

Free speech on public college campuses

Free-speech zones

By [David L. Hudson Jr.](#)

First Amendment Center research attorney

Public universities were a hotbed of social activism in the late 1960s and early 1970s, with much student energy focused on opposing the Vietnam War. In the 1980s, college students did not continue this high level of activism perhaps because of lack of a common cause around which to rally.

But First Amendment expert Robert Richards, a professor and administrator at Penn State University, says issues regarding race and sex have emboldened students to become more vocal in their expression. In the 1980s and 1990s, many universities enacted speech codes designed to instill greater civility on public campuses and prevent harassment based on race and sex. "The issues related to sexuality and race that lead to the implementation of speech codes, which did not fare well in the courts, have not gone away," Richards said. "In addition, there has been an increased level of student activism — though not approaching the level seen in the 1960s."

Perhaps because the speech-code movement was stifled in the courts, some universities have resorted to limiting student protests and demonstrations to certain select areas of the campus — called free-speech zones. Whatever the reason, the last several years have seen a rise in such speech zones. Some college administrators believe free-speech zones are a way to prevent student activism from disturbing the primary function of a university — the teaching of students in classrooms.

The issue of universities trying to "move" speech away from certain areas of the campus is not entirely new. Robert O'Neil, a well-known First Amendment expert and former university president, recalls his days as chairman of the Campus Rules Committee at the University of California-Berkeley campus from 1966-67.

O'Neil said that many members of the committee wanted to relocate student rallies from the upper plaza to the lower plaza to prevent disruption of the educational environment. "We were concerned that the protests on the upper plaza were causing congestion and interfering with other student activities and classroom instruction," he said.

O'Neil recalls that the rules committee, made up of faculty and students, voted 6-5 to move the rallies to the lower plaza. He says that the recent controversy over "free-speech zones" presents the same sort of issues that he dealt with at Berkeley. But he fears that many of the new policies, which limit protest activity to a few spaces or zones on campus, restrict too much speech.

Several universities have adopted these policies, which officials describe as content-neutral time, place and manner restrictions on speech. In First Amendment jurisprudence, regulations that restrict speech based on content are presumptively unconstitutional and are subject to a high degree of judicial scrutiny. Content-neutral laws, on the other hand, are held to a less stringent form of judicial review.

University officials have argued that free-speech zones are content-neutral and don't ban student expression. Along this line of thinking, the policies are constitutionally acceptable because they merely regulate where the speech takes place as opposed to whether the speech can take place at all.

Controversies have erupted at several public universities including New Mexico State University, West Virginia University, the University of Mississippi and Florida State University to name a few. The Foundation for Individual Rights in Education, a Philadelphia-based civil liberties group, is advocating strongly against free-speech-zone policies. Thor Halvorssen, the group's executive director, told a newspaper: "There are dozens of college campuses across the U.S. with free speech zones. We plan to take each one down, one by one. By creating zones, the administration is saying that free speech does not exist in the areas of campus outside the zones." ¹ The group's president, Alan Charles Kors, has called free-speech zones "absurdly named" because they limit freedom of speech. ²

Other First Amendment experts also question the constitutionality of some of the free-speech zone policies. "In a public institution, there is a presumption in favor of the speaker," says O'Neil, who is the founder of the Virginia-based Thomas Jefferson Center for the Protection of Free Expression.

First Amendment expert Kevin O'Shea writes: "There is a serious question regarding whether the renewed use of free speech zones is compatible with the First Amendment." 3

"A university is supposed to be a marketplace of ideas," says Richards of Penn State. "When you limit the free interchange of ideas, that is problematic."

West Virginia University

A group of student organizations, known collectively as the Free Speech Coalition of West Virginia University, sued the university in June 2002 over the school's free-speech zone policy. In *Free Speech Coalition of West Virginia University v. Hardesty*, the student groups allege that the policy, which now allows for seven campus free-speech zones, violates the students' First Amendment rights.

In February 2002, students and a few faculty members began protesting the policy. In response, the university expanded its number of free-speech zones from two to seven. But that was not enough to satisfy the student groups.

In their complaint, they say that even though there are seven free-speech zones, these areas "do not constitute more than five percent (5%) of the total campus area." Furthermore, they allege that the policy prohibits student demonstrations in the places most likely to have the greatest impact or the places that would be most appropriate. They explain in their complaint:

"Many core functions of the University and buildings and sites fully appropriate for public expression are not within the 'Free Expression Areas,' including the University's administration building, large portions of the grounds around the Mountainlair, the Business and Economics Department building, the University's newspaper the Daily Athenaeum, and many others. ... Neither Plaintiffs nor others may protest or demonstrate against University restrictions on the rights of free expression and the press at the offices of the school newspaper. Neither Plaintiffs nor others, including African-American members of the University community, may protest or demonstrate against racism or in support of or against affirmative action at the Center for Black Culture and Research."

