

The Politics of Campus Free Speech in Canada and the United States

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Ontario Premier Doug Ford and US President Donald Trump have something in common: both recently issued directives to colleges and universities intended to promote free speech on campus. Premier Ford's came first. In August 2018, shortly after winning the provincial election, Ford required all colleges and universities in the province to devise policies upholding free speech on their campuses in line with a minimum standard prescribed by his government. The policies were to be in place no later than January 1, 2019. Failure to comply would result in a reduction of operating grant funding from the province. President Trump's executive order concerning "free inquiry" on American campuses was issued in March 2019. The order states that it is the policy of the federal government to encourage institutions of higher learning "to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."¹ Colleges and universities that fail to do so are threatened with the loss of federal research and education grants.

In contemplating these parallel directives, two things stand out. First, politics is driving policy. Conservatives in both countries have been complaining for years that the professoriate skews to the left, making college and university campuses inhospitable toward conservative ideas and hostile environments for conservative-minded students. That President Trump was playing to his base is made abundantly clear by his remarks at the signing ceremony. Addressing an audience that included conservative students, he said: "Under the guise of speech codes, safe spaces, and trigger warnings, these universities have tried to restrict free

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1 Andy Thomason, "Here's What Trump's Executive Order on Free Speech Says", *The Chronicle of Higher Education* (21 March 2019), online: <[chronicle.com/article/Here's-Wat-Trumps-Executive/245943?cid=bn&utm_medium=en&cid=bn](https://www.chronicle.com/article/Here's-Wat-Trumps-Executive/245943?cid=bn&utm_medium=en&cid=bn)>. An executive order is a directive issued by the President of the United States in his capacity as head of the executive branch and has the force of law. Trump's executive order on campus free speech is reproduced in its entirety online.

thought, impose total conformity, and shut down the voices of great young Americans like those here today.”² That Trump previewed his executive order at a speech to the Conservative Political Action Conference offers further evidence of its political character. Writing in *The Atlantic*, Adam Harris described the order as “red meat for Trump’s base.”³

What also stands out is the vagueness of these directives. It is far from clear how they will be enforced or what changes they will require in the way colleges and universities manage free speech on campus. At York University, where I am on faculty, the administration responded to Premier Ford’s directive by establishing a committee to formulate the required policy. The committee held a series of stakeholder meetings on campus, reviewed existing policies on free speech and academic freedom, and in the end produced a document that bundles together all of the university’s pre-existing policy statements touching on free expression, which was duly transmitted to the province.

In the judgment of many this was much ado about nothing; the Premier’s directive was a solution in search of a problem. As it happens, this is also how the American Association of University Professors (AAUP) characterizes President Trump’s Executive Order, observing that public institutions of higher learning in the United States are required by the First Amendment to protect free expression on campus and, as Trump’s order itself notes, private institutions already have policies in place protecting free speech. What, if anything, American colleges and universities will need to do differently going forward is unknown.⁴ The vagueness and ambiguity of the president’s executive order leads two prominent American legal scholars to doubt its constitutionality.⁵

It is conceivable that the Ford and Trump governments will attempt to meddle with how colleges and universities go about protecting free speech on campus, using the threat of withholding public monies as a lever. In the United States, in any event, the right has demonstrated a keen appetite for this sort of intervention. In 2017, the Goldwater Institute, a right-wing libertarian think tank, and the conservative American Legislative Exchange Council (ALEC) each developed model legislation for safeguarding free speech on campus. The model legislation gives students the right to sue colleges and universities for infringements of their free speech rights; prohibits colleges and universities from disciplining faculty and students for exercising their speech rights; requires college and university administrators to discipline students who interfere with the free speech rights of others; disallows the creation of “free speech zones” that confine expressive activity to one part of campus; and mandates annual public reports on the state of free expression on campus.

2 Lauren Cooley, “Federal Funding, the First Amendment, and Free Speech on Campus”, *Quillette* (24 March 2019), online: <<https://quillette.com/2019/03/24/federal-funding-the-first-amendment-and-free-speech-on-campus/>>.

3 Adam Harris, “Trump’s Redundant Executive Order on Campus Speech”, *The Atlantic* (21 March 2019), online: <<https://www.theatlantic.com/education/archive/2019/03/trump-signs-executive-order-campus-free-speech/585484/>>.

