AMERICAN CONSTITUTION SOCIETY

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The First Amendment in Flux

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

The rights protected by the First Amendment to the U.S. Constitution, including freedom of religion, speech, assembly, and petition, are essential for the proper functioning of a responsive democracy.[*] But these freedoms often operate in tension with one another, with other constitutional rights, and with values central to a pluralistic, multiracial democracy. Balancing these tensions requires good faith, respect, and vibrant political and legal discourse—elements that are in short supply in the current landscape.

With a conservative supermajority controlling the U.S. Supreme Court, a U.S. President that has demonstrated a dismissive attitude towards the rights of those whom he views as his political or ideological enemies, and many states' legislative, judicial, and executive branches controlled by one party, our political and legal system may be ill-equipped to balance these tensions, resulting in skewed and inconsistent applications of First Amendment rights.

This Program Guide offers an overview of some of the First Amendment issues implicated by recent doctrinal developments as well as executive and legislative actions at the federal and state level. The topics selected for this Program Guide are not exhaustive but are meant to provide a starting point for chapters as they consider upcoming programming on the First Amendment and related issues.

I. The Roberts Court's Retrograde First Amendment

During a public event in 2019, U.S. Supreme Court Chief Justice John Roberts commented, "I'm probably the most aggressive defender of the First Amendment. Most people might think that doesn't quite fit with my jurisprudence in other areas. . . . People need to know that we're not doing politics. We're doing something different. We're applying the law." Yet, in recent years, the Roberts Court has gone out of its way to rewrite First Amendment law and unwind decades

[*] Freedom of the press, another critical tenet protected in the First Amendment, is beyond the scope of this Program Guide. For more information and speaker recommendations for freedom of the press, see our previous Program Guide, Fighting for Our First Freedoms.

of well-established precedent as it pursues an obvious conservative agenda and wades into the culture wars on the side of religious litigants time and time again. And its hostility to stare decisis in this area fits quite comfortably with Chief Justice Roberts' jurisprudence in other areas, as found by a survey of his decisions conducted by Take Back the Court.

Even before Justice Amy Coney Barrett was confirmed in 2020 to Justice Ruth Bader Ginsburg's seat and dramatically shifted the ideological balance of the Court to the right, the Roberts Court was measurably "far more likely to embrace free-speech arguments concerning conservative speech than liberal speech . . . [in] a sharp break from earlier eras," according to a 2018 *New York Times* report. And Chief Justice Roberts has been the driving force of this conservative project. A 2021 study revealed that Chief Justice Roberts has authored significantly more First Amendment free expression majority opinions than any other justice and voted in the majority 95% of the time in such cases, as of the report's publication date.

A. Campaign Finance and Freedom of Speech

Nowhere was this trend been more apparent than in a series of cases featuring conservative challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA). In short order, the Court heard and decided *FEC v. Wisconsin Right to Life* in 2007, followed by *Citizens United v. FEC* in 2010, *McCutcheon v. FEC* in 2014, and *FEC v. Cruz* in 2022. These decisions have reshaped modern politics. In *Citizens United*, the majority maintained that is was compelled to overturn a twenty-year precedent because it was "undermined by experience since its announcement." As Justice Breyer wrote in his opinion dissenting from the majority's main holding, "if [stare decisis] is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine." Over the past twenty years, the Roberts Court's campaign finance jurisprudence has prioritized the First Amendment rights of corporations and wealthy people while downplaying the government's interest in regulating the deleterious effects that the subsequent record-setting amounts of dark money may have on our elections.

B. Speech the Justices Find Distasteful

Many of the same justices who have opened the floodgates of corporate and dark money in deference to the First Amendment have demonstrated less concern for speech with which they disagree. In recent years, the Court has taken up a number of cases focused on the regulation of pro-LGBTQ+ speech and speech that states have deemed "harmful to minors." The Court's most recent term featured two such cases: *Free Speech Coalition v. Paxton* and *Mahmoud v. Taylor*.

In *Free Speech Coalition*, the Court upheld a Texas law that requires websites hosting material that the state deems "harmful to minors" to verify that users are over 18 years old. In 2004, the Court reached a completely different result on nearly identical facts in *Ashcroft v. ACLU*. All parties in the case agreed that protecting minors from pornographic material was a compelling state interest, but the dispute arose over how narrowly tailored Texas's solution to that problem was and what impact the state's regulation would have on the protected speech of adults.

Justice Kagan in her dissent in *Free Speech Coalition* accuses the majority of backing into the practical result that it wanted with "a maneuver found nowhere in the world of First Amendment doctrine," with complete disregard for the protected speech rights of affected adults. And as one scholar has noted, the law passed by Texas was both overinclusive and underinclusive and the state's definition of the content in question "gives rise to serious vagueness and overbreadth issues, especially in light of recent conservative attempts to characterize LGBTQI+ content as inherently pornographic." One foreseeable result of such regulation is that anonymity of speech will be corroded, and thus speech chilled, for both minors and adults.

In *Mahmoud v. Taylor*, the 6-3 conservative majority took aim at speech in public school classrooms that acknowledged the existence of LGBTQ+ people. A group of parents from several faith traditions sued a Maryland public school board after the public elementary school their children attend added LGBTQ+-inclusive books to the school's curriculum. The parents claimed that the inability to opt their children out of such content violated their free exercise rights and a 6-3 Court agreed with their position. Writing for the majority, Justice Samuel Alito went out of his way to misrepresent the content of the books and object to children's exposure to the idea that gay people exist. As Justice Sotomayor wrote in dissent:

> The majority's myopic attempt to resolve a major constitutional question through close textual analysis of *Uncle Bobby's Wedding* also reveals its failure to accept and account for a fundamental truth: LGBTQ people exist. They are part of virtually every community and workplace of any appreciable size. Eliminating books depicting LGBTQ individuals as happily accepted by their families will not eliminate student exposure to that concept. Nor does the Free Exercise Clause require the government to alter its programs to insulate students from that "message."

The holding in *Mahmoud* has been celebrated by conservative religious advocates and decried by advocates for public education. The Court's decision, creating a requirement for public schools that parents be able to opt their children out of any part of the curriculum they claim to be contrary to their religious beliefs, will create chaos for educators and result in chilling of speech in the classroom.

During the same term, the Court declined to hear a First Amendment challenge to Tennessee's Adult Entertainment Act, banning public performances that are "harmful to minors," most notably drag performances. The Court's denial of cert allowed the ban to go into effect, although the Sixth Circuit Court of Appeals later narrowly interpreted the law so as not to include drag performances. It is unclear where the justices land on the question of drag bans and similar laws targeting performances that conservatives have deemed "harmful to minors." What is clear is that as observed by Robert Kim, Executive Director of the Education Law Center, after the conclusion of the Court's most recent term: "[T]his Court continues to be enthralled by the Free Exercise Clause–to such an extent that it is willing elevate religious rights

above other constitutional interests, including the separation of church and state and equal protection."

C. Shifting Relationship Between the Establishment and Free Exercise Clauses

As we noted in our 2024 Program Guide, Securing Rights in Every Community, the Court has only recently abandoned the principle that the First Amendment's two religion clauses should be held in balance to allow religious practice to be neither compelled nor inhibited by the government. In recent years, the Roberts Court has so dramatically altered the balance between the Establishment Clause and the Free Exercise Clause that the latter now threatens to subsume the former entirely.

1. The Slide to Compulsory Public Funding of Religious Organizations

In 2017, the Court made its initial step toward compelling public funding for religious institutions in *Trinity Lutheran Church v. Comer*. In a decision authored by Chief Justice Roberts, the Court held that a Missouri state agency violated the Free Exercise Clause by denying a religious organization the opportunity to participate in a grant program to resurface playgrounds solely because of the organization's religious character. Justice Sotomayor noted in her dissent, "The Court today profoundly changes [the relationship between religious institutions and the civil government] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church."

In 2020, the Court went further, with Chief Justice Roberts writing for the majority once again in *Espinoza v. Montana Department of Revenue* that "a state need not subsidize private education. But once a state decides to do so, it cannot disqualify some private schools solely because they are religious." Montana created a program to provide a tax-credit to individuals and entities who donated to private, nonprofit scholarship organizations and prohibited scholarship recipients from using their scholarship funds at religious schools. The Court found the state's prohibition on scholarship funds flowing to religious schools to violate the Free Exercise Clause of the First Amendment.

In 2022, Chief Justice Roberts completed his religious public funding trifecta in *Carson v. Makin*, writing for the majority that Maine's tuition assistance program, which provided money to families in rural areas for private, nonsectarian school tuition when no public school was easily accessible, violated the Free Exercise Clause as it "operate[d] to identify and exclude otherwise eligible schools on the basis of their religious exercise."

