at Student Newspaper*, STUDENT PRESS L. CTR. (Nov. 1, 2016), splc.org/article/2016/11/censored-liberty-university-columnist-steps-down-from-position-at-student-newspaper.

¹² Dan Stockman, *Pressure Causes Madonna University Center to Cancel Talk by Theologian M. Shawn Copeland*, GLOBAL SISTERS REP. (Sep. 25, 2017).

¹³ *Id.*

¹⁴ Lahav Harkov, *Princeton Hillel Director Cancels Deputy Foreign Minister’s Talk on Campus*, JERUSALEM POST (Nov. 6, 2017), jpost.com/Diaspora/Princeton-Hillel-director-cancels-Deputy-Foreign-Ministers-talk-on-campus-513541; see also Asher Schechter, *Hillel Abruptly Cancels Princeton Speech by Israeli Deputy Foreign Minister*, HAARETZ (Nov. 7, 2017).

decision to disinvite Hotovely apparently aimed to appease activist students, rather than to suppress Hotovely, it effectively stifled one viewpoint in favor of another. And as recently as November 2018, officials at the University of Wisconsin – La Crosse reprimanded Chancellor Joe Gow for inviting an adult actress to lead “discussions about consent and safe sex practices.”¹⁵

These incidents are not anomalous. The Foundation for Individual Rights in Education discovered:

192 incidents in which students or faculty have pushed for speakers invited to campus (both for commencement and other speaking engagements) to be disinvited since 2000. Eighty-two of those incidents were ‘successful’ in that ultimately the speaker did not speak. Of those 82 successful disinvitations, 53 occurred via the revocation of the speaker’s invitation to campus . . . and 12 were ‘heckler’s vetoes’ in which speakers were shouted down, chased off stage, or otherwise prevented from speaking.¹⁶

Moreover, reports of such incidents have risen at an alarming rate. “Of those 192 disinvitation efforts since 2000, 114 have happened since 2009, when FIRE first noticed an uptick in the frequency of disinvitation incidents. Of the 82 ‘successful’ disinvitation attempts, 50 occurred during or after 2009.”¹⁷

B. The University of Chicago’s Free Speech Policy

The University of Chicago addressed this troubling trend in 2014 by appointing a Committee on Freedom of Expression charged with creating a statement “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”¹⁸ The Committee—chaired by Geoffrey R. Stone and composed of a diverse array of professors¹⁹—recalled an historic incident in which students invited the Communist Party’s presidential candidate to lecture on campus at the height of American anti-communist sentiment. Despite significant public criticism, then President Robert M. Hutchins affirmed the importance of

¹⁵ See Cailin Crowe, *U. of Wisconsin System President Reprimands La Crosse Chancellor for Bringing Porn Star to Campus*, THE CHRONICLE OF HIGHER EDUCATION (Nov. 28, 2018), chronicle.com/article/U-of-Wisconsin-System/245187.

¹⁶ Greg Lukianoff, *News Report: The Push Against Campus Speakers Is Getting More Intense*, HUFFINGTON POST, May 30, 2014, huffingtonpost.com/greg-lukianoff/new-report-the-push-again_b_5417664.html.

¹⁷ *Id.*

¹⁸ See Geoffrey R. Stone, *FREE SPEECH ON CAMPUS: A REPORT FROM THE UNIVERSITY FACULTY COMMITTEE | UNIVERSITY OF CHICAGO LAW SCHOOL*, law.uchicago.edu/news/free-speech-campus-report-university-faculty-committee.

¹⁹ Initial signers included: Geoffrey R. Stone (Edward H. Levi Distinguished Service Professor of Law, Chair), Marianne Bertrand (Chris P. Dialynas Distinguished Service Professor of Economics, Booth School of Business), Angela Olinto (Homer J. Livingston Professor, Department of Astronomy and Astrophysics, Enrico Fermi Institute, and the College), Mark Siegler (Lindy Bergman Distinguished Service Professor of Medicine and Surgery), David A. Strauss (Gerald Ratner Distinguished Service Professor of Law), Kenneth W. Warren (Fairfax M. Cone Distinguished Service Professor, Department of English and the College), and Amanda Woodward (William S. Gray Professor, Department of Psychology and the College). See *id.*