4 Julie Schmid, “Response to President Trump’s Executive Order on Denial of Research Funds” (21 March 2019), online: *American Association of University Professors* <aaup.org/news/response-president-trumps-executive-order-denial-research-funds>.

5 Erwin Chemerinsky & Howard Gillman, “Trump’s executive order on college free speech is unconstitutional”, Op-Ed, *Los Angeles Times* (22 March 2019), online <<https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-gillman-trump-free-speech-college-201903222-story.html>>.

The Goldwater Institute's proposal makes no attempt to mask its agenda, declaring that its ultimate goal is to "change the balance of forces contributing to the current baleful national climate for campus free speech."⁶ The American Civil Liberties Union characterizes the model legislation drawn up by the Goldwater Institute and ALEC as straightforwardly political, intended to support "the embattled minority of conservatives on campus against the 'politically correct' majority."⁷ Also problematic in the view of the ACLU is the heavy emphasis the model legislation places on disciplining students who disrupt speakers or otherwise interfere with the speech rights of their fellow students, substituting state-mandated punishments for the disciplinary policies of individual institutions. Intentionally or not, this punitive approach could have a chilling effect on campus free speech.

The Goldwater Institute and ALEC have a Canadian counterpart: the Justice Centre for Constitutional Freedoms (JCCF), based in Alberta. The JCCF has developed its own model legislation for protecting free speech on campus. Included among its provisions are protection for all speech that does not explicitly violate the sections of the Criminal Code pertaining to hate speech and a requirement that all campus policies affecting speech be viewpoint neutral. While institutions would be allowed to retain their own procedures for dealing with complaints arising in connection with speech on campus, the provincial government would gain authority to conduct its own investigations along with the power to impose significant financial penalties on institutions found to be in violation of the law.

As in Ontario, failure to implement and enforce a campus free speech policy could also result in a loss of provincial funding. Like the model legislation proposed by the Goldwater Institute and ALEC, this bill would seriously impair institutional autonomy. And like its American counterparts, the JCCF's model bill tilts to the right, as revealed by provisions that bar colleges and universities from requiring student groups to pay security costs associated with inviting controversial figures to campus but allowing those who *protest* such speech to be made to foot the bill for any additional security required.

The JCCF bill has not yet been enacted, but in May 2019, the conservative government of Alberta Premier Jason Kenny announced its intention to require Alberta's post-secondary institutions to enact policies about free speech on campus patterned on the University of Chicago "Statement on the Principles of Free Expression."⁸ Observers anticipate that the government's legislation will hew closely to the JCCF model bill.⁹

6 Stanley Kurtz, Jim Manley & Jonathan Butcher, "Campus Free Speech: A Legislative Proposal" (30 January 2017) at 4, online (pdf): [The Goldwater Institute <goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf>](http://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf).

7 American Association of University Professors Committee on Government Relations, "Campus Free-Speech Legislation: History, Progress, and Problems" (April 2018) at 3, online (pdf): aaup.org/file/Campus_Free_Speech_2018.pdf.

8 See Madeline Smith, "Kenney follows Ford's push for campus free speech. But critics say it's a dog whistle for far-right voters", *The Star* (6 May 2019), online: thestar.com/calgary/2019/05/06/alberta-and-ontario-premiers-campus-free-speech-policies-a-dog-whistle-blow-for-the-right-expert.html.

9 See Field Law, Alert, "New Challenges to Free Speech on Campus" (May 2019), online: fieldlaw.com/News-Views-Events/149902/New-Challenges-to-Free-Speech-on-Campus?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.

The legislative battle is much further advanced in the US. By the March of 2019, thirty-nine American states had taken up bills inspired by the model legislation drawn up by the Goldwater Institute and ALEC. In thirteen of these states, the bills became law.¹⁰ At the federal level, similar legislation was introduced early in 2018 by Republican Senator Orin Hatch of Utah.¹¹ Two years earlier, the Republican controlled Senate passed the Anti-Semitism Awareness Act, a like-minded piece of legislation that required the federal government to adopt a definition of anti-Semitism so broad as to risk impugning protected political speech critical of Israel when determining whether schools have violated civil rights laws by failing to protect students from anti-Semitic speech.¹² Hatch's bill failed to clear the Senate and the Anti-Semitism Awareness Act died in the House of Representatives. The sponsors of the latter did not give up, however. The Act was reintroduced in the Senate in 2018 and again in 2019.¹³

