

FREE SPEECH AT CALIFORNIA COLLEGES & UNIVERSITIES

FREE SPEECH LAWS PROTECT ACTIVISM ON BOTH PUBLIC AND PRIVATE CAMPUSES, BUT THEY HAVE THEIR LIMITS



Free Speech is a Constitutional Right

Both the California Constitution and the First Amendment to the U.S. Constitution offer strong free speech protections—even for speech that is unpopular, controversial, political, or deeply offensive. These constitutional provisions prohibit officials at public colleges and universities from establishing or enforcing disciplinary rules that punish protected expression.

But there are some limits. Read on to learn more.

Even though public institutions are generally subject to different laws than private ones, constitutional free speech protections apply equally to California's private colleges and universities because of a state statute called the "Leonard Law."



Overview of Your Rights

On campus, you have the right to engage in protected speech. This means you can wear expressive clothing, hand out flyers, collect signatures for petitions, campaign to effect change, and come together for protests, so long as:

- you are expressing yourself in a public area on campus;
- your expression doesn't substantially disrupt classes or the school's other essential functions; and
- your expression complies with "time, place, and manner" rules that your school has established.

You also have the right to a learning environment that is free from unlawful harassment.

Universities and colleges have long been sites of protest, particularly anti-war protests.

It is important that higher education remains an open space for students, faculty, and staff to exchange ideas and express themselves.



Where You Speak Matters

Speech is more, or less, protected depending on where you seek to express yourself. In general, the more public an area, the better the reason the school needs to restrict your right to speak, assemble, or protest. And in almost no circumstance can a school restrict your speech merely because it doesn't like your viewpoint.

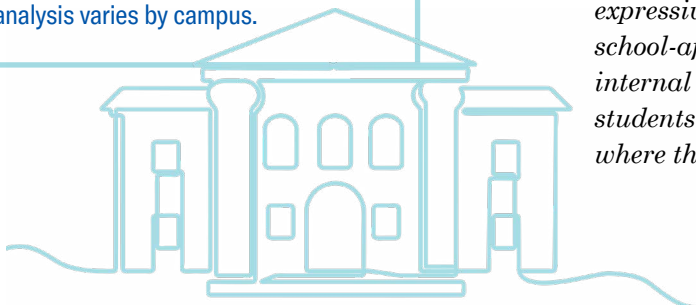
Courts analyze whether a speech restriction is lawful using a place-based framework that begins with determining if you are in (1) a traditional public forum, (2) a limited public forum, or (3) a nonpublic forum.

- **TRADITIONAL PUBLIC FORUM:** A space that has traditionally been open for public speech activities—like a park, plaza, or sidewalk. A school can restrict speech only if the restriction is tied to a significant governmental interest and not based on the speech's content. Any restriction must be “reasonable” as to “time, place, and manner,” and a school must still leave open good alternatives at different times or places for protected speech.

- **EXAMPLE:** *Depending on its reasons, a school could probably require that all demonstrations in a campus quad take place between the hours of 8am and 10pm. It could also say that you aren't allowed to block building entrances because of safety or demonstrate using amplified sound near where classes are in session. And a school could likely prevent students in dorms from hanging displays in their windows (but it couldn't only prohibit hanging Confederate or pride flags because that would be a content- and viewpoint-based restriction).*

PUBLIC BY DESIGNATION

A quad or other campus space frequently used by the general public can be designated as a public forum by school policy or just practice. Check your school's policies to learn about any specific designations—and know that the analysis varies by campus.



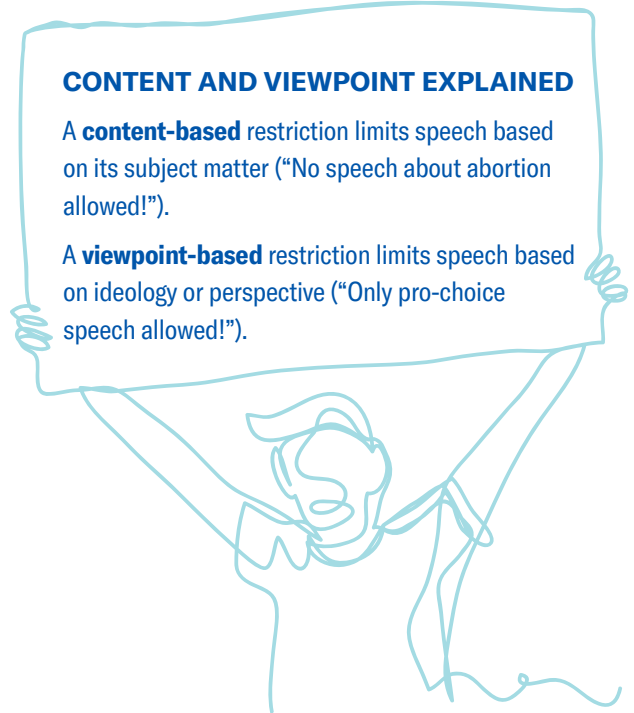
- **LIMITED PUBLIC FORUM:** A space where the government (or, here, a school) chooses to allow speech for certain groups or subjects. In such a space, officials are allowed to restrict speech based on content or subject matter, but not on the basis of viewpoint.