In just half a decade, the Court moved from *allowing* religious organizations to benefit from public funding programs for secular purposes to *allowing* public money to flow to private religious schools for religious education to *requiring* public money to flow to private religious schools for religious education should a state choose to allow for any public money to flow to any private schools. This slide caused Justice Sotomayor to note in her *Carson* dissent that "[t]he Court's increasingly expansive view of the Free Exercise Clause risks swallowing the space

between the Religion Clauses that once 'permitted religious exercise to exist without sponsorship and without interference.'" As Professors Ira Lupu and Robert Tuttle noted in the immediate aftermath of *Carson*, "the Court in five short years has used the [trilogy of cases] to turn the law of the Religion Clauses upside down, without any analysis of text, history, or precedent."

In response to the *Carson* decision, the Archdiocese of Oklahoma City and the Diocese of Tulsa applied to the Oklahoma Statewide Charter School Board to form St. Isidore of Seville Catholic Virtual School. St. Isidore would provide online classes, including religious curriculum, at what would be the nation's first public religious charter school. The Board approved the school's contract, which stated that St. Isidore has the right to freely exercise its religious beliefs and practices and explicitly notes the school's affiliation with a nonpublic sectarian school or religious institution. Oklahoma Attorney General Gentner Drummond sought a writ of mandamus directing the Board to rescind the school's contract, which the Oklahoma Supreme Court granted. After hearing argument in the case this past term, a divided 4-4 U.S. Supreme Court (with Justice Barrett recusing herself presumably due to a connection with a lawyer who advised St. Isidore) affirmed the lower court's holding without explanation. Given the 4-4 split, it remains to be seen what might happen in a similar case in which Justice Barrett does not feel compelled to recuse herself.

2. Religious Intrusion into Public Education

At the same time that the Court has opened government coffers to religious organizations, particularly religious schools, it has opened the schoolhouse doors to public displays and performance of religious expression. It has done so in the face of five decades of well-established and refined precedent. In 1971, the Court issued a decision in *Lemon v. Kurtzman* establishing what would come to be known as the *Lemon* test. For a law and/or government action to be constitutional under the Establishment Clause: 1) it must have a secular purpose; 2) "its principal or primary effect must be one that neither advances nor inhibits religion"; and 3) it must not "foster an excessive government entanglement with religion." The Roberts Court would abandon the *Lemon* test entirely 51 years later.

In 2022, Justice Neil Gorsuch wrote for a 6-3 court in *Kennedy v. Bremerton School District*, "given the apparent 'shortcomings' associated with *Lemon*'s 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned *Lemon* and its endorsement test offshoot.'" The Court would instead apply a history and tradition test that has become a favorite of the Roberts Court. The facts of the case, that a high school football coach led public prayers with student athletes on the 50-yard line after games, were recharacterized so dramatically that Justice Sotomayor included photographs in her dissent to dispute the majority's narrative of a quiet moment of private prayer. The Court announced the new history-and-tradition test but spent no time explaining or applying its new test, "reserv[ing] any

meaningful explanation . . . for another day, content for now to disguise it as established law and move on," as Justice Sotomayor's dissent observed.

In the wake of *Kennedy*, conservative lawmakers have unleashed a torrent of new rules and regulations aimed at bringing Christian teachings and expressions of faith into public schools. Earlier this year, the Fifth Circuit Court of Appeals ruled that Louisiana's H.B. 71, requiring public schools to display the Ten Commandments in every classroom regardless of class-subject matter, was unconstitutional. Louisiana has asked the Fifth Circuit to review the decision en banc. A similar law in Arkansas is currently being blocked by a district court judge while another in Texas has been the subject of several recently filed lawsuits.

Taken together, the Court's recent Establishment and Free Speech cases have resulted in "a constitutional doctrine of equal funding without equal regulation" of religion and significantly eroded the founding principle of separation of church and state to advance the project of Christian nationalism. And conservative lawmakers have taken notice, passing laws that in the recent past would have been quite obviously unconstitutional. Yet, as Justice Sotomayor wrote in her *Carson* dissent "with growing concern for where this Court will lead us next," "the Court leads us to a place where separation of church and state becomes a constitutional violation." Rather than enforcing a strict separation of church and state, the Roberts Court increasingly sides with religious litigants seeking public benefit or governmental endorsement. The Court seems determined to elevate one clause above all others.

3. Preferential Treatment for (Some) Religious Beliefs

On February 6, 2025, President Trump issued an executive order entitled "Eradicating Anti-Christian Bias," establishing a taskforce within the Department of Justice to review all activities of executive departments and agencies during the Biden Administration and identify any "anti-Christian policies, practices, or conduct." At the taskforce's first meeting, testimony included a Navy Seal relieved of duty for not taking the COVID-19 vaccine and a pastor of a church investigated by the Internal Revenue Service (IRS) for violating restrictions on churches that receive tax-exempt status. On July 7, 2025, the IRS in a court filing announced that it would no longer enforce the 1954 provision in the tax code, referred to as the Johnson Amendment, that restricts churches from endorsing political candidates at the risk of losing their tax exempt status. On July 28, 2025, the Office of Personnel Management released a memo saying that federal workers can now proselytize at work. These moves by the administration are encouraged and enabled by the Supreme Court's recent string of Establishment Clause decisions.

Discussion Questions

With the Court taking up another BCRA provision in next term's *NRSC v. FEC*, what does the future hold for campaign finance reform? What are the legal and policy implications of the public square and marketplace of ideas migrating to the internet and social media platforms? How can we protect speech online while building a truly pluralistic, multiracial democracy? Is

there still a meaningful separation of church and state and if so, what are the boundaries? How does the Court's decision in *Fulton v. Philadelphia* fit in to the Court's First Amendment jurisprudence and is *Employment Division v. Smith* the next well-established First Amendment precedent to fall? What policies could states enact now to get ahead of the Court's growing appetite for public funds for religious schools? How should litigators adapt to a Supreme Court willing to distort or misread the factual record when grappling with speech it agrees or disagrees with?

Resources

MARIA PINO & JULIA FISHMAN, BRENNAN CTR. FOR JUSTICE, FIFTEEN YEARS LATER, CITIZENS UNITED DEFINED THE 2024 ELECTION (2025); Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199 (2025); Preston C. Green III & Suzanne E. Eckes, *All Aboard! Making Charter School Boards All-Purpose State Actors Under the Supreme Court's Amtrak Case*, 71 DRAKE L. REV. 561 (2024); Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. ILL. L. REV. 1943 (2022); Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles*, 5 AM. CONST. SOC'Y SUP. CT. REV. 221 (2021); Linda Greenhouse, *The Urgent Supreme Court Case That's Not Getting Enough Attention*, N.Y. TIMES (Mar. 9, 2025); Peter Smith, *Trump Energizes Conservative Christians with Religious Policies and Assaults on Cultural Targets*, PBS NEWS (Aug. 7, 2025); STRICT SCRUTINY: *Law & Religion on the Barrett Court* (Apple Podcast, Aug. 1, 2022).

II. The Trump Administration's Assault on the First Amendment

The beginning of President Donald Trump's second administration has been marked by explosive activity within the executive branch, including more than 196 executive orders as of the time of this writing. That is more than triple the number of executive orders President Trump issued during the entire first year of his previous term in office and far outpaces any of his recent predecessors. Many of these executive orders seek to achieve their policy aims by leveraging the coercive power of the executive branch's civil and criminal enforcement authority and its role administering federal funding to influence or retaliate against people or institutions whose speech or activity the administration disagrees with. In many instances, this has raised serious concerns about rampant violations of First Amendment rights to speech, assembly, association, and petition.

A. Diversity, Equity, Inclusion, and Accessibility

Programs designed to advance diversity, equity, inclusion, and accessibility (DEIA) have come under sustained assault since the Supreme Court's 2023 decision in *Students for Fair Admission v. Harvard* ending affirmative action in most colleges. Since the decision, nearly 200 cases have been filed in federal court challenging diversity and inclusion programs. President Trump has issued executive orders dismantling diversity and equity programs across the federal government and launching investigations into allegedly illegal DEIA practices in the private sector. And dozens of bills have been filed and enacted ending DEIA programs at colleges and

universities and limiting discussion of "divisive concepts" relating to race and gender at the state level.

Practices challenged under the DEIA umbrella range from trainings on unconscious bias, to affinity groups that support employees of color, to scholarship programs for underrepresented students. While proponents of anti-DEIA measures frame them as an attempt to uplift merit, excellence, and intelligence and root out discrimination, opponents have framed anti-DEIA measures as an attempt to silence or censure necessary conversations about the nation's history and the ongoing challenges faced by women, people of color, and other historically oppressed groups. The courts have mediated this conflict, balancing federal, state, and private litigator interests with First Amendment concerns.

Contemporary battles over racial equity, gender, and sexuality and the First Amendment have challenged and rearranged longstanding debates about the tension between free speech and efforts to address discrimination. In recent decades, some progressive advocates have criticized Supreme Court decisions upholding First Amendment rights in the face of antidiscrimination laws, like *Boy Scouts of America v. Dale*, which interpreted the Boy Scout's First Amendment right of expressive association to include excluding gay members, and *303 Creative v. Elenis*, which held that a generally applicable anti-discrimination law violated a web designer's First Amendment expressive speech and association rights by compelling her to design websites for same sex weddings or face civil penalties. In the new legal environment, some progressive litigators are now using those same precedents to defend pro-diversity programs and policies.