The model legislation developed by the Goldwater Institute and ALEC, along with the multiple legislative initiatives undertaken at the state and federal levels for the purpose of safeguarding free speech on campus, testify to the seriousness with which the American conservative movement regards the contest for hearts and minds that it sees being played out at colleges and universities, as well as the lengths to which conservatives are willing to go in order to combat what they regard as the unfair tactics employed by the other side. The same may be said of the Canadian conservative movement in regard to the JCCF's model bill and the directive issued by Premier Ford. It deserves to be noted that, to date, the greater number of legislative efforts to dictate terms on campus free speech have failed. But even failed legislation can be counted as a victory of sorts if it succeeds in framing the ongoing conversation over campus free speech in a way favourable to conservative aims. This could very well be what conservatives hope to achieve by their efforts.

With this in mind, it makes sense to view President Trump's executive order — and Premier Ford's similar directive — as being most importantly an instance of *symbolic politics*. In symbolic politics, what is signaled matters more than any substantive result. Trump's executive order can be understood as yet another volley in the “culture wars” that American conservatives have been fighting for decades. Canadian conservatives have shown an interest in waging a similar struggle, but thus far have been less successful than their American counterparts in generating enthusiasm for a *kulturrekampf* among their base.

10 For data through the end of 2018, see Jonathan Friedman, “Chasm in the Classroom: Campus Free Speech in a Divided America” (April 2019) at 72-75, online (pdf): *PEN America* <pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf>. On Kentucky's campus free speech law, see Christopher Vondracek, “Kentucky's Bevin signs bill to protect expression on campus, ban ‘free speech’ zones”, *The Washington Times* (27 March 2019), online: <washingtontimes.com/news/2019/mar/27/kentucky-enacts-campus-free-speech-law-bans-free-s/>. On Iowa's law, see Stephen Gruber-Miller & Aimee Breaux, “Kim Reynolds signs bill requiring Iowa universities to respect ‘free speech’ on campus”, *Des Moines Register* (27 March 2019), online: <desmoinesregister.com/story/news/politics/2019/03/27/free-speech-on-campus-governor-kim-reynolds-bill-university-iowa-business-leaders-christ-ui-isu-uni/3288307002/>. For a fuller discussion of the model legislation, see also AAUP, *supra* note 7.

11 AAUP, *supra* note 7 at 8.

12 “Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire” (7 November 2017) at 5, online (pdf): *PEN America* <pen.org/wp-content/uploads/2017/11/2017-wrong-answer_11.9.pdf>.

13 US, Bill S 852, *Anti-Semitism Awareness Act of 2019*, 116th Cong, 2019.

It hardly seems like a coincidence that the Ford government is requiring Canadian schools to adhere to principles contained in a statement on free speech issued by the University of Chicago and much celebrated by American conservatives.¹⁴ Indeed, it hardly seems a stretch to say that the tone associated with the politics of free speech on campus has been imported into Canada from the United States, and the whole business, both north and south of the 49th parallel, probably has as much or more to do with electoral strategy than with making fundamental alterations to campus life. It's not that conservative proponents do not want to humble what they regard as an intractably left-leaning academic establishment; it's just that bashing the academic left wins points with the conservative base even if nothing much changes on campus.

Politically speaking, then, the Ford and Trump directives look pretty much the same. From a constitutional standpoint, however, there is a significant difference. While both the American Bill of Rights and the Canadian Charter of Rights afford constitutional protection to the freedom of expression, it is as yet unclear whether or to what extent the Charter guarantee is (or ought to be) applicable to public colleges and universities.¹⁵ In contrast, there is no ambiguity in American constitutional law; the free speech clause of the First Amendment is binding on state-run schools, and private American colleges and universities can be made to conform to the requirements of the First Amendment as a condition of accepting public funds, such as research grants.

Arguably, the uncertainty of the Charter's application to post-secondary education offers Premier Ford a plausible rationale for stepping in to safeguard free speech on campus. This is not to say that the freedom of expression is currently impaired on provincial campuses, nor is to imply that the Premier was moved to act by a well-founded concern regarding the exercise of free speech rights at colleges and universities in Ontario. It is merely to acknowledge that there is nothing inherently wrong with having a provincial government take steps to protect the exercise of a fundamental right in public institutions of higher learning, especially if the protection of the Charter cannot be counted on. How government goes about that, of course, makes all the difference in the world. Useful legislation would not turn campus free speech into a partisan wedge issue, and it would not pre-empt a post-secondary institution's own policies and procedures.

