

## Backgrounder: Free Speech Controversies

The U.S. Constitution was written in 1787 and ratified in 1788. Delegates from the 13 states who were voting on the Constitution thought it lacked protection for the rights of individuals.

To address this shortcoming, James Madison, who went on to become our fourth president, drafted and submitted 12 Constitutional amendments. In 1791, the 10 that were ratified became known as the Bill of Rights. Since then, 17 more amendments have been added.

The amendments deal with a variety of rights ranging from the right for women to vote to the right for everyone to speak freely. “Freedom of speech” is included in the First Amendment, which also guarantees freedom of religion and freedom of the press.

The freedom to speak freely and engage in an open exchange of ideas continues to be a hotly debated and contested issue, especially in those instances when what is said is considered offensive or hate-filled. In the lead-up to the 2020 presidential election, the debate over who should and shouldn’t be allowed a platform to speak has intensified. Much of the debate has centered on speech in schools and college campuses.

In March 2019, President Trump issued an executive order requiring colleges to support free speech or risk losing their federal research funds. The order echoes laws passed by a number of states: Since 2015, at least 17 states have adopted legislation they say is intended to protect everyone’s free speech rights on college campuses. Eight states passed such laws in 2019 alone.

Some states passed legislation to overturn the “free speech zones” that limit students’ freedom to protest anywhere on campus. Other states are passing laws to prevent students from shouting down or disinviting speakers whom they deem offensive or racist, or whose viewpoints they don’t share. A September 16, 2019 article in [Inside Higher Education](#) offered insight into this growing trend:

Free speech advocates were enraged with Middlebury College students in 2017 drowned out a planned talk by the author Charles Murray, whose writings many consider racist. The students’ chants prevented Murray from speaking. Some protesters surrounded and jumped on his car after he was ushered out of the lecture hall.

Conservative lawmakers, academics and other observers pointed to that incident and several similar shout-downs of other controversial speakers at various campuses as proof that college administrators needed to beef up their free expression policies.

Lawmakers, mainly Republicans, from states all over the country have subsequently intervened in matters of free speech in academe by proposing and helping to pass legislation that makes clear students can’t interfere with the speech of their peers or of visitors on campus.

Civil liberties advocates say states are likely to keep adopting such legislation, especially leading up to and following the 2020 presidential election, when political demonstrations will likely heat up on campuses. They are concerned that some of the proposed laws may be too prescriptive, particularly those that force colleges to carry out certain mandatory punishments for free speech infractions.

Some have also argued that protesting racist speakers, for example, can also be a form of speech, or "counter-speech," that should be guarded. Law professor Thomas Healy writes in the [Atlantic](#):

Speech is a powerful weapon that can cause grave harms, and the First Amendment does not entirely prohibit the government from suppressing speech to prevent those harms. But one of the central tenets of modern First Amendment law is that the government cannot suppress speech if those harms can be thwarted by alternative means. And the alternative that judges and scholars invoke most frequently is the mechanism of counter-speech...

Counter-speech can take many forms. It can be an assertion of fact designed to rebut a speaker's claim. It can be an expression of opinion that the speaker's view is misguided, ignorant, offensive, or insulting. It can even be an accusation that the speaker is racist or sexist, or that the speaker's expression constitutes an act of harassment, discrimination, or aggression.

In other words, much of the social pushback that critics complain about on campus and in public life—indeed, the entire phenomenon of political correctness—can plausibly be described as counter-speech. And because counter-speech is one of the mechanisms Americans rely on as an alternative to government censorship, such pushback is not only a legitimate part of our free speech system; it is indispensable.

College faculty are also making headlines in matters relating to free speech rights. In November 2019, a top Indiana University official [announced](#) the school's condemnation of a professor, Eric Rasmusen, who tweeted sexist and racist ideas but stated that the University would not fire him, citing his free speech rights. According to [Inside Higher Education](#):

Rasmusen "has, for many years, used his private social media accounts to disseminate his racist, sexist and homophobic views," Robel [University Provost] wrote in a statement. "When I label his views in this way, let me note that the labels are not a close call, nor do his posts require careful parsing to reach these conclusions."

At the same time, "We cannot, nor would we, fire Professor Rasmusen for his posts as a private citizen, as vile and stupid as they are, because the First Amendment of the U.S. Constitution forbids us to do so," Robel said. That's "not a close call," either.

Still, Robel said that no student will have to take a course with Rasmusen, as it's "reasonable" to worry that women and sexual and racial minorities would not get a "fair shake" in his classes. And so Rasmusen also will use double-blind grading on assignments going forward to "ensure that the grades are not subject to Professor Rasmusen's prejudices." When that is not possible, other instructors will grade the work.

Rasmusen, who has tenure, has been at Indiana since 1992.

The First Amendment "is strong medicine, and works both ways," Robel said. "We are free to avoid [Rasmusen's] classes, and demand that the university ensure that he does not, or has not, acted on those views in ways that violate either the federal and state civil rights laws or IU's nondiscrimination policies."