In *Saadeh v. New Jersey State Bar Association*, a New Jersey appellate court found that the Bar Association's policy of reserving a certain number of board seats for attorneys from underrepresented groups was a form of protected "expressive association." In reaching this finding, the court relied heavily on the reasoning in *Dale* that the state's interest in ensuring access to public accommodations regardless of sexual orientation could not justify the "severe intrusion" of compelling the Boy Scout's to modify their membership requirements to include gay men. Applying these principles to the New Jersey State Bar association, the court found that compelling the Bar to modify its inclusion policy would force the organization to send the message "that it no longer cares, or cares as much, about diversity in general or about assuring access to leadership positions for underrepresented groups in particular."

In *American Alliance for Equal Rights v. Fearless Fund*, a district court relying on *303 Creative* similarly initially characterized an investment program designed for Black woman (who currently receive less than 1% of venture capital funding) as expressive conduct protected by the First Amendment, when the program was charged with violating federal laws outlawing racial discrimination in contracting. The Eleventh Circuit distinguished *Fearless Fund* from *303 Creative*, finding that there was a difference between advocating race discrimination and practicing it—a distinction between "status and message." But unlike the New Jersey court, the Eleventh Circuit did not consider the more analogous example set by *Dale*, which, if applied,

might have led the court to find that Fearless Fund's expressive association rights would be violated if it was not allowed to choose whom it funds.

While the line between "expression" and "conduct" remains contested, courts have generally upheld the rights of public and private employers to determine what topics they wish to cover and what views they wish to express to their employees on matters of diversity. In *Henderson v. Springfield*, a district court rejected arguments that a pro-DEIA training held by a public school district constituted compelled speech, finding that plaintiffs "were not forced to wear an arm-band classifying them as white supremacists or to suffer any comparable penalty." Last year, in *Honeyfund.com, Inc., v. Desantis*, the Eleventh Circuit upheld an injunction against Florida's "Stop WOKE" Act, which prevented employers from requiring employees to attend DEIA trainings that endorsed certain concepts regarding race, color, sex, and national origin, characterizing the restrictions as a clear case of viewpoint and content discrimination impermissible under the First Amendment.

The corollary is that there are no free speech issues implicated when private employers move away from DEIA or when public universities shutter their DEIA programs. The Supreme Court has held that as a general matter, "when the government appropriates public funds to establish a program, it is entitled to define the limits of that program," including what speech activities it chooses to subsidize, without violating the First Amendment. But the First Amendment prohibits the government from "seek[ing] to leverage funding to regulate speech outside the contours of the program itself." Courts have varied in their approach to determining how these principles apply to First Amendment challenges to the DEIA executive orders.

In his Second Administration, President Trump has issued new executive orders ending diversity, equity, inclusion, and accessibility and environmental justice programs across the federal government, eliminating federal grants and contracts for DEIA, requiring recipients of federal funding to certify that they do not operate "any programs promoting DEI that violate any applicable Federal antidiscrimination laws," and directing the government to investigate "illegal DEI" practices in the private sector.

In *National Association of Diversity Officers in Higher Education v. Trump*, a Maryland-based federal district court issued a preliminary injunction against the certification provisions of the DEIA executive orders "because on its face it constitutes a content-based restriction on the speech rights of federal contractors and grantees, and further because such restriction expands to all of those contractors' and grantees work, whether funded by the government or not." However, the Fourth Circuit stayed the injunction, with a three judge panel unanimously writing that the government had a strong likelihood of success on the merits because the plaintiffs did "not challenge any particular agency action implementing the Executive Orders." The judges reasoned that the "Certification" and "Enforcement Threat" provisions applied only to conduct that violates existing federal anti-discrimination law. In *National Urban League v. Trump*, a district court reached similar findings, interpreting the provision as merely "requiring

counterparties to certify that they do not violate federal laws that they are otherwise obligated to comply with" and noting that the fear of violating federal antidiscrimination law cannot support a "chilling effect" claim under the First Amendment.

But while both courts narrowly interpreted the term "illegal DEI" to describe practices that are already unlawful under prevailing nondiscrimination law, the government has recently signaled that its definition of "illegal DEI" may be more expansive. Recent guidance from the attorney general suggests that facially neutral practices like diversity statements, geographic recruitment, and cultural competence requirements, may now be "illegal" in the administration's eyes. As civil rights organizations have pointed out in their response to the memo, "courts, not federal agencies" have the final say on federal law, and many of the practices criticized in the guidance memo have been affirmatively embraced by the Supreme Court. Nevertheless, fear and uncertainty over the outcome of a federal investigation and the desire to avoid provoking the administration's wrath may lead some organizations to comply in advance.

In *Chicago Women in Trades v. Trump*, an organization providing technical assistance and gender equity trainings to attract and retain women in the skilled trades successfully challenged the termination and certification provisions. A federal judge issued a nationwide preliminary injunction in favor of CWIT against the certification provision, finding that the provision's reference to "programs promoting DEI" could be fairly read as a reference to First Amendment protected speech and advocacy. Citing *Brandenberg v. Ohio*, the court reasoned that "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy . . . of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." The court found a nationwide injunction appropriate because its analysis that the certification provision violates the First Amendment applies to all federal grantees and contractors, but few organizations would take the risk of suing the government and would therefore likely self-censor on diversity, equity, or inclusion issues to avoid running afoul of the certification and termination provisions. The court also reasoned that a nationwide injunction was necessary to provide complete relief to CWIT, because the certification provision would also deter other organizations who receive government funding from working with CWIT.

As the federal government continues to expand its campaign against "illegal DEI," it remains to be seen how private speech will be affected and whether as-applied challenges to federal policy will find greater traction.

B. Immigration

The Supreme Court has recognized that noncitizens are "protected by the First Amendment" and that the amendment's language does not make "any distinction between citizens and resident aliens." At the same time, the Supreme Court has long deferred to congressional enactments regarding which immigrants to admit or expel, acknowledging that "Congress

regularly makes rules [regarding noncitizens] that would be unacceptable if applied to citizens." But as scholars have pointed out, "granting noncitizens constitutional protection from laws regulating their conduct is of little practical value when they have no such protection from laws restricting their ability to enter or remain in the United States."

In practice, the Supreme Court has, so far, declined to apply the First Amendment to strike down federal efforts to exclude or deport immigrants on the basis of their ideology. In the 1904 case *Turner v. Williams*, the Supreme Court upheld the government's decision to deport a labor organizer who identified as an anarchist. In the 1952 case *Harisiades v. Shaughnessy*, the Supreme Court upheld a statute which provided for lawful permanent residents to be deported if they were or had previously been members of the Communist Party. And in the 1999 case *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court rejected First Amendment arguments brought by noncitizens who the government had singled out for deportation due to their support for the Palestinian liberation movement. These decisions are also heavily influenced by the political circumstances in which they were issued and the Court's own view of the value of the speech in question. In *Turner*, the Court alluded to the government's right to "self-preservation" from anarchist doctrines, the *Harisiades* Court noted that "no responsible American" could deny the specter of communist infiltration," and in *Reno*, the Court described the Popular Front for the Liberation of Palestine as a "disfavored terrorist group."

Advocates have noted that the exclusion and deportation of speakers on the basis of their messages also burdens the First Amendment rights of U.S. citizens to organize with and learn from noncitizens. In *Kleindeinst v. Mandel*, U.S. citizens asserted that the government's policy of denying visas to advocates of world communism violated their First Amendment rights to engage with and learn from those speakers. There, the Supreme Court ruled that when the government provides a "facially legitimate and bona fide reason" for refusing to admit a noncitizen, it will not "look behind" or "test" the government's decision against the asserted interests of U.S. citizens. However, in *Trump v. Hawaii*, the Court conducted a somewhat more rigorous rational basis review to determine whether President Trump's executive order restricting travel from certain countries should be understood as a Muslim Ban violating the Establishment Clause in light of the President's multiple public statements characterizing it as such. Noting that the policy itself was facially neutral and contained several features that could plausibly advance "legitimate national security interests," the Court found that it could "be reasonably understood to result from a justification independent of unconstitutional grounds" and declined to invalidate it.

Federal officials have also weaponized immigration enforcement to silence and deter political assembly and protest, most explicitly in the context of pro-Palestinian organizing. Upon taking office, President Trump issued Executive Orders 14161 and 14188 announcing the policy of the United States to "protect its citizens from aliens who . . . espouse hateful ideology" or bear "hostile attitudes" towards the country's "founding principles" and directing the Department of Homeland Security to coordinate with colleges and universities to "monitor for and report

activities by alien students and staff," which could lead to their removal. Quoting the President in an accompanying fact sheet, the White House explicitly linked these actions to the pro-Palestine protests of prior months: "To all the resident aliens who joined in the pro-jihadist protests, we put you on notice: come 2025, we will find you, and we will deport you."