In contrast with the situation in Canada, the well-established applicability of the First Amendment to public schools, and conditionally to private educational institutions as well, would seem to render President Trump's vague and ambiguous executive order redundant.¹⁶ It also undercuts the argument for intrusive legislation to ensure free speech on campus. If stu-

14 Committee on Freedom of Expression, "Report of the Committee on Freedom of Expression", online (pdf): *University of Chicago* <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>.

15 The Supreme Court's understanding of the Charter's relationship to post-secondary education appears to be evolving. Cf Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5:1 *Can J Hum Rts* 59. Model campus free speech legislation developed by Alberta's Justice Centre for Constitutional Freedom (JCCF) would make post-secondary institutions "governmental" and therefore subject to the *Charter's* guarantee of free expression. See Field Law, *supra* note 9.

16 Benjamin Wermund points out on Politico.com that Trump's order "essentially reinforces what schools are already supposed to be doing." Benjamin Wermund, "Trump's hyped free speech order asks colleges to do what they already have to do", *Politico* (21 March 2019), online: <[politico.com/story/2019/03/21/trump-free-speech-college-1286517](https://www.politico.com/story/2019/03/21/trump-free-speech-college-1286517)>.

dents or faculty members at American colleges or universities believe that their First Amendment right to free expression is being infringed by the practices or policies of their institution, they have an effective remedy: they can go to court. As a matter of policy, the added threat of de-funding public institutions that abridge the free speech rights of students and faculty would only appear truly necessary if this judicial remedy were ineffective. But the relevant case law shows just the opposite.

Take the example of speech codes. President Trump referenced speech codes in his remarks at the signing ceremony for his executive order, including them among the stratagems used by the left to shut down conservative voices. In their 2017 book, *Free Speech on Campus*, Erwin Chemerinsky and Howard Gillman report that over 350 American colleges and universities adopted hate speech codes in the early 1990s. The codes were intended to prevent the creation of a hostile learning environment for minority students by curtailing overtly racist speech.

While the architects of these codes did their best to make them consistent with the First Amendment, the task ultimately proved impossible. In practice, as Chemerinsky and Gillman observe of one such policy at the University of Michigan, “the code was used not against the kinds of purely hateful slurs that inspired its passage, but against people who expressed opinions that others objected to.”¹⁷ Under challenge, the University of Michigan’s code was struck down by a federal judge for being impermissibly vague and overbroad, such that it was impossible for the court to discern any limitation on the policy’s reach. In fact, between 1989 and 1995, every court that examined a university speech code found the code to be unconstitutional, either because, as in the University of Michigan case, the code was void for vagueness and overbroad, or because, as in the case of Stanford University, the code was found to penalize speech based solely upon its objectionable content, which violates the long established rule of First Amendment jurisprudence requiring that permissible regulation of protected expression be content-neutral.¹⁸

Shutting down racist hate speech remains a concern on American campuses, more so than on Canadian campuses, because First Amendment jurisprudence treats hate speech as protected speech so long as the impugned utterance does not entail a credible threat of violence.¹⁹ In contrast, the Canadian Supreme Court’s *Keegstra* decision determined that criminalization of the willful promotion of hatred is a reasonable limit on the right to free expression.²⁰ This gives Canadian universities a freer hand when it comes to penalizing hateful speech. In the United States, good faith efforts to curb racist speech on campus ran afoul of the First Amendment because campus speech codes overreached and penalized expression that was offensive

17 Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* (New Haven: Yale University Press, 2017) at 99.

18 *Ibid* at 102. Chemerinsky and Gillman explain that the court in the Stanford case relied on a California statute that prohibits private schools from punishing speech that would be deemed protected in a public institution, thus making Stanford’s speech code subject to First Amendment jurisprudence under which permissible government regulation of expression, such as time, manner and place restrictions, must be content-neutral. See also Timothy C Shiell, *Campus Hate Speech on Trial* (Lawrence, Kansas: University of Kansas Press, 1998), ch 4, for a discussion of the court challenges to campus speech codes.