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preserving the “freedom [of students] to discuss any problem that presents itself.”²⁰ Subsequent presidents of the University produced a series of statements over the ensuing decades articulating the merits of free discourse.²¹ The Committee distilled this rich history into the Report attached as Appendix A hereto and *available at* freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf. At least 35 universities have since adopted close iterations of the Report.²²

Section II: Free Speech and the Supreme Court

Though free expression on campus has value independent of constitutional protections, it nevertheless is true that the most prominent manifestation of this country’s commitment to free expression lies in the First Amendment.²³ In the latter part of the 20th century, the Supreme Court expounded upon the First Amendment through a number of important decisions.

Edwards v. South Carolina involved a group of African-American students who marched to the South Carolina State House to “protest . . . discriminatory actions against [African Americans].”²⁴ Authorities arrested members after they ignored orders to disperse and, instead, sang “The Star Spangled Banner.”²⁵ In ruling that the arrests violated the First Amendment, the Court reasoned that fear of public agitation could not justify infringing free speech, which “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”²⁶

Five years later, in *Keyishian v. Board of Regents of University of State of NY*, a public university implemented a policy conditioning teachers’ continued employment on a pledge that they had never exercised membership in the Communist Party.²⁷ In ruling that this violated the First Amendment, the Court called “academic freedom...a special concern of the First Amendment.”²⁸ It premised this elevated protection on America’s need for “leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”²⁹

²⁰ *Id.*

²¹ *Id.*

²² Tom Lindsay, 35 UNIVERSITIES ADOPT ‘THE CHICAGO STATEMENT’ ON FREE SPEECH--1,606 TO GO FORBES (2018), forbes.com/sites/tomlindsay/2018/02/28/35-universities-adopt-the-chicago-statement-on-free-speech-1590-to-go/#c7d48cf771bf.

²³ See Floyd Abrams, THE SOUL OF THE FIRST AMENDMENT xxii (2017) (“[T]he First Amendment is part of this country’s ethos, its popular culture, unrivaled by any other provision in the Constitution.”).

²⁴ 372 U.S. 229 (1963).

²⁵ *Id.* at 233.

²⁶ *Id.* at 327-38 (citing *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949)).

²⁷ 385 U.S. 589, 591 (1967).

²⁸ *Id.* at 603.

²⁹ *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff’d* 326 U.S. 1 (1945)); see also Jeffrey Aaron Snyder, *America Will Never Move Beyond the Culture Wars*, THE NEW REPUBLIC (April 23, 2015) (“Schools are much more than conveyor belts for academic content—they are

Cohen v. California was tried at the height of the Vietnam War, when authorities arrested Paul Robert Cohen for wearing a jacket bearing the words “Fuck the Draft” in a courthouse where women and children were present.³⁰ In overturning Cohen’s conviction, the Court rejected restrictions on discourse intended “solely to protect others from hearing [it].”³¹ The government could not censor profane speech merely because it offended observers. Such authority, the Court noted, “would effectively empower a majority to silence dissidents simply as a matter of personal predilections.”³²

Tinker v. Des Moines Independent Community School District further amplified Supreme Court support for free expression in academic environments.³³ In *Tinker*, school administrators sent students home for wearing black armbands supporting a truce in Vietnam.³⁴ The Court observed that students did not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³⁵ To the administration’s defense that it acted to prevent “fear” and “apprehension” among students,³⁶ the Court responded: “Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk.”³⁷

In *Rosenberger v. Rector and Visitors of University of Virginia*, a public university refused to pay for the printing costs of a religious student newspaper because it promoted “a particular belie[f] in or about a deity.”³⁸ The Court held that this violated the First Amendment because the “ideology . . . of the speaker [was] the rationale for the restriction.”³⁹ Moreover, it reasoned that casting “disapproval on particular viewpoints” posed exceptional dangers on “its college and university campuses.”⁴⁰

Protecting free expression sometimes permits offensive expression. *Snyder v. Phelps*⁴¹ dealt with the Westboro Baptist Church’s infamous picketing of public events (including military funerals) proclaiming “God Hates Fags.”⁴² Yet protecting offensive expression is often necessary to preserving socially desirable speech. As decided in the recent *Blackhorse* and *Tam* litigations, the same First Amendment invalidation of the Lanham Act’s bar on registering “offensive” marks that facilitated the ability of Pro Football, Inc. to continue calling Washington, D.C.’s NFL team the “Redskins” also facilitated Simon

also critical sites for the transmission of beliefs and values from one generation to the next. Curriculum disputes in the culture wars idiom are not going away anytime soon.”).