In December 2002, [the university relented](#) and abandoned its free-speech zone policy.

New Mexico State

Officials at New Mexico State University adopted a new free-speech policy in the 1980s. This policy said members of the university community were free to speak on any topic as long as they did so in three designated areas. In September 2000, student activist Sean Rudolph was arrested for distributing leaflets criticizing the university's policy on freedom of speech and promoting his soon-to-be released underground newspaper.

The New Mexico chapter of the American Civil Liberties Union intervened and filed a lawsuit on behalf of Rudolph and another student, Marlene Yesquen. In *Rudolph v. Archuleta*, the plaintiffs alleged: "NMSU has designated three extremely small areas of its campus as 'open forum' or 'free speech' areas. Two of these areas have virtually no pedestrian traffic, and thus are unusable as areas in which to distribute literature to other students."

"To us, this presented a clear-cut First Amendment issue because you had students exercising their legitimate right to distribute literature on campus," said Peter Simonson, executor director of the ACLU of New Mexico. "This was a clear instance of students' rights to free speech being shut down in an extremely aggressive manner."

The university agreed to revise its policy under a settlement in November 2000 (no court opinion). Under the terms of the settlement, the university agreed to appoint a task force to develop a new policy; pay the plaintiffs' attorneys fees and court costs; establish a \$2,500 student scholarship to be awarded by the

university's government department; and not take any administrative action against Rudolph, Yesquen or any other NMSU student for actions related to the lawsuit.

The university adopted a new policy in March 2001 that provides in part: "Any outdoor area that is generally accessible to the public may be used by any individual or group for petitioning, distributing written material, handing out newspapers, or conducting speech acts. Prior approval is not necessary as long as the primary action is not to advertise or sell a commercial product."

Are they constitutional?

The lawsuits at New Mexico State and West Virginia are simply two of the more high-profile free-speech-zone controversies. The issue continues to rage at university campuses across the country. For example, in March 2003, two students at the University of Texas El-Paso sued their school, contending that the university's free-speech zone policy violates the First Amendment.

Many civil libertarians rail against the policies, calling them both moronic and oxymoronic.

Legally, free-speech zones implicate a principle of First Amendment law known as the public-forum doctrine. Under the public-forum doctrine, government officials have less authority to restrict speech in places that by tradition have been open for free expression. Such an area is called a public forum. In its 1983 decision [*Perry Education Ass'n v. Perry Local Educators Ass'n*](#), the U.S. Supreme Court wrote: "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed."

"Where you have places that have been traditionally used for speech, the public forum doctrine comes into play," Richards explains. Unfortunately, as O'Shea writes, "The public forum doctrine is so ill-defined, however, that its application is often confusing." He adds that "there is no consistent doctrine for either students or school officials to follow when trying to determine whether restrictions on campus speech are consistent with the First Amendment."

Richards says it may be possible to draft a constitutional free-speech zone policy. "I think if university officials could show that they were allowing speech and even encouraging speech in particular locations, they might have a sympathetic ear in some courts," he said.

The courts have upheld the zoning of speech in other areas of First Amendment law, including buffer zones outside abortion clinics (in [*Hill v. Colorado*](#)) and zones between patrons and performers at nude-dancing establishments (in [*Colacurcio v. City of Kent*](#)).

Technically, a free-speech zone is content-neutral in the sense that it applies to all types of student speech without regard to the message. But, as O'Neil says, "the policies, while seeming to be content-neutral, can create a content effect. While seemingly content-neutral, when you look deeper some of the policies they seem to mask content discrimination." He points out that some of the policies, while purporting to further the principle of free speech, severely limit the areas in which free speech can occur.

Until a court issues a decision on the merits regarding such a policy, the debate will likely continue between student activists and university officials. As Kevin O'Shea writes in the April 2003 issue of his monthly legal tract for educators, *First Amendment Rights in Education*, "[n]either side in this debate intends to go quietly into the night."

Notes

- 1 Mary M. Kershaw, "WVU students are at greater liberty to protest," *USA TODAY*, 5/13/2002, p. 6D
- 2 Ellen Sorokin, "Civil libertarians take on campus 'free-speech zones'," *The Washington Times*, March 26, 2002, p. A01
- 3 Kevin O'Shea, "Muzzling Campus Speech," in *First Amendment Rights in Education* (May 2002), p. 3