19 See *RAV v City of St Paul*, 505 US 377 (1992). For a proposal to limit at least some forms of hate speech on campus within the limits set by the First Amendment, see Nadine Strossen, “Regulating Racist Speech on Campus: A Modest Proposal?” (1990) 1990:3 *Duke LJ* 484.

20 *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.

but not threatening. Attempts to anchor speech codes in the anti-discrimination and anti-harassment provisions of federal civil rights law also failed, not because the law is inapplicable to colleges and universities (the federal courts have ruled that it is), but because speech that is merely rude or discourteous or expresses offensive views toward a protected class is not regarded as injurious.²¹

The unqualified defeat of campus speech codes in American courts hardly conforms to Trump's narrative of political correctness run amok. Of course, campus speech codes are not the only or even the primary target of his executive order. At the forefront of the current campus free speech controversy is the practice of "no-platforming" controversial speakers, either by disinviting them or by disrupting their talks. Recent targets have included high profile conservatives such as Ann Coulter, Charles Murray, Milo Yiannopolous, Ben Shapiro, and Richard Spencer.²² Similar incidents have occurred on Canadian campuses involving some of the same figures.

The idea behind no-platforming is to deny persons whose views are deemed utterly reprehensible the appearance of legitimacy (or normalcy) that being invited to speak at a college or university confers. Also at issue are trigger warnings and safe spaces, two other left stratagems for imposing "total conformity" on campus according to Trump. Trigger warnings are cautions issued by professors to their classes so that students who have experienced personal trauma or are otherwise especially vulnerable can avoid exposure to material they might find particularly offensive or disturbing. Safe spaces are designated zones on campus within which expression potentially offensive to historically marginalized social groups is curtailed. Like campus speech codes, trigger warnings and safe spaces are intended to make campuses more inclusive of racial minorities and other persons whose subaltern status makes them subject to discrimination.

There is reason to question just how widespread a problem these practices pose for free speech. In 2018, Zack Beauchamp analyzed data on campus free speech incidents compiled in three separate studies conducted between 2011 and 2018. He reports that the number of confirmed incidents is relatively small, especially when one stops to consider that there are over 4,500 colleges and universities in the United States. Georgetown University's Free Speech Project, which keeps records on all types of free speech incidents involving both faculty and students, cataloged roughly sixty incidents between 2016 and 2018. A study published by the libertarian Niskanen Center looking solely at faculty disciplined or dismissed because of expressly political speech turned up a total of forty-five cases between 2015 and 2017. The Foundation for Individual Rights in Education (FIRE), a nonprofit educational foundation, tracked the number of *attempts* to disinvite speakers from American campuses between 2011 and 2017 and found that the number ranged between 20 and 42 disinvitations per year. As reported by FIRE, the actual numbers of speakers disinvited in each year were considerably lower: 12 in 2011 and 24 in 2016 (the year with the highest number of attempted disinvitations).²³

21 Chemerinsky & Gillman, *supra* note 17 at 118–120.

22 For a discussion of these and other incidents, see Friedman, *supra* note 10 at 5–46; see also Chemerinsky & Gillman, *supra* note 17 at 1–21.

23 FIRE, "Disinvitation Database", online: FIRE <thefire.org/research/disinvitation-database/#home/?view_2_per_page=500&view_2_page=1>.

In short, while any interference with free speech on campus is regrettable, the relatively low number of incidents hardly supports the notion of there being a free speech crisis at American colleges and universities. Moreover, as Beauchamp points out, a fairly large percentage of the individuals targeted in these incidents were liberals, which further serves to undercut the argument that conservatives are at a particular disadvantage on campus when it comes to exercising their speech rights.²⁴

Comparable data regarding incidents on Canadian campuses is harder to come by. If one were to judge by the annual Campus Freedom Index issued by the Justice Center for Constitutional Freedoms (JCCF) since 2011, it would appear that free speech is gravely endangered at virtually all of Canada's colleges and universities. Graded on a scale of A through F, most institutions consistently receive low or failing marks for having inadequate policies safeguarding free speech and abominable practices affecting speech.²⁵ Sadly, the index does not provide a tally of incidents. It is impossible to know from the assigned grades how many outside speakers have had their invitations canceled or how many students have faced disciplinary measures for having expressed a disfavoured opinion.