³⁰ 403 U.S. 15, 16 (1971).

³¹ *Id.* at 21.

³² *Id.*

³³ 393 U.S. 503 (1969).

³⁴ *Id.* at 504.

³⁵ *Id.* at 506.

³⁶ *Id.* at 508.

³⁷ *Id.*

³⁸ 515 U.S. 819 (1995).

³⁹ *Id.* at 829.

⁴⁰ *Id.* at 836.

⁴¹ 552 U.S. 443 (2011).

⁴² See, e.g., Westboro Baptist Church Home Page, godhatesfags.com/.

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Tam's ability to fight race bias by referring to his Asian-American rock band as "The Slants."⁴³

Section III: The ABA's Historical Role as Free Speech Advocate

The ABA's stated mission is to "defend liberty and deliver justice as the national representative of the legal profession."⁴⁴ The ABA Constitution says it exists to "uphold and defend the Constitution of the United States," which obviously includes the First Amendment.⁴⁵ As early as 1939, the ABA filed an amicus brief with the Supreme Court condemning a municipal ordinance allowing officials to deny city leases to groups advocating government obstruction; the ABA argued that such discretion constituted "a manifestation of intolerance" and cautioned that "the American way of life...can survive only if we support tolerance and free discussion within wide limits."⁴⁶ In 1943, the ABA filed another amicus brief arguing that a compulsory flag salute violated the due process rights of children with sincere religious scruples against such acts.⁴⁷ It has since opposed considerations of "content, the subject matter, message or idea" in government decisions regarding funding for the arts⁴⁸ and, separately, "the use of government funding programs as a vehicle to suppress or discourage speech activities by government grantees based on the government's disapproval of a particular content of the speech."⁴⁹ Recognizing the unique importance of protecting free speech in academia, in 2017, the ABA passed a resolution urging state, local, and tribal legislative bodies to "rigorously protect the ability of student journalists...to make the independent editorial judgments necessary to meaningfully cover issues of social and political importance without fear of retaliation or reprisal."⁵⁰

Section IV: Why the ABA Should Endorse Campus Free Speech

Free expression promotes peace and constitutes an essential element of a free and just society. Ideological oppression in Tudor England ultimately injured every major religious and political group as monarchs with competing creeds traded places atop the throne.

⁴³ *Matal v. Tam*, 582 U.S. ____ (2017); *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 448 (E.D. Va. 2015), vacated, 709 F. App'x 182 (4th Cir. 2018). See generally Kaitlin Corey, "We Are Slant. Who Cares? We're Proud of That": Intersection of the Lanham Act and Free Speech, 2017 50 Md. B.J. 36.

⁴⁴ ABA Mission and Goals, AMERICAN BAR ASSOCIATION (Feb. 13, 2017), americanbar.org/about_the_aba/aba-mission-goals.html.

⁴⁵ American Bar Association, CONSTITUTION AND BYLAWS: RULES OF PROCEDURE HOUSE OF DELEGATES, §1.2 Purposes, americanbar.org (2015), available at americanbar.org/content/dam/aba/administrative/house_of_delegates/aba_constitution_and_bylaws_2015.authcheckdam.pdf. Implementation should also, of course, respect First Amendment principles.

⁴⁶ See Brief of the Committee on the Bill of Rights, American Bar Association as Amicus Curiae, p. 42, *Hague v. Committee for Industrial Organization* 307 U.S. 496 (1939).

⁴⁷ Brief of the Committee on the Bill of Rights, American Bar Association as Amicus Curiae, p. 3-4, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

⁴⁸ American Bar Association. House of Delegates. *Resolution 10H*, americanbar.org (1990), available at americanbar.org/content/dam/aba/directories/policy/1990_am_10h.authcheckdam.pdf.

⁴⁹ American Bar Association. House of Delegates. *Resolution 104*, americanbar.org (1993), available at americanbar.org/content/dam/aba/directories/policy/1993_my_104.authcheckdam.pdf.