In March of 2025, Columbia University students Mahmoud Khalil and Mohsen Mahdawi, who are both lawful permanent U.S. residents, and Tufts University student Rumesya Öztürk, who is in the U.S. on a student visa, were arrested and detained by the Department of Homeland Security and informed that their green cards or visas had been revoked. Although the legal bases for their arrests were not initially clear, Secretary of State Marco Rubio eventually filed letters clarifying that DHS was seeking their removal based on "the alien's past, current, or expected beliefs, statements, or associations that are otherwise lawful" but would "compromise a compelling U.S. foreign policy interest"—a grounds for removal codified in the Immigration and Naturalization Act at 8 USC § 1227 (a)(4)(C)(i).

Both Öztürk and Mahdawi challenged their arrests and detention as unconstitutional retaliation for their participation in First Amendment activity. In the Second Circuit, where Mahdawi was detained, retaliation for protected speech is grounds for habeas relief in the immigration context. To establish a claim for First Amendment retaliation Mahdawi needed to show, "(1) that the speech or conduct at issue was protected, (2) that the defendant took an adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." A U.S. District Court judge in the District of Vermont found that Mahdawi's speech, which advocated for a peaceful resolution of the conflict in Gaza and opposed Israel's military campaign, was "core political speech" entitled to the highest First Amendment protections, that his arrest and detention were an adverse action, and that the government's many statements of intent to punish college activists were enough to support a substantial claim of retaliation.

Looking to credible evidence presented by Öztürk, including statements by the Secretary of State describing the purpose of the government's actions, another judge in the Vermont District Court ruled that Öztürk had demonstrated a substantial claim that her due process rights had been violated. The judge ordered her to be released on bail while the court continued to consider the merits of her habeas petition.

Khalil also challenged the constitutionally of Rubio's determination, arguing that it was unreasonably vague as applied to him. Applying heightened scrutiny due to the First Amendment interests implicated, a New Jersey district court agreed with Khalil, and preliminarily enjoined the government from detaining him on that ground. The court also noted that while the Immigration and Naturalization Act refers to "foreign policy interest," the letter referenced only the government's purported interest in preventing antisemitism around the world, without referencing the United States' relationship with any foreign power. As an alternative ground for removal, the Trump administration has argued that Khalil is deportable

due to certain omissions in his naturalization application. Unfortunately, as noted above, under current precedent "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation." If applied broadly, this precedent could open the door to the selective prosecution of large numbers of immigrants on the basis of technical flaws in their applications as a pretext to remove those the government deems undesirable because of their otherwise constitutionally protect political or ideological beliefs.

It is also important to note that while Khalil, Mahdawi, and Öztürk were successful in securing their release, they faced several procedural hurdles to receiving their day in federal court. Immigration challenges must first be brought to an immigration judge, who is an administrative official, and then appealed to the Board of Immigration Appeals before they can be appealed to the relevant circuit court. As noted above, federal judges can sometimes provide habeas relief to end unlawful detentions, but generally habeas petitions must be filed in the jurisdiction where the person is held. Because ICE frequently moves people hundreds of miles across state lines after detaining them, it is difficult for their attorneys or families to know where to file petitions on their behalf. For less well-resourced immigrants, it may be very hard or practically impossible to access justice, even with a clear claim of First Amendment retaliation.

Federal officials, particularly members of Congress, have suffered retaliation in their efforts to monitor and respond to immigration abuses, including Senator Alex Padilla (CA) and Representative LaMonica Iver (NJ). Senator Padilla was handcuffed by ICE and forcibly removed from a news conference by Kristi Noem, while Rep. McIver was arrested while attempting an oversight visit to an ICE detention center, which federal law explicitly permits, and subsequently charged with assaulting, impeding, and interfering with law enforcement. Under precedent set by the Supreme Court in *Lozman v. Riviera*, in limited circumstances a person subject to arrest in response to their exercise of First Amendment protected activity can bring a claim of retaliatory arrest, including when there is a government policy of retaliation. As ICE is poised to grow, such confrontations over retaliatory arrest may become increasingly common.

C. Academic Freedom

Decades of Supreme Court precedent have recognized academic freedom as an area of "special concern" for the First Amendment. Academic freedom has been understood to include, at a minimum, the "four essential freedoms" of a university: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Despite these norms, in recent months, President Trump has cited allegations of antisemitism at America's leading universities to justify unprecedented measures to demand changes to faculty, curriculum, and admissions standards.

Shortly after taking office, the President announced the formation of a Joint Task Force to Combat Anti-Semitism, which launched investigations into alleged failures to prevent unlawful discrimination against Jewish students and faculty members at ten major universities, in

connection with protests over the war in Gaza. In a public letter to Columbia, the administration conditioned the release of $400 million in grant funding on the school making comprehensive changes to its admissions and disciplinary processes and adopting new definitions of antisemitism that would include criticism of Israel. In a letter issued to Harvard, the administration demanded that the college make changes ranging far beyond antisemitism concerns, including shifts in faculty governance, recruiting and admissions standards, closing-DEIA programs and departments and ending support and recognition for pro-Palestine student groups.

Columbia quickly agreed to the administration's demands, announcing harsher discipline against protesters, adopting broader definitions of antisemitism, and strengthening its partnerships with Israel and paying a $200 million fine. Meanwhile when Harvard publicly announced that it would not comply with the administration's demands, the administration swiftly retaliated, first by terminating or freezing more than $3 billion in federal grants and contract funding to the university and proposing to revoke the institution's tax exempt status. Next the administration moved to prevent international students from attending Harvard through J1 visas and the Exchange Visa Program.

In *Harvard v. U.S. Dep't of Homeland Security*, a district judge ruled that Harvard's decision to exercise its academic freedom by rejecting the administration's demands was protected conduct under the First Amendment. The court agreed that that the university was likely to succeed on its claims of Free Speech and Petition Clause retaliation and viewpoint discrimination and granted a preliminary injunction against the presidential proclamation suspending entry of any international students to study at Harvard. Despite these victories, observers have noted how many tools remain at the executive's disposal to harass and retaliate against the university, including onerous and costly investigations and tools to delay or redirect funding away from Harvard.

Although antisemitism has been cited as the core basis for the administration's broad attacks on Harvard, federal courts have thus far largely declined to find that the pro-Palestine protests cited by the President's administration rise to the level of "pervasively hostile educational environment" that would violate federal civil rights law. Considering allegations brought by students alleging antisemitic conduct at the University of Pennsylvania, a federal court concluded that "at worst, Plaintiffs accuse Penn of tolerating and permitting the expression of viewpoints which differ from their own." Meanwhile, a federal court enjoined the University of Maryland from canceling pro-Palestinian demonstrations scheduled for October 7, 2024, despite some community members' concern that the events would include offensive or antisemitic language. Nevertheless, courts have distinguished between "pro-Palestinian" or anti-Zionist speech, however offensive, and conduct harassing or targeting Jewish or Zionist students. For example, a court found that by permitting student protesters to erect encampments, and establish checkpoints which blocked access to libraries and classrooms for students who

expressed support for Israel, UCLA risked violating those students rights to freely exercise their faith.

D. Law Firm Executive Orders and the First Amendment

On February 25, 2025, President Trump issued a memo entitled "Suspension of Security Clearances and Evaluation of Government Contracts." The memo directed federal agencies to revoke the security clearances of lawyers from the law firm Covington & Burling who represented former Department of Justice Special Counsel Jack Smith and to terminate any government contracts with the firm. Smith was being represented by Covington in his personal capacity in anticipation of a government investigation related to his work as special counsel investigating then-former President Trump for election interference and mishandling of classified documents.

On March 6, 2025, President Trump followed this up with the release of Executive Order 14230, "Addressing Risks from Perkins Coie LLP." The executive order, targeting one of the largest law firms in the United States, directed the U.S. Attorney General "to suspend any active security clearances held by individuals at Perkins Coie," and directed all agency heads to "take appropriate steps to terminate any contract . . . for which Perkins Coie has been hired to perform any service," to "provide guidance limiting official access from Federal Government buildings to employees of Perkins Coie [and] limiting Government employees acting in their official capacity from engaging with Perkins Coie employees," and to "refrain from hiring employees of Perkins Coie."

As justification for these sanctions, the executive order noted the firm's representation of "failed Presidential candidate Hillary Clinton," its work with "activist donors including George Soros to judicially overturn popular, necessary, and democratically enacted laws," and the firm's efforts to increase the racial and gender diversity among the attorneys working at the firm.

This executive order was followed by similar orders against other high-profile law firms, including an executive order targeting Paul Weiss on March 14, 2025, an executive order targeting Jenner & Block on March 25, 2025, an executive order targeting WilmerHale on March 27, 2025, and an executive order targeting Susman Godfrey on April 9, 2025. The sanctions against these firms were similarly justified based on the clients they represented, the attorneys who worked for the firms, the types of cases the firms took and legal arguments they made in those cases, and the firms' adoptions of diversity, equity, and inclusion programs.

In response to these executive orders, some law firms, including law firms who were not yet subject to executive orders, quickly capitulated to the administration's demands. Many of these firms agreed to provide hundreds of millions of dollars in pro bono service for causes of the administration's choosing, to disavow diversity, equity, and inclusion initiatives, and to accept clients regardless of political beliefs.