What seems to irk the JCCF are policy statements that contain any proscription of offensive, discriminatory, or disrespectful speech; institutional funds going toward any group that engages in "ideological advocacy" by promoting "vague and ambiguous concepts" such as "diversity" and "inclusion;" and the failure to penalize students who disrupt speakers or otherwise interfere with free expression.²⁶ The JCCF's own ideological orientation is revealed clearly enough by its characterization of speech in favour of diversity and inclusion as "ideological advocacy." By this token, it is easy to imagine that the JCCF criteria would justify labeling the government of Canada a mouthpiece for the ideology of the extreme left because it celebrates multiculturalism, embraces the nation's diversity, and expresses a commitment to including historically oppressed and marginalized groups in the social and political life of the nation. Perhaps in their own minds, the authors of the JCCF criteria made a distinction between official multiculturalism and "ideological advocacy," but the criteria themselves do not make any such distinction clear. And, are we really to believe that free speech is impaired on campus if there are prohibitions on offensive and disrespectful speech in the classroom or in living areas?

This is not to say that there have been no free speech incidents on Canadian campuses. If, as Beauchamp reports, there have been dozens of incidents on American campuses every year, it is safe to assume that Canadian campuses have experienced a proportionately similar number. Anecdotal information abounds. But while everyone might know a story involving the likes of Jordan Peterson²⁷ or Ann Coulter²⁸, it seems unlikely that the incident rate in

24 Zack Beauchamp, "The myth of a campus free speech crisis", *Vox* (31 August 2018), online: <[vox.com/policy-and-politics/2018/8/31/17718296/campus-free-speech-political-correctness-musa-al-gharbi](https://www.vox.com/policy-and-politics/2018/8/31/17718296/campus-free-speech-political-correctness-musa-al-gharbi)>.

25 For the most recent findings, see "Campuses" (2020), online: *Campus Freedom Index* <campusfreedomindex.ca/campuses/>.

26 See "Methodology" (2020), online: *Campus Freedom Index* <campusfreedomindex.ca/methodology/>.

27 Peterson was shouted down when he tried to deliver a talk at McMaster University in 2017. Colleen Flaherty, "Hijacking a Fundamental Right", *Insider Higher Ed* (21 March 2017), online: <insiderhighered.com/news/2017/03/21/shouting-down-controversial-speaker-mcmaster-raises-new-concerns-about-academic>.

28 In 2017 Coulter cancelled a scheduled talk at the University of Ottawa out of security concerns after some 200 students held a protest. Michael Rowe, "Sorry Ann Coulter, Canada's Just Not That Into

Canada is higher than that recorded in the US — which, in the Trump era, has shown itself to be a far more volatile political environment than its northern neighbour.

Still, even if talk of a free speech crisis on American and Canadian campuses is overblown, the relatively small number of incidents that have occurred should be a cause for concern to anyone worried about the future of free expression. This is for two reasons. First, recent surveys show that while American students are generally supportive of free speech in the abstract, a majority of them also show a deep ambivalence toward tolerating expression that is racist, sexist, homophobic, or otherwise offensive.²⁹ In Canada, where the right to free expression is not as deeply rooted in the political culture, acceptance of limitations on offensive speech of this sort in the interest of making all members of the community feel secure and protected is already the default position.³⁰ Second, the arguments mobilized in defense of speech codes, no-platforming, and to a lesser degree, trigger warnings and safe spaces demonstrate a troubling willingness to sacrifice free speech in the interest of creating an inclusive campus community. To the extent that these arguments take hold in the academy (and beyond), they could further erode the majority's willingness to tolerate offensive and controversial speech.

PEN America's 2019 white paper on campus free speech, *Chasm in the Classroom*, goes so far as to warn of “a looming danger that our bedrock faith in free speech as an enduring foundation of American society could give way to a belief that curtailing harmful expression will enable our diverse population to live together peaceably.”³¹ Taken at face value, PEN America's worry appears to be that the United States will come to be more like Canada. But the real danger here is that both countries will become increasingly less tolerant of speech that is merely offensive and not truly injurious.