⁵⁰ American Bar Association. House of Delegates. *Resolution 119B*, americanbar.org (2017), available at [americanbar.org/content/dam/aba/images/abanews/2017 Annual Resolutions/119B.pdf](http://americanbar.org/content/dam/aba/images/abanews/2017%20Annual%20Resolutions/119B.pdf).

King Henry VIII killed insubordinate subjects (most famously, Thomas More) for refusing to ratify the king's religious supremacy;⁵¹ Queen Mary I persecuted "heretics" unwilling to embrace her Catholic ideology;⁵² and Elizabeth I turned the same laws against Catholicism.⁵³ Even more startling acts of violence accompanied speech suppression in places like the Soviet Union, where millions lost their lives in suppression of anti-government viewpoints.⁵⁴ While speech suppression typically produces violence, free speech is no recipe for tranquility. The Supreme Court recognizes its tendency to "[stir] people to anger."⁵⁵ Nonetheless, it celebrates such commotion as the sign of a healthy democracy⁵⁶ and reminds us that using "speech [to] rebut speech" outweighs using force to punish taboo perspectives.⁵⁷ As early as 1939, the ABA premised the very survival of the American way of life depended on ideological tolerance.⁵⁸

Free speech often bruises public sensibilities, but it avoids the violence, imprisonment, and extermination otherwise necessary to perpetuate a unitary political ideology.⁵⁹ Diminished free expression is unlikely to spark genocide on college campuses any time soon. However, efforts at eradicating alternative viewpoints have caused violence already. Free expression encourages the use of words, not violence, to settle disputes.

Furthermore, free expression uniquely benefits minority interests. In Nazi Germany, the eradication of competing viewpoints created a vacuum through which the state normalized racist propaganda, leading to the marginalization and subsequent genocide of minority groups, especially Jews.⁶⁰ David Cole, the National ACLU Legal Director, has observed that "in a democracy, the state acts in the name of the majority, not the minority. Why would disadvantaged minorities trust representatives of the majority to decide whose speech should be censored?"⁶¹ As noted, the Supreme Court has repeatedly commented that restrictions on discourse tend to permit majority groups to impose their personal

⁵¹ See Germain P. Marc'hadour, THOMAS MORE ENCYCLOPÆDIA BRITANNICA (2018), britannica.com/biography/Thomas-More-English-humanist-and-statesman.

⁵² See Nicole Hill, *Religious Beliefs & Heresy in Tudor Times*, CLASSROOM (Sept. 29, 2017), classroom.synonym.com/religious-beliefs-heresy-in-tudor-times-12086739.html.

⁵³ See FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476-1776: THE RISE AND DECLINE OF GOVERNMENT CONTROL 351-62 (1952); see also C. N. Trueman, *Elizabeth I and the Catholic Church*, THE HISTORY LEARNING SITE (Mar. 17, 2015), historylearningsite.co.uk/tudor-england/elizabeth-i-and-the-catholic-church.

⁵⁴ See BRIAN KASSOF, GLAVLIT, IDEOLOGICAL CENSORSHIP, AND RUSSIAN-LANGUAGE BOOK PUBLISHING, 1922-38 (2015); see also Bill Keller, *Major Soviet Paper Says 20 Million Died as Victims of Stalin*, N.Y. TIMES, Feb. 4, 1989, nytimes.com/1989/02/04/world/major-soviet-paper-says-20-million-died-as-victims-of-stalin.html; ALEXANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO TWO 10 (1975) (reporting estimated 66 million dead).

⁵⁵ *Edwards v. South Carolina*, 372 U.S. 229, 327-28 (1963) (citing *Terminiello*, 337 U.S. at 4-5).

⁵⁶ See generally *id.*

⁵⁷ *Dennis*, 341 U.S. at 503.

⁵⁸ See Brief of the Committee, *supra*.

⁵⁹ See, e.g., Keller, *supra*.

⁶⁰ See e.g. Ori Nir, *Exhibit Sheds Light on Nazi Suppression of Free Speech*, FORWARD (May 2, 2003), forward.com/news/8724/exhibit-sheds-light-on-nazi-suppression-of-free-sp/ (citing personal interview with Stephen Goodell, director of exhibitions at the United States Holocaust Memorial Museum).