Other law firms chose not to settle but rather challenge the executive orders in federal court, including Perkins Coie, Jenner & Block, WilmerHale, and Susman Godfrey. Among their many claims, the firms asserted that the executive orders violated the First Amendment by 1) targeting them and their clients for their protected speech; 2) discriminating based on viewpoint; 3) seeking to prevent the firms from petitioning the government on behalf of themselves and their clients; 4) interfering with association rights by compelling disclosure of confidential client information; and 5) leveraging government controls to suppress protected speech and association.

As explained by U.S. District Court Judge Richard Leon in his order granting summary judgment largely in favor of WilmerHale in its litigation, the questions central to the First Amendment claims in each case was whether, "(1) [the firms] engaged in conduct protected under the First Amendment; (2) the defendant[s] took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff's position from speaking again; and (3) a causal link between the exercise of a constitutional right and the adverse action taken against [the firms]." In other words, was there First Amendment protected speech or activity, did the government retaliate in a manner sufficient to chill that speech or activity, and was the retaliation *because of* the protected speech or activity?

In each of the litigated cases, a district court judge granted summary judgment in favor of the law firm, at least in part based on their First Amendment claims. As U.S. District Court Judge Beryl Howell said in her order granting summary judgement for Perkins Coie, "Using the powers of the federal government to target lawyers for their representation of clients and avowed progressive employment policies in an overt attempt to suppress and punish certain viewpoints . . . is contrary to the Constitution, which requires that the government respond to dissenting or unpopular speech or ideas with 'tolerance, not coercion.' *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023)."

In general, the courts found that the executive orders targeted the law firms for constitutionally protected First Amendment speech, association, and petition rights. This included expressing political viewpoints, such as representing political opponents or perceived political rivals of the Trump administration, advocating for positions in litigation that the administration opposed, and making statements in favor of diversity and inclusion.

The courts also found that the alleged retaliation was sufficient to chill First Amendment protected activity. As Judge Howell observed, the fact that other firms targeted by executive orders or concerned about being targets sought to make deals with the administration, "provides further evidence to satisfy the second element of plaintiff's retaliation claim, given that each of these firms, presumably possessing 'ordinary firmness,' sought successfully to avoid being targeted by similar Executive branch actions, with each law firm committing the equivalent of $100 million or more as part of the price to do so."

Connecting the administration's retaliation to the firms' protected First Amendment activities proved to be straightforward, according to some of the judges, since the executive orders themselves stated their retaliatory purpose. In the WilmerHale case, Judge Leon noted that Section 1 of the executive order "makes clear the causal link between the protected speech and the retaliatory conduct. This Background section characterizes WilmerHale's representation of certain causes as 'harmful,' 'egregious,' and 'partisan,' and states that the purpose of the Order is to 'address the significant risks associated with law firms' like WilmerHale. . . . The sanctions laid out in §§ 2 through 5 follow this Background section and are plainly the result of those findings."

Judge Howell also notes that the executive order targeting Perkins Coie cites four reasons for the government's action against the firm, including: "(1) the Firm's representation of 'Hillary Clinton' during the 2016 presidential election; (2) the Firm's involvement in litigation against 'election laws, including those requiring voter identification'; [] (3) the Firm's alleged discrimination in "hiring and promotion" and efforts to "purposefully hide the nature of" this alleged discrimination "through deceiving language;" and (4) the Firm's participation in "'lawsuits against the Trump Administration,' which are also described as "partisan lawsuits against the United States." She noted that President Trump had repeatedly attacked the firm since 2017 for these very reasons and concluded that, "This purpose amounts to no more than unconstitutional retaliation for plaintiff's First Amendment protected activity," which the U.S. Supreme Court has held "threatens to inhibit exercise of the protected right" to free speech.

As of this writing, the government has filed notices of appeal in the Perkins Coie, WilmerHale, Jenner & Block, and Susman Godfrey litigations.

Even without evidence of retaliation, the U.S. Supreme Court has made clear that the First Amendment prohibits the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker," and that any effort to chill such speech is a "blatant and egregious form of content discrimination" subject to strict scrutiny. The Court has expressed special concern for regulation of speech that is at the core of First Amendment protection, such as the speech targeted by the executive orders regarding the election of candidates and the contours of election laws generally. Under Supreme Court precedent, for the executive orders to survive strict scrutiny in these cases, the administration would have to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." The Court is also suspicious of, "restrictions distinguishing among different speakers, allowing speech by some but not others," because, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."

With regard to First Amendment rights of association, the Supreme Court has recognized limits on the government's ability to compel individuals to disclose their "affiliation[s] with groups engaged in advocacy." The Court has established that impairment of association rights must satisfy "exacting scrutiny," a standard that requires the government to show that there is "a

substantial relation between the disclosure requirement and a sufficiently important governmental interest." Exacting scrutiny also applies to the executive orders' impairment of the law firms' right to petition by restricting access to federal buildings and engagement with federal employees.

Both under strict scrutiny's "compelling interest" standard and exacting scrutiny's "sufficiently important governmental interest" standard, each district court found the government's justification for its restrictions unconvincing. This creates high barriers for the administration to clear in its efforts to successfully appeal the district courts' orders.

E. Federal Funding and the First Amendment

As of this writing, there are more than twenty cases challenging executive orders or executive actions purporting to freeze or eliminate government grants or funding as violative of First Amendment speech and association rights. At the core of each of these challenges is the assertion that the administration has made funding decisions in an effort to chill or in retaliation for the exercise of constitutionally protected speech and association rights.

Federal grantees, including non-profits like Head Start programs, domestic violence coalitions, and workforce and skills training programs raised First Amendment challenges to adverse funding decisions designed to effectuate the "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" executive orders. As discussed at greater length in Section II(C) above, educators, universities, public schools, non-profits, and labor unions have raised First Amendment challenges to conditions on educational grants and funding imposed by these same executive orders. Parents and their children, LGBTQ+ rights organizations, and healthcare providers have brought a challenge to restrictions on gender-affirming care in response to the "Protecting Children From Chemical and Surgical Mutilation" executive order, including claims under the First Amendment. A number of other grantees, including a coalition of nonprofits, a group of theater and arts nonprofits, and a coalition of immigrant rights groups have brought First Amendment challenges against a number of other executive orders that would limit their speech and association rights, including "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," "Protecting the American People Against Invasion," and "Unleashing American Energy."

In general, there is no affirmative right to receive government aid.[†] The U.S. Supreme Court has acknowledged that under the Constitution's Spending Clause the government may attach conditions to federal funding that "affect the recipient's exercise of its First Amendment rights," to ensure that funds are used as Congress intended. Given the discretionary nature of most government funding to individuals and organizations, courts, and the U.S. Supreme Court in

[†] Notwithstanding certain entitlement programs that create a statutory right to government aid for those who qualify, such as Medicare, Medicaid, Social Security, and unemployment.

particular, have given the government wide—though sometimes difficult to parse—latitude to condition government aid in a manner that would otherwise violate the speech and associational rights guaranteed under the First Amendment. In *Rust v. Sullivan*, the Court held that "the Government may make a value judgment," in favor of one viewpoint, in that case upholding regulations prohibiting abortion counseling, and that, "the government has no obligation to subsidize even the exercise of fundamental rights, including speech rights."

As the Supreme Court explained in the 2013 case *Agency for International Development v. Alliance for Open Society International*, there are, however, limits to the conditions the government may place on speech rights. As the majority in *Agency for International Development* explained, there is an important distinction between "conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize," which are permissible, and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself," which violate the First Amendment. Under this reasoning, the plaintiffs in the various challenges must demonstrate that the funding decisions place conditions on speech that is *outside* the reach of the government program being funded.

In one of the cases challenging funding decisions effectuated under the "Ending Radical and Wasteful Government DEI Programs and Preferencing" and "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" executive orders, the district court found that the plaintiffs would be required to certify that none of its programs, even those not being funded by the government, promote DEI. Furthermore, the court concludes that the provision in the "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" executive order that requires a grantee "to certify that it does not operate any programs promoting DEI," violates the First Amendment because, as the court explains, "Even if the Certification Provision is limited to promoting whatever the government may now contend is 'illegal DEI,' it is a bedrock First Amendment principle that advocating for violation of the law cannot be proscribed unless it rises to incitement," and therefore cannot serve as a condition on funding.

In litigation challenging the DOJ's termination of funding pursuant to the "Protecting the American People Against Invasion" executive order to legal service organizations that provide basic legal information to unrepresented non-citizens facing deportation under a series of congressionally appropriated programs, a judge in the U.S. District Court for the District of Columbia found that a temporary restraining order blocking the cancellation of grant funding was not justified. Quoting the 1983 Supreme Court case *Regan v. Taxation with Representation*, the court acknowledged that, "First Amendment concerns are properly raised where the government 'discriminate[s] invidiously in its [funding] in such a way as to aim[ ] at the suppression of dangerous ideas.'" The court held, however, that, "[t]here is no evidence that the Defendants have 'discriminate[d] invidiously' in their funding decisions . . . [T]hey have decided to eliminate funding to private contractors for the Programs entirely and have not reallocated the funds to those who might engage in 'favored speech.'"