- **EXAMPLE:** *A school could make a bulletin board available for advertising campus events (but prohibit signage about other matters) or it could let registered student groups borrow a room in an administrative building (but decline to let others in the community borrow it).*

CONTENT AND VIEWPOINT EXPLAINED

A **content-based** restriction limits speech based on its subject matter (“No speech about abortion allowed!”).

A **viewpoint-based** restriction limits speech based on ideology or perspective (“Only pro-choice speech allowed!”).



- **NONPUBLIC FORUM:** A space that is not typically available for public expression—even if it is school property or owned by the government. Speech restrictions need only be viewpoint-neutral and reasonable given how the space is intended to be used.

- **EXAMPLE:** *A school could prohibit affixing posters to building walls not designated for expressive activity, could prescribe that only school-affiliated groups are allowed to use the internal school mail system, and could punish students for demonstrating in a private office where the public is not typically invited.*

WHAT ABOUT PRIVATE PROPERTY OUTSIDE OF CAMPUS?

You don't have a right to engage in free-speech activities on private property unless you are the property owner or have the owner's permission. Shopping malls in California are the one exception; your speech rights there are protected so long as your activity doesn't interfere with the mall's primary commercial purpose.

Applying Time, Place, and Manner Rules

California colleges and universities are allowed, within reason, to pass content-neutral rules about when, where, and how you protest. They can, for example, ban overnight camping on campus and reasonably limit protests to certain areas at certain times of day.

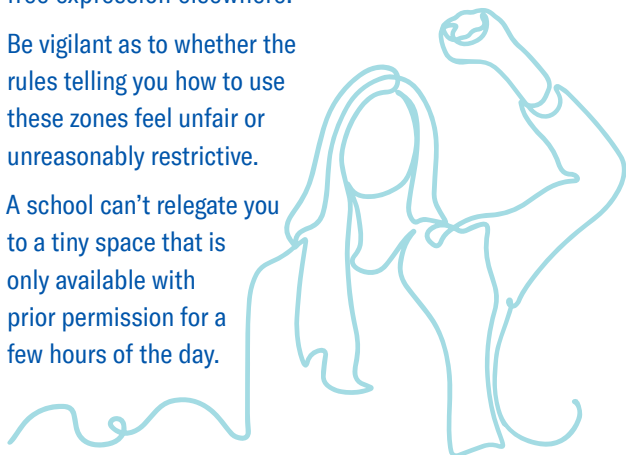
Schools can also require permits for large, pre-planned assemblies as a way of managing competing demands on shared public spaces. (No permit should be required if you're protesting by yourself or in a small group that is not too disruptive of a school event.) Whatever the rules are, they must be applied equally to everyone and must leave open meaningful alternative channels to free expression. Context matters in determining what is reasonable or unreasonable.

"FREE SPEECH" ZONES

Schools sometimes designate parts of campus as free speech zones. While this sounds like a good practice, it can be used as cover to dramatically limit free expression elsewhere.

Be vigilant as to whether the rules telling you how to use these zones feel unfair or unreasonably restrictive.

A school can't relegate you to a tiny space that is only available with prior permission for a few hours of the day.



Inside and Outside the Classroom

Inside the classroom, speech can be constrained to topics relevant to a class's stated scope and subject to rules promoting civil dialogue and learning. Faculty must satisfy scholarly norms and meet teaching excellence standards. But outside the classroom, including on social media, courts have said that First Amendment freedoms need "breathing space" to survive.

With respect to student groups, a school can require that all student organizations—as a condition for recognition and receipt of school funding—be open to all students.

PRINCIPLES OF ACADEMIC FREEDOM

Academic freedom is related to, but separate from, the First Amendment. It protects faculty when expressing ideas that relate to their academic field of work. It also protects faculty when participating in institutional governance. Public universities and colleges can rarely regulate faculty members' speech outside the classroom when they are speaking for themselves on matters of public concern. (Private schools may differ.)