⁶¹ DAVID COLE, WHY WE MUST STILL DEFEND FREE SPEECH THE NEW YORK REVIEW OF BOOKS (2017), nybooks.com/articles/2017/09/28/why-we-must-still-defend-free-speech/.

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preferences on a minority.⁶² Litigants appealing to First Amendment free expression principles share a common characteristic: the desire to express their view of truth regardless of whether it is politically ascendant.

Free expression impels intellectual progress. The Supreme Court has observed: “Free debate of ideas will result in the wisest governmental policies.”⁶³ History demonstrates the toxic effects of suppressing expression. It is hardly coincidental that ideologically repressive regimes produce few artistic, scientific, and literary contributions compared to more ideologically tolerant societies. One scholar notes: “Insofar as literature is defined negatively, by what it is not, censorship has had a determining role in its historical constitution.”⁶⁴ After all, a brutally honest expose on the state of society incurs wrath, not accolades, in a political environment unwilling to endure criticism. Free expression also reflects ideological humility. By accommodating conflicting viewpoints, we acknowledge our intellectual limits and broaden our ability to understand truth.

Free expression is uniquely important in the realm of education. Liberal education began in ancient Greece as a collection of individuals dedicated to freely discussing the most important subjects of the day.⁶⁵ Early philosophers such as Socrates relied on open dialogue to explore the nature of justice and the merits of existing political regimes.⁶⁶

Though the issues are different today, controversy over campus freedom of expression is not new. In 1974, the Committee on Freedom of Expression at Yale reported “a willingness to compromise standards, to give priority to peace and order and amicable relations over the principle of free speech when it threatens these other values.”⁶⁷ It continued:

A significant number of students and some faculty members appear to believe that when speakers are offensive to majority opinion, especially on such issues as war and race, it is permissible and even desirable to disrupt them; that there is small chance of being caught, particularly among a mass of offenders; that if caught there is a relatively good chance of not being found guilty; and that if found guilty no serious punishment is to be expected.⁶⁸

More recently, President Obama remarked:

⁶² See *Cohen*, 403 U.S. at 21.

⁶³ *Dennis*, 341 U.S. at 497.

⁶⁴ NICOLE MOORE, CENSORSHIP AND LITERATURE OXFORD RESEARCH ENCYCLOPEDIA OF LITERATURE (2017), literature.oxfordre.com/view/10.1093/acrefore/9780190201098.001.0001/acrefore-9780190201098-e-71.

⁶⁵ See generally R.R. PALMER, JOEL COLTON & LLOYD KRAMER, A HISTORY OF THE MODERN WORLD 39 (7th ed. 1992).

⁶⁶ See, e.g., PLATO, ALLAN BLOOM & ADAM KIRSCH, THE REPUBLIC OF PLATO (2016).

⁶⁷ YALE COLL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1974), available at yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale.

⁶⁸ *Id.*

I've heard some college campuses where they don't want to have a guest speaker who is too conservative or they don't want to read a book if it has language that is offensive to African-Americans or somehow sends a demeaning signal towards women. I gotta tell you, I don't agree with that either. *I don't agree that you, when you become students at colleges, have to be coddled and protected from different points of view.* I think you should be able to — anybody who comes to speak to you and you disagree with, you should have an argument with 'em. But you shouldn't silence them by saying, "You can't come because I'm too sensitive to hear what you have to say." That's not the way we learn either.⁶⁹

Liberal education should prepare students to endure, understand, and combat opposing viewpoints with better facts and arguments. Education equips Americans to consider religious, political, and philosophical beliefs beyond their own. This skill is uniquely important to our multicultural society.

Conclusion

As Chemerinsky and Gillman maintain:

[T]he record shows that restrictions on freedom of thought and expression on campuses have been used to stifle and punish dissenters, social critics, vulnerable and marginalized voices, and the sort of innovative thinkers who fuel social progress. . . . [C]ampuses cannot censor or punish expression of ideas, or allow intimidation or disruption of those who are expressing ideas, without undermining their core function of promoting inquiry, discovery, and the dissemination of new knowledge.⁷⁰

The accompanying resolution advocates the idea that institutions of higher learning should teach students *how* to think, not *what* to think. Inaction undermines the ABA's identity and influence on matters of law and public policy. The ABA should adopt this resolution in support of free expression on university and college campuses.