In the challenge to the termination of funding to medical institutions that provide gender affirming healthcare under the "Protecting Children from Chemical and Surgical Mutilation" and "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," among the plaintiff's claims in their original complaint was that by requiring the withholding of funds from medical institutions that provide gender affirming care, the executive orders "engage in unconstitutional viewpoint discrimination in violation of the First Amendment and violate the rights of grant recipients and transgender patients." In their motion for a preliminary injunction, however, the plaintiff's omitted their First Amendment Claims, and the court issued a preliminary injunction against the government based on the remaining claims, including that the executive orders violate separation of powers, directly conflict with existing statutes, and violate the equal protection component of the Fifth Amendment's Due Process Clause.

The various approaches and conclusions drawn in each of these cases demonstrate both the fact-dependent nature of First Amendment claims challenging government funding decisions, and the various ways in which courts may interpret and weigh those facts to determine whether a funding condition affects speech that is inside or outside the federal program's purview. As the majority in *Agency of International Development* warned, "the definition of a particular program can always be manipulated to subsume the challenged condition."

Discussion Questions

What are the consequences for current and potential clients of firms targeted by executive orders or otherwise threatened by the federal government? If allowed to remain in effect, how might the executive orders chill speech and association rights in manners that hinder litigation strategies and the fundamental right to counsel principles? How might successful challenges to the executive orders affect the agreements between those law firms who chose to negotiate with the administration? Given the wide latitude Congress has to determine the government's funding priorities, are there benefits in plaintiff's raising First Amendment challenges to executive orders that chill speech? How, if at all, would a First Amendment challenge differ if an executive order *compelled* rather than restricted the speech of recipients of federal funding? Would a court's First Amendment analysis differ if an executive order or action discontinued funding of a specific program entirely in contrast to terminating funding certain recipients whose speech the administration objected to? What is the interplay between the constitutional separation of powers challenges to the Executive's decision to unilaterally terminate funding appropriated by Congress and the First Amendment concerns around chilling or compelling speech?

Resources

Bernadette Meyler, *Leveraging Institutions: Imposing Unconstitutional Constraints on Individual Speech through State and Private Organizations*, 78 STAN. L. REV. ONLINE (forthcoming 2025); Micheal Kagan, *Regulatory Constitutional Law: Protecting Immigrant Free Speech Without Relying on*

the First Amendment, 56 GA. L. REV. 1417 (2022); Nico Lang, *The Trump Administration Thinks It's Winning the War on DEI. But a Self-Inflicted Wound Is Becoming Worse by the Day.*, SLATE (Aug. 13, 2025); Molly Redden, *Trump's War on Big Law Means It's Harder to Challenge the Administration*, PROPUBLICA (Aug. 6, 2025); Mike Spector, et. al, *How Trump's Crackdown on Law Firms Is Undermining Legal Defenses for the Vulnerable*, REUTERS (Jul. 31, 2025); Kathryn Rubino, *Trump Won't Give up on His Biglaw Executive Orders Until He Gets in Front of the Supreme Court* ABOVE THE LAW (July 22, 2025); Lisa Larrimore Ouellette, *The Trump Administration's Multi-Front Assault on Federal Research Funding*, JUST SECURITY (July 9, 2025); Genevieve Lakier, *The Trump Spending Cuts, the Public/Private Distinction, and the Limits of the Modern First Amendment*, KNIGHT FIRST AMENDMENT INSTITUTE (July 1, 2025); Sam Bagenstos, *Employing the Anti-Leveraging Test to Effectively Protect Grantee Speech*, KNIGHT FIRST AMENDMENT INSTITUTE (MAY 21, 2025).

III. State Laws Aimed at Suppressing or Chilling First Amendment Activity

The rights to speak, associate, peaceably assemble, and petition the government for redress of grievances enshrined in the First Amendment pre-date the U.S. Constitution. Indeed, protests are part of what led to the founding of the country. The right to join with others in protest is essential to a functioning democracy and at the core of the First Amendment. Unfortunately, states and localities too frequently respond to protests and the social movements underpinning them by adopting legislation that purports to criminalize protest activities protected by the First Amendment.

Every state constitution contains constitutional protections for expressive activities like speech and assembly, and they sometimes offer greater protection for speech and assembly rights than those based on the U.S. Constitution.‡ Some of these state constitutional protections pre-date the First Amendment.

The rights enshrined in these constitutional provisions are not absolute, and state and local governments may burden these rights if they can show an adequate justification for so doing. States and municipalities can impose time, place, or manner restrictions on First Amendment activities in a traditional public forum if the restrictions are "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." When states and localities target speech based on its content, the restrictions are subject to strict scrutiny and must be the least restrictive means of achieving a compelling state interest.

State and local police and prosecutors often use content-neutral criminal laws to punish people engaged in disfavored protest activity. These laws—ranging from "breach of the peace," "disorderly conduct," "unlawful" assembly, and loitering to conspiracy, racketeering, incitement, and domestic terrorism—usually do not target specific content, but they have long been used to criminalize speech and protest activity that is unpopular or that challenges

‡ See our previous Program Guide, Securing Rights in Every Community, for more on state constitutional protections generally.

powerful interests. Police often use increased surveillance, including the use of advanced technologies and aggressive policing tactics, to target protest movements.

This Section does not address the use of general criminal statutes to target disfavored expressive activity, nor does it focus on the use of state and local permitting and licensing requirements or the use of "Strategic Lawsuits Against Public Participation" (SLAPPs) to punish dissent. Rather, it focuses on the ways states and local governments respond to protest activity by enacting new measures aimed at suppressing or chilling particular social movements.

Throughout U.S. history, state and local government have enacted laws that are intended to suppress or chill particular types of speech, assembly, and other expressive activity, especially when that activity is disfavored or targets the interests of the powerful. For example, in the late 19th and early 20th centuries, several states enacted criminal anarchy laws targeting labor organizers and communists, and in response to social changes in the late 1910s and early 1920s, many states enacted "criminal syndicalism" laws to make it illegal for individuals or groups to advocate radical political and economic changes by purportedly criminal or violent means. The Supreme Court struck down Ohio's criminal syndicalism law as unconstitutional in *Brandenberg v. Ohio*.

State efforts to enact legislation aimed at disfavored speech and assembly activities have accelerated in recent years, with the number of bills that target protests increasing exponentially after the 2016 elections. Researchers have noted that where previously it was normal to see a handful of anti-protest laws proposed or enacted each year, more than 380 of these laws have been proposed since 2017 in 45 states, and more than 50 of these laws have been enacted in more than 20 states in less than a decade. Legislators often make their intent explicit, invoking specific protests or movements in introducing and debating these proposals, and sometimes even in the titles and texts of the bills. But even where the bills don't name a specific social movement, they all have the clear aim of discouraging protest and dissent. And where they are enacted, they drain the resources of organizations that challenge them.

A number of social movements have been targeted by state efforts to chill speech, particularly movements to address environmental protection, racial justice, and international human rights.

A. Responses to Land and Water Defenders & Protectors

Beginning in 2008, indigenous and environmental activists joined to resist the construction of the Keystone XL oil pipeline which would carry crude oil from Canada to Texas, violating indigenous sovereignty and treaty rights and posing risk of environmental harm to all lands through which the pipeline runs. In 2016, members of the Standing Rock Sioux Tribe of North and South Dakotas began protesting the construction of another largescale pipeline project, the Dakota Access Pipeline. The indigenous peoples' movement to defend and protect the ancestral lands and waters of their tribes has also led to protests of pipelines in Iowa, Georgia, Louisiana, Minnesota, Oklahoma, South Carolina, and West Virginia. The movement often involved sit-ins, traffic and equipment obstruction, and persistent protests at work sites aimed at slowing down work on the pipelines.

In response to this movement and under intense lobbying by the fossil fuel industry, states and localities started ramping up anti-protest measures to chill the exercise of First Amendment speech and assembly rights by harshly punishing anyone who protests in the future. More than 20 states have enacted so-called "critical infrastructure bills" that increase penalties for anyone who protests at or near the site of a current or planned fossil fuel facility or pipeline, and punish organizations that support or organize such protests. These laws have transformed what would ordinarily be misdemeanor trespassing charges into felonies. Felony convictions not only generally come with harsher penalties than misdemeanors, including steeper fines and potentially longer terms of incarceration, but could have implications for the right to vote and the right to serve on a jury or grand jury. These measures have been enacted in states that account for more than half of oil and gas production in the country, effectively preventing people from protesting the very sites they seek to protect from the fossil fuel industry. States also dramatically heightened penalties for so-called "riot" offenses and increased the number of crimes defined as "domestic terrorism" to target the types of actions taken by water and land protectors.