Although Americans have been taught for generations that the freedom of expression is the first freedom, prerequisite to all the rest, the fact is that the idea of giving *everyone* free speech has never enjoyed anything close to unanimous support. On the contrary, as Chemerinsky and Gillman point out, “American history amply demonstrates that there is no natural or inevitable intuition to support disruptive, offensive, or even countercultural speech.”³² In the decade following the Second World War — an era today's students are likely to regard as ancient history — conservatives argued that free speech must be weighed against the nation's security. The balance they favored placed the expression of pro-communist sympathies beyond the pale of tolerable discourse, with dire repercussions for free

You”, *Huffington Post* (6 December 2017), online: <[huffpost.com/entry/sorry-ann-coulter-canadas_b_513865?guccounter=1&guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAAA-wMDPYA75gLo2JySVafGU82n9CFpJM7c_HxCTnZnZmmo0EAF52gm-C7620ufPZEYYk4nBpsOXk2SI623ysjzRbEtOShTqrrCAhsKexyiXz9WKTOfvZwP34N6gYaTwxXagaDwAA9FcA0xN-55dThjUIJK7JR2PbgcMJZdB4gxK](https://www.huffpost.com/entry/sorry-ann-coulter-canadas_b_513865?guccounter=1&guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAAA-wMDPYA75gLo2JySVafGU82n9CFpJM7c_HxCTnZnZmmo0EAF52gm-C7620ufPZEYYk4nBpsOXk2SI623ysjzRbEtOShTqrrCAhsKexyiXz9WKTOfvZwP34N6gYaTwxXagaDwAA9FcA0xN-55dThjUIJK7JR2PbgcMJZdB4gxK)>.

29 Chemerinsky & Gillman, *supra* note 17 at 9; Friedman, *supra* note 10 at 60-71; Conor Friedersdorf, “America's Many Divides Over Free Speech”, *The Atlantic* (9 October 2017), online: <[theatlantic.com/politics/archive/2017/10/a-sneak-peek-at-new-survey-data-on-free-speech/542028/](https://www.theatlantic.com/politics/archive/2017/10/a-sneak-peek-at-new-survey-data-on-free-speech/542028/)>.

30 Rhoda Howard-Hassmann, “Canadians Discuss Freedom of Speech: Individual Rights Versus Group Protection” (2000) 7:2 *Intl J Minority & Group Rts* 109; Cf Paul M Sniderman et al, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1997) at 57-8.

31 Friedman, *supra* note 10 at 9.

32 Chemerinsky & Gillman, *supra* note 10 at 12.

speech on campus.³³ At the time, it was the left that championed a broader interpretation of the right to free expression, arguing that the fate of allegedly “un-American” ideas be decided through free and open debate. Today, the players in America’s never-ending conversation about free speech have repositioned themselves. Those wanting to balance free speech against other important values are on the left, while the right bemoans a free speech crisis on campus.

It is impossible to imagine President Trump standing in the footsteps of the civil libertarians who took a brave stand against the anti-communist hysteria of the 1950s. Critics of his executive order have pointed out that, as president, he has demonstrated little interest in defending the First Amendment. On the contrary, his characterization of the news media as “enemies of the people” and oft repeated preference for stronger libel laws reveal him as having little appreciation for First Amendment values. Small wonder that critics see his executive order on campus free speech as a crassly partisan measure.³⁴ The danger in this for anyone genuinely concerned about the state of free speech on campus is that the very real concerns identified by the likes of the ACLU, Chemerinsky and Gillman, and PEN America will be overlooked in the sort of partisan brawl that President Trump appears to enjoy.

When it comes to weighing the value of free speech against good faith efforts to combat prejudice and build more inclusive campuses, there is no obvious right answer. But in the United States, First Amendment jurisprudence provides a framing mechanism within which the discussion can proceed. Using First Amendment law as their guide, Chemerinsky and Gillman helpfully enumerate what public colleges and universities may and may not do to create inclusive learning environments:

Public colleges and universities may not censor or punish speech merely because some or even many persons consider it offensive or hateful; they may, however, censor or punish credible threats of physical injury, speech acts that meet the legal criteria for harassment, and other speech acts not protected by the First Amendment, like libel and slander.

Public colleges and universities may not prevent protests on campus or impose restrictions that render protest ineffective; however, they impose time, place, and manner restrictions on protests for the purpose of preventing protestors from disrupting the normal operation of classes and other educational activities.

Public colleges and universities may not impose content-based restrictions on speech in living areas on campus; however, they may impose content-neutral speech restrictions in dormitories designed to ensure a supportive living environment for students.

33 For a timely reminder of what the McCarthy era was like, see Geoffrey R Stone, “Free Speech in the Age of McCarthy: A Cautionary Tale” (2005) 93:5 *Cal Law Rev* 1387.