⁶⁹ See Janell Ross, *Obama Says Liberal College Students Should Not Be 'Coddled.' Are We Really Surprised?*, WASH. POST (2015), [washingtonpost.com/news/the-fix/wp/2015/09/15/obama-says-liberal-college-students-should-not-be-coddled-are-we-really-surprised/?utm_term=.64a4fddb5ad3](http://www.washingtonpost.com/news/the-fix/wp/2015/09/15/obama-says-liberal-college-students-should-not-be-coddled-are-we-really-surprised/?utm_term=.64a4fddb5ad3) (emphasis added).

⁷⁰ Chemerinsky & Gillman, *supra*, at 52-53.

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Respectfully submitted,

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August 2019

APPENDIX A

University of Chicago

Report of the Committee on Freedom of Expression

(Available at: freeexpression.uchicago.edu/sites/freeexpression.uchicago.edu/files/FOECommitteeReport.pdf)

The Committee on Freedom of Expression at the University of Chicago was appointed in July 2014 by President Robert J. Zimmer and Provost Eric D. Isaacs “in light of recent events nationwide that have tested institutional commitments to free and open discourse.” The Committee’s charge was to draft a statement “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”

The Committee has carefully reviewed the University’s history, examined events at other institutions, and consulted a broad range of individuals both inside and outside the University. This statement reflects the long-standing and distinctive values of the University of Chicago and affirms the importance of maintaining and, indeed, celebrating those values for the future.

From its very founding, the University of Chicago has dedicated itself to the preservation and celebration of the freedom of expression as an essential element of the University’s culture. In 1902, in his address marking the University’s decennial, President William Rainey Harper declared that “the principle of complete freedom of speech on all subjects has from the beginning been regarded as fundamental in the University of Chicago” and that “this principle can neither now nor at any future time be called in question.”

Thirty years later, a student organization invited William Z. Foster, the Communist Party’s candidate for President, to lecture on campus. This triggered a storm of protest from critics both on and off campus. To those who condemned the University for allowing the event, President Robert M. Hutchins responded that “our students . . . should have freedom to discuss any problem that presents itself.” He insisted that the “cure” for ideas we oppose “lies through open discussion rather than through inhibition.” On a later occasion, Hutchins added that “free inquiry is indispensable to the good life, that universities exist for the sake of such inquiry, [and] that without it they cease to be universities.”

In 1968, at another time of great turmoil in universities, President Edward H. Levi, in his inaugural address, celebrated “those virtues which from the beginning and until now have characterized our institution.” Central to the values of the University of Chicago, Levi explained, is a profound commitment to “freedom of inquiry.” This freedom, he proclaimed, “is our inheritance.” More recently, President Hanna Holborn Gray observed that “education should not be intended to make people comfortable, it is meant to make

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them think. Universities should be expected to provide the conditions within which hard thought, and therefore strong disagreement, independent judgment, and the questioning of stubborn assumptions, can flourish in an environment of the greatest freedom.”

The words of Harper, Hutchins, Levi, and Gray capture both the spirit and the promise of the University of Chicago. Because the University is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community “to discuss any problem that presents itself.”

Of course, the ideas of different members of the University community will often and quite naturally conflict. But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University. But these are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.

In a word, the University’s fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed. It is for the individual members of the University community, not for the University as an institution, to make those judgments for themselves, and to act on those judgments not by seeking to suppress speech, but by openly and vigorously contesting the ideas that they oppose. Indeed, fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University’s educational mission.

As a corollary to the University’s commitment to protect and promote free expression, members of the University community must also act in conformity with the principle of free expression. Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest

speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.

As Robert M. Hutchins observed, without a vibrant commitment to free and open inquiry, a university ceases to be a university. The University of Chicago's longstanding commitment to this principle lies at the very core of our University's greatness. That is our inheritance, and it is our promise to the future.