B. Responses to the Black Lives Matter Movement

Black Lives Matter began as a social media hashtag in 2013 after the acquittal of the man who murdered Trayvon Martin. Within a year, it grew in prominence after the police killings of Michael Brown in Ferguson, Missouri, and Eric Garner in Staten Island, New York. The movement continued to grow after the subsequent deaths caused by police or in police custody of Sandra Bland, Philando Castile, John Crawford, Freddie Gray, Akai Gurley, Laquan McDonald, Tamir Rice, Walter Scott, Alton Sterling, and countless others. In the summer of 2020, the movement grew exponentially after the horrific murder of George Floyd by police officers in Minneapolis, Minnesota, and the police killing of Breonna Taylor in her home in the middle of the night earlier that year. Millions of people participated in these protests, making it one of the largest protest movements in American history. And because the protests occurred during the COVID-19 pandemic, when masks were required in many public places to stem the spread of the virus, many protesters wore masks.

At each stage of the movement and after each uprising for Black lives, state and local governments responded with laws directly aimed at criminalizing protest activities and chilling future protest actions. More than 100 anti-protest bills were proposed in 33 states after the mass protests of 2020. Of these, thirteen were enacted in 10 states. Because many of the protests were on roads and highways, many states and localities proposed or enacted measures increasing penalties for protestors who block roadways or obstruct or impede traffic and immunizing drivers who hit protestors. Many states broadened the definition of "riot" to capture not just already-criminal activity, but to criminalize participation in a protest where other people engage in property destruction or create an "imminent danger" of the destruction of property. These laws also created liability for organizations that encourage or attempt to encourage participation in nonviolent protest if police later deem that protest an "unlawful assembly."

In another example, Tennessee, where Black Lives Matter protesters camped on state capitol grounds for two months, made it a felony to camp on state property not designated for

camping. And in Florida, a sweeping anti-protest law enacted in 2021 expanded the definition of "riot" to include any group of three or more persons acting with intent to assist each other in disorderly or violent conduct resulting in the "imminent danger" of property damage or personal injury, or actual damage or injury. If a person attends a protest of 25 or more people where violence or property destruction occurs, that person could be charged with "aggravated rioting." The law also prohibits the "willful obstruction of traffic" using language broad enough to criminalize standing on the street and temporarily hindering any traffic. It also created a new crime of "mob intimidation," which prohibits a group of three or more people acting with a "common intent" to compel or induce, or attempt to compel or induce, another person to "do or refrain from doing any act or to assume, abandon, or maintain a particular viewpoint" against their will. The law was challenged and enjoined by a federal court. In 2024, the Florida Supreme Court issued an opinion holding that the law cannot be used to prosecute non-violent protesters or bystanders. In a concurring opinion is that case, Florida Supreme Court Justice Jorge Labarga succinctly explained, "a narrow interpretation of 'violent public disturbance' is essential to ensure that prosecutions involving violations of the statute do not capture the peaceful, nonviolent exercise of First Amendment rights nor criminalize the mere presence at or lawful participation in an otherwise peaceful assembly or protest."

C. Responses to Protests in Support of Palestinian Human Rights

After Hamas murdered almost 1,200 people and kidnapped more than 250 people on October 7, 2023, the State of Israel began bombing Gaza, killing tens of thousands of people and displacing most of the more than 2 million people who live there. Israel also tightened its blockade on food and goods entering the territory. People across the United States, like people around the world, engaged in widespread protests demanding a ceasefire, an end to the blockade, and humanitarian aid in Gaza. Other protests and vigils demanding the return of the hostages by Hamas and counter-protests also occurred around the world and the U.S. Many of the pro-Palestinian protests involved tactics used by other social movements, including encampments and direct action. Likewise, because the COVID-19 pandemic is ongoing despite the end of the public health emergency, many protesters wore medical masks and respirators to protect themselves and their communities from the spread of disease, as well as to stymie surveillance by law enforcement. Many protests occurred on college campuses around the country where students demanded that the schools divest from companies linked to Israel's military campaign.

The state and local responses to these protests have been similar to the responses to other social movements, bringing a new round of legislation criminalizing dissent. Members of Congress and the President have also pushed for greater criminalization of protest activities, and many states and localities have obliged. Over the last year alone, more than 40 anti-protest measures have been introduced in 24 states. Notably, many of the proposed state bills again seek to enhance penalties for protests that block roads or expand the definition of "riot" to ensnare peaceful protesters. But many new proposals are aimed directly at student protesters, proposing to ban encampments on college campuses, strip student protesters of financial aid, and create criminal penalties for anyone who wears a mask at a protest.

While many states enacted mask bans in response to the threat of violence by the Ku Klux Klan (which challenged some of the bans on First Amendment grounds, with mixed results), most states either repealed or ceased enforcing these measures once the SARS-CoV-2 virus became a pandemic virus in March 2020. After protesters covered their faces or wore masks during the Black Lives Matter and pro-Palestinian protests, jurisdictions started adopting new mask bans and threatened to enforce exiting mask bans against protesters. Some new anti-masking proposals purport to target people who commit crimes while masked, but some target people wearing masks during protests and other public demonstrations. While some provisions have medical exemptions, advocates have argued that they are simply inadequate to protect vulnerable populations and people with disabilities. And, notably, the proposals contain no exemptions for those who cover their faces for religious reasons and make anyone masking subject to scrutiny by law enforcement.

D. Other State and Local Laws Targeting First Amendment Activity

Aside from measures aimed at protests, state and local governments have also enacted measures squarely aimed at other disfavored First Amendment activities. The backlash against the momentum of the Black Lives Matter movement found its way into classrooms through state laws banning the discussion of "divisive concepts," and Florida's "Stop W.O.K.E. Act," which prohibit the discussion of history that recognizes the suffering of enslaved people, the extermination of Native Americans, the internment of Japanese Americans, or the laws that entrenched racial subjugation and segregation. States and localities have also enacted reactionary measures targeting books in libraries that contain LGBTQ+ characters or discussions, and anti-drag show bills. Finally, more than a dozen states have proposed and enacted measures targeting the First Amendment right to boycott, which is related to other efforts to crack down on protests. Many of these measures have been challenged in litigation with mixed results.

Discussion Questions

What state or local laws that limit or chill the exercise of First Amendment rights have been enacted in our community? Were these laws directly aimed at particular movements? If they are content-neutral on their face, can they be or have they been enforced in biased ways? How do these anti-protest measures also restrict the ability of those punished to participate in democracy in other ways? What would a legal challenge to these laws look like (parties, venue, claims)? What type of scrutiny would apply? What is the likelihood of success of a legal challenge? What are the prospects for the possible repeal the legislation or enactment of protective legislation? Are there new proposals aimed at ongoing or new social movements? What do they propose? How can we mobilize to prevent further infringements of First Amendment rights? Does the state constitution or state supreme court precedent offer more robust protection of expressive activity than the U.S. Constitution?

Resources

Tabatha Abu El-Haj, *A Right of Peaceable Assembly*, 125 COLUMBIA L. REV. 10149 (2025); Timothy Zick, *Public Protest and Civil Unrest*, 67 ARIZ. L. REV. 459 (2025); Jenna Ruddock, *Coming Down the Pipeline: First Amendment Challenges to State-Level "Critical Infrastructure" Trespass Laws*, 69

AM. U.L. REV. 665 (2019); John Inazu, *Unlawful Assembly As Social Control*, 64 UCLA L. REV. 2 (2017); ADVANCEMENT PROJECT, OUR SILENCE WILL NOT PROTECT US: TRACKING RECENT TRENDS IN ANTI-PROTEST LAWS (2025); EVERYLIBRARY, CODIFYING CENSORSHIP OR RECLAIMING RIGHTS? THE STATE-BY-STATE 2025 LEGISLATIVE LANDSCAPE FOR LIBRARIES (2025); ANDRES CHANG, ET AL., GREENPEACE, DOLLARS VS. DEMOCRACY (2023); NORA BENAVIDEZ & JAMES TAGER, PEN AMERICA ARRESTING DISSENT: LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST (2020); CARRIE LEVINE, GABRIELLE COLCHETE & BASAV SEN, INST. FOR POL'Y STUD., MUZZLING DISSENT: HOW CORPORATE INFLUENCE OVER POLITICS HAS FUELED ANTI-PROTEST LAWS (2020); *Resource Hub,* FREE TO SPEAK BILL OF RIGHTS (Aug. 25, 2025); INT'L CTR. FOR NOT-FOR PROFIT LAW, US PROTEST LAW TRACKER (Aug. 4, 2025); THE CTR. FOR MEDIA AND DEMOCRACY, ANTI-PROTEST LOBBY TRACKER (AUG. 14, 2025); INT'L CTR. FOR NOT-FOR PROFIT LAW, ANALYSIS OF US ANTI-PROTEST BILLS (Feb. 5, 2025); Elly Page & Alana Greer, *States Are Restricting Protests and Criminalizing Dissent*, TEEN VOGUE (June 26, 2024); *New Anti-Protest Laws Cast a Long Shadow on First Amendment Rights*, CTR. FOR POL'Y INTEGRITY (Dec. 10, 2021); Alan Greenblatt, *As Protests Escalate Under Trump, States Seek New Ways to Deter Them*, GOVERNING (Sept. 20, 2017).