34 See e.g. Patricia McGuire, “Whose Freedom of Speech?,” *Inside Higher Ed* (27 March 2019), online: <insidehighered.com/views/2019/03/27/trumps-free-speech-executive-order-protects-only-those-right-political-spectrum/>; Leah Asmelash, “Academic Freedom: Move to protect free speech on US campuses raises concerns,” *Index: The Voice of Free Expression* (29 April 2019), online: <indexoncensorship.org/2019/04/move-to-protect-free-speech-on-us-campus-es-raises-concerns/>; Osita Nwanevu, “Trump’s Free-Speech Executive Order and the Right’s Fixation on Campus Politics,” *The New Yorker* (22 March 2019), online: <[newyorker.com/news/current/trumps-free-speech-executive-order-and-the-rights-fixation-with-campus-politics](https://www.newyorker.com/news/current/trumps-free-speech-executive-order-and-the-rights-fixation-with-campus-politics)>.

Public colleges and universities may not selectively censor or punish some speakers but not others based on the content of their speech; however, they may employ content-neutral regulations governing on-campus expression, for example a rule allowing leaflets to be distributed in public areas of campus but not in student residences.

Public colleges and universities may not penalize faculty or students for what they say in a private capacity on matters of public concern; however, faculty and students should expect to have their scholarly work evaluated according to professional standards.

Public colleges and universities may require that all student organizations, as a condition of receiving funding and official recognition, be open to all students; however, they may not deny recognition or funding to a student organization or penalize it on account of the views expressed by the organization, its members, or the outside speakers it hosts.³⁵

Chemerinsky and Gillman see no impediment to trigger warnings or even safe spaces in principles derived from the First Amendment, so long as the former are not imposed by the administration on reluctant professors and the latter are conceived as educational settings designed to ensure that students feel free to express themselves and are not used to censor speech deemed too offensive for students to hear. No-platforming speakers, on the other hand, is clearly at odds with First Amendment principles. Public colleges and universities have a constitutional obligation to ensure that protestors do not exercise the heckler's veto. Again, Chemerinsky and Gillman's list of constitutional dos and don'ts is legally binding on public colleges and universities, not private schools; but they offer it as a workable and appropriate set of guidelines for both.³⁶

It is certainly useful for colleges and universities to know what the law is when it comes to regulating speech on campus. But in order to shore up support for the broad, robust conception of free speech associated with the First Amendment today, it is necessary to present a compelling argument that what the law requires is also the right thing to do. Laws can change — American courts did not always interpret the free speech clause of the First Amendment as a shield for speech that legislative majorities and public opinion found dangerous or morally pernicious. It is not impossible to think that the judicial tide could change once again, acted upon by the tangled political currents that give us President Trump's showboating executive order on the one hand and the zeal shown by elements of the campus left for no-platforming on the other.

While Canada has its own constitutional tradition of free expression to help frame the debate over campus free speech, the normative challenge is the same in Canada as in the United States. Legal doctrine must be backed up by a morally compelling defense of allowing offensive and otherwise controversial speech that a great many persons consider indefensible. Selling any such defense to a skeptical public is no easy task and never was, which is why organizations like the ACLU and PEN America stress the need for educating the current generation of American students about the importance of First Amendment values to the struggle for civil rights and social justice in the United States. There is a similar case to be made for educating Canadian students about the Charter right to free expression and how it actually

35 Chemerinsky & Gillman, *supra* note 17, ch 5.

36 PEN America offers similar guidelines. Friedman, *supra* note 10 at 91-94.

contributes to a more inclusive campus and fosters greater comity in a diverse, multicultural society.

Free speech advocates also need to challenge the absolute moral certainty, not infrequently paired with a profound sense of victimization, which one too often encounters on both the right and the left. Sure that their cause is righteous, and equally certain that they have suffered unjustly, partisans in the free-speech wars tend to view the politics of free speech on campus as a zero sum game. The result is as unfortunate as it is predictable. If one's goal is to make secure the expression of "good" speech and to stifle "bad" speech, having the better argument matters less than having the power to assign and enforce these labels. Ironically, this divorces the struggle over free speech from speech itself. If power is allowed to decide the question of what may and may not be said on campus, then only those persons and groups favoured by the powerful will have the right to speak freely — and only for as long as they remain in favour.