Geoffrey R. Stone, Edward H. Levi Distinguished Service Professor of Law, *Chair*

Marianne Bertrand, Chris P. Dialynas Distinguished Service Professor of Economics, Booth School of Business

Angela Olinto, Homer J. Livingston Professor, Department of Astronomy and Astrophysics, Enrico Fermi Institute, and the College

Mark Siegler, Lindy Bergman Distinguished Service Professor of Medicine and Surgery

David A. Strauss, Gerald Ratner Distinguished Service Professor of Law

Kenneth W. Warren, Fairfax M. Cone Distinguished Service Professor, Department of English and the College

Amanda Woodward, William S. Gray Professor, Department of Psychology and the College

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GENERAL INFORMATION FORM

Submitting Entity: Maricopa County Bar Association

Submitted By: Charles W. Wirken

1. Summary of Resolution(s).

This Resolution urges all private and public universities and colleges to uphold the principles of free expression on university and college campuses. They should follow these principles by promoting freedom of debate and thought, and to protect that freedom when others attempt to restrict it. Except as necessary to comply with reasonable administrative rules applied on a content-neutral basis, universities and colleges should not restrict freedom of speech and debate. They should protect all members of their communities and all speakers on their campuses and other locations from censorship, intimidation or retaliation on the basis of their opinions or beliefs.

2. Approval by Submitting Entity.

The Maricopa County Bar Association Board of Directors voted unanimously to sponsor this Resolution on May 16, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?

No, but the ABA has historically advocated rights of free speech protected by the First Amendment.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA has historically advocated rights of free speech protected by the First Amendment. See Report, Section III.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (if applicable)

Not applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The Resolution and Report would be circulated to university and college presidents, and law school deans

8. Cost to the Association. (Both direct and indirect costs)

None, beyond any staff time associated with preparing and circulating the Resolution as proposed above.

9. Disclosure of Interest. (if applicable)

Not applicable.

10. Referrals.

Section of Litigation
Section of Civil Rights and Social Justice
Section of State and Local Government Law
Center for Human Rights

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Charles W. Wirken
Maricopa County Bar Association Delegate
Gust Rosenfeld, PLC
1 E. Washington St., Suite 1600
Phoenix, AZ 85004-2553
cwirken@gustlaw.com
(602) 257-7959

12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Charles W. Wirken
Maricopa County Bar Association Delegate
cwirken@gustlaw.com
(602) 620-4605 (cell)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges all private and public universities and colleges to uphold the principles of free expression on university and college campuses. They should follow these principles by promoting freedom of debate and thought, and to protect that freedom when others attempt to restrict it. Except as necessary to comply with reasonable administrative rules applied on a content-neutral basis, universities and colleges should not restrict freedom of speech and debate. They should protect all members of their communities and all speakers on their campuses and other locations from censorship, intimidation or retaliation on the basis of their opinions or beliefs.

2. Summary of the Issue that the Resolution Addresses

Free expression is indispensable to free thought, and therefore to achieving justice and the rule of law. From protecting minority interests to facilitating intellectual exchange, societies open to free expression foster safety, stability, and progress. Distrust and decay typically define regimes resigned to unitary ideological discourse. In England, successive monarchs spent centuries persecuting dissenting viewpoints to perpetuate their power. This generated unprecedented support in early America for intellectual inclusion, culminating in the adoption of the First Amendment.

Many universities face significant backlash for permitting speech some deem offensive. School administrators also sacrifice free speech principles to shield their own interests. Though free expression on campus has value independent of constitutional protections, it nevertheless is true that the most prominent manifestation of this country's commitment to free expression lies in the First Amendment. Liberal education should prepare students to endure, understand, and combat opposing viewpoints with better facts and arguments. Education equips Americans to consider religious, political, and philosophical beliefs beyond their own. This skill is uniquely important to our multicultural society.

This Resolution addresses the great debate about all students having the opportunity to freely express their opinion at private and public universities and colleges. Thus, the belief that the universities and colleges must adhere to specific principles to ensure that all forms of views are allowed and not actively suppressed by the majority opinion.

3. Please Explain How the Proposed Policy Position will address the issue

Given the current political climate, urging universities and colleges to protect other opinions will not only foster a greater learning environment for students, but it will also promote safety for those who feel they will be retaliated against for their opinion. Universities and colleges are institutions for learning and for challenging thinking, by them actively taking a stance to not restrict opinion.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None as of this writing.