Speakers List

The following list includes a variety of scholars, advocates, and litigators you may contact when planning your chapter's events this year. The speakers are listed in alphabetical order by last name. We have provided their title, organization, and the First Amendment areas most relevant to their work. These categories are necessarily simplistic. When considering any of the experts listed below for your programming, we encourage you to research the speaker to ensure their specialties align with the goals of your event.

This speakers list is not exhaustive. Instead, it is intended to provide you with a sampling of the scholars, advocates, institutions, and organizations that work on these issues. When developing your events, you should also consider local experts and practitioners and consult law school faculty members, including ACS student chapter faculty advisors, for additional suggestions.

Name	Title	Organization	State	Specialty
Ashutosh Bhagwat	Boochever and Bird Distinguished Professor of Law	UC Davis School of Law	CA	Speech
Tabatha Abu El-Haj	Professor of Law	Drexel University Thomas R. Kline School of Law	PA	Speech; Assembly
David Armiak	Research Director	Center for Media and Democracy	WI	State & Local Laws
Alicia Bannon	Director, Judiciary Program, Democracy	Brennan Center for Justice	NY	State & Local Laws
Nora Benavidez	Senior Counsel; Director of Digital Justice and Civil Rights	Free Press		Speech; Assembly

Name	Title	Organization	State	Specialty
Derek Black	Professor of Law and Ernest F. Hollings Chair in Constitutional Law	University of South Carolina School of Law	SC	Religion
Joseph Blocher	Professor of Law	Duke University School of Law	NC	Speech
Dale Carpenter	Judge William Hawley Atwell Chair of Constitutional Law; Altshuler Distinguished Teaching Professor; Professor of Law	SMU Dedman School of Law	TX	Education and Civil Rights
Elizabeth Cavell	Deputy Legal Director	Freedom From Religion Foundation	WI	Religion
Erwin Chemerinsky	Dean; Jesse H. Choper Distinguished Professor of Law	UC Berkeley School of Law	CA	Speech
Alen Chen	Thompson G. Marsh Law Alumni Professor	University of Denver Sturm College of Law	CO	Speech
David Cole	Hon. George J. Mitchell Professor in Law and Public Policy	Georgetown University Law Center	DC	Speech
Carmen Daugherty	Deputy Executive Director	Advancement Project	DC	Speech; Assembly

Name	Title	Organization	State	Specialty
Xavier T. de Janon	Director of Mass Defense	National Lawyers Guild	NC	Speech; Assembly
Evelyn Douek	Assistant Professor of Law	Stanford University Law School	CA	Speech; Religion; Technology
Garrett Epps	Professor of Practice	University of Oregon School of Law	OR	Speech
Mary Anne Franks	Eugene L. and Barbara A. Bernard Professor in Intellectual Property, Technology, and Civil Rights Law	George Washington University Law School	DC	Speech
Ra'Shya Ghee	Visting Assistant Professor	University of Minnesota Law School	MN	Speech; Assembly
Steven K. Green	Director of the Center for Religion, Law & Democracy; Fred H. Paulus Professor of Law	Willamette University College of Law	OR	Religion
Alana Greer	Director and Co-Founder	Community Justice Project	FL	Speech; Assembly
Darrell Hill	Policy Director	ACLU of Arizona	AZ	Speech; Religion

Name	Title	Organization	State	Specialty
David Hudson	Associate Professor of Law	Belmont University College of Law	TN	Speech (Students, Public Employees; Prisoners); Religion
John Inazu	Sally D. Danforth Distinguished Professor of Law & Religion	Washington University School of Law	MO	Speech; Assembly; Religion
Vicki Jackson	Laurence H. Tribe Professor of Constitutional Law	Harvard Law School	MA	Speech
Mark Kende	Director of the Drake Constitutional Law Center; James Madison Chair in Constitutional Law	Drake University Law School	IA	Speech
Andrew Koppelman	John Paul Stevens Professor of Law	Northwestern Pritzker School of Law	IL	Speech; Religion; Congressional Power; Law and Sexuality
Maria LaHood	Deputy Legal Director	Center for Constitutional Rights	NY	Speech; Assembly
Genevieve Lakier	Professor of Law; Herbert and Marjorie Fried Teaching Scholar	The University of Chicago School of Law	IL	Speech
Jenna Leventoff	Senior Policy Counsel	ACLU	DC	Speech

Name	Title	Organization	State	Specialty
Ira Lupu	F. Elwood and Eleanor Davis Professor Emeritus of Law	George Washington University Law School	DC	Religion
Gregory Magarian	Thomas and Karole Green Professor of Law	Washington University School of Law	MO	Speech; Religion
Caroline Mala Corbin	Professor of Law	University of Miami School of Law	FL	Speech; Religion
Rebecca Markert	Vice President and Legal Director	Americans United for Separation of Church and State	DC	Religion
William Marshall	William Rand Kenan, Jr. Distinguished Professor of Law	University of North Carolina School of Law	NC	Speech; Religion
Joseph Mead	Special Litigation Counsel	Institute for Constitutional Advocacy and Protection at Georgetown University Law Center	DC	Speech; Assembly
Athena Mutua	Professor; Floyd H. & Hilda L. Hurst Faculty Scholar	University at Buffalo School of Law (SUNY)	NY	Speech
Helen Norton	University Distinguished Professor and Rothgerber Chair in Constitutional Law	University of Colorado School of Law	CO	Speech; Religion

Name	Title	Organization	State	Specialty
Jim Oleske	Professor of Law	Lewis & Clark Law School	OR	Religion
Elly Page	Senior Legal Advisor	International Center for Not-for-Profit Law	DC	Speech; Assembly
Robert Post	Sterling Professor of Law	Yale Law School	CT	Speech; Assembly
Zachary Price	Professor of Law	UC San Francisco Law	CA	Speech
Nick Robinson	Senior Legal Advisor	International Center for Not-for-Profit Law	DC	Speech; Assembly
Kate Ruane	Director, Free Expression Project	Center for Democracy and Technology	DC	Speech
Mark Satta	Associate Professor of Law and Philosophy	Wayne State University Law School	MI	Speech; Religion
Richard Schragger	Walter L. Brown Professor of Law; Roy L. and Rosamond Woodruff Morgan Professor of Law	University of Virginia School of Law	VA	State & Local Laws; Religion
Jacob Schriner-Briggs	Visting Assistant Professor	Chicago-Kent College of Law	IL	Speech

Name	Title	Organization	State	Specialty
Micah Schwartzman	Hardy Cross Dillard Professor of Law; F.D.G. Ribble Professor of Law; Director, Karsh Center for Law and Democracy	University of Virginia School of Law	VA	Religion
Elizabeth Sepper	Crillon C. Payne, II Professorship in Health Law; Professor	University of Texas at Austin School of Law	TX	Religion
Amanda Shanor	Associate Professor of Legal Studies & Business Ethics	Wharton School of the University of Pennsylvania	PA	Speech
Nomi Stolzenberg	Nathan and Lilly Shapell Chair in Law	USC Gould School of Law	CA	Religion
Geoffrey Stone	Edward H. Levi Distinguished Service Professor of Law	University of Chicago Law School	IL	Speech
Rick Su	Arch T. Allen Distinguished Professor of Law	University of North Carolina School of Law	NC	State & Local Laws
Nelson Tebbe	Jane M.G. Foster Professor of Law	Cornell Law School	NY	Religion
Daniel Tilley	Legal Director	ACLU-FL	FL	State & Local Laws
Ciara Torres-Spelliscy	Professor of Law	Stetson University College of Law	FL	Speech; Election Law
Vincent Warren	Executive Director	Center for Constitutional Rights	NY	Speech; Assembly

Name	Title	Organization	State	Specialty
Gerry Weber	Senior Staff Counsel	Southern Center for Human Rights	GA	Speech
Sonja West	Otis Brumby Distinguished Professor in First Amendment Law	University of Georgia School of Law	GA	Speech
Jay Wexler	Professor of Law and Michaels Faculty Research Scholar	Boston University School of Law	MA	Religion
Timothy Zick	Robert & Elizabeth Scott Research Professor and John Marshall Professor of Government and Citizenship	William & Mary Law School	VA	Speech; Assembly

About the Author

Lindsay Langholz serves as Senior Director of Policy and Program with the American Constitution Society. Taonga Leslie serves as Director of Policy and Program for Racial Justice with the American Constitution Society. Valerie Nannery serves as Senior Director of Policy and Program with the American Constitution Society. Christopher Wright Durocher serves as Vice President of Policy and Program with the American Constitution Society.

About the American Constitution Society

The American Constitution Society for Law and Policy (ACS) is a 501(c)3 non-profit, nonpartisan legal organization. Through a diverse nationwide network of progressive lawyers, law students, judges, scholars, advocates, and many others, our mission is to support and advocate for laws and legal systems that strengthen our democratic legitimacy, uphold the rule of law, and redress the founding failures of our Constitution and enduring inequities in our laws in pursuit of realized equality