Not All Speech is Protected

Certain narrowly defined categories of speech fall outside constitutional protections. Speech that constitutes obscenity, defamation, or harassment is unprotected. So is speech that is intended to incite imminent violence and lawless action, or speech that conveys a true threat of violence. The "true threats" analysis focuses on protecting a person from fear of physical harm, but not necessarily from emotional distress. A school must give equal treatment to the speech that falls in the same unprotected category. Officials could punish defamation, for instance, but they could not only punish defamation of school officials.

"SAFE SPACES"

Schools cannot use the concept of safe spaces to censor ideas considered too offensive for some students to hear.

Schools can, however, try to sensitize students and faculty to the impact of certain words and can also support student efforts to self-organize according to shared interests or experiences. In addition, teachers may choose to provide students with a warning before presenting upsetting material—but schools should not mandate "trigger warnings" before such material is presented.

Discrimination and Harassment on Campus

Under federal anti-discrimination statutes, such as Title VI of the Civil Rights Act and Title IX of the Education Amendments Act, all colleges and universities receiving federal funds must address discrimination that involves a “protected characteristic,” such as a person’s race, national origin, religion, sex, age, or disability. It can be challenging for school officials to balance anti-discrimination obligations with constitutional free speech guarantees.

U.S. OFFICE OF CIVIL RIGHTS

If you believe that an education institution that receives federal financial assistance has discriminated against someone on account of a protected characteristic, you can file a complaint with the U.S. Office of Civil Rights.

Learn more here:

<https://www2.ed.gov/about/offices/list/ocr/aboutocr.html>.

To be considered unlawful conduct, the discriminatory harassment must include something beyond the expression of offensive views, words, or symbols. The U.S. Supreme Court established this test for when speech crosses the line: The disputed act must be (1) unwelcome; (2) discriminatory on the basis of a protected characteristic; (3) specifically targeted at an individual or a group of individuals bearing that characteristic; and (4) “so severe, pervasive, and objectively offensive” that it “undermines and detracts from the victim’s educational experience.”

Courts analyze whether the targeted students are effectively being denied “equal access to an institution’s resources and opportunities.” A university or college is liable for student-on-student harassment only if it is “deliberately indifferent” to the harassment allegedly taking place.

SCHOOLS HAVE SPEECH RIGHTS TOO

When speech is divisive or hateful—but still protected and therefore not punishable—a school can consider meeting its Title VI and Title IX obligations by using its own voice to speak out, educate, and support all those in the community.

BALANCING PUBLIC SAFETY AND PUBLIC DEBATE

Crying out “from the river to the sea” in favor of a Palestinian state or speaking in defense of Israel’s war in Gaza are both protected under the First Amendment.

Conversely, shouting racially-charged epithets at a particular student could constitute impermissible harassment—as could pinning an antisemitic sign to a Jewish student’s dorm room or an anti-Islam sign to a Muslim student’s dorm room.

Speech versus Conduct

Free speech laws generally protect speech, not conduct. There is no First Amendment right, for example, to spray graffiti on a public building or to destroy someone else’s property, even if the act is done to communicate a message. Nor do free speech protections readily shield encampments or protests that substantially disrupt classes or other events like graduation ceremonies and Board of Regents meetings.

Physically intimidating students by blocking their movements or by pursuing them aggressively is definitively not expressive speech.

Restricting Protests

College and university officials have legal obligations to combat discrimination and a responsibility to maintain order. But this authority can’t be used to curtail free speech rights on campus or shut down a protest just because an official doesn’t like what you’re saying.

In fashioning responses to campus activism, schools must not single out particular viewpoints for censorship, discipline, or disproportionate punishment. Campus officials and law enforcement generally may not:

- prohibit an event from taking place based on a concern that some attendees may react negatively or engage in illegal activity;
- punish peaceful speakers if a listener’s reaction turns violent; or
- silence a peaceful speaker as an easy alternative to managing a mass event.

What about Counterprotests?

A counterprotester may not lawfully silence, or substantially disrupt, another person's protected speech. One does not have the right to a "Heckler's Veto" by, for example, blocking-off access to an event featuring a controversial speaker or chanting over the remarks of that speaker.

The law would protect, however, a counterprotestor who wants to use their speech to picket outside an event, distribute leaflets, hold up signs, or host an alternative event at another location.

When Can a School Take Action at a Protest?

During a demonstration, school officials may choose to enlist campus security, campus police, or local law enforcement. These officers should not break up a gathering if people are complying with reasonable time, place, and manner restrictions—the big exceptions are if there is a "clear and present danger of riot," a specific threat of harm to a particular person, or some other immediate threat to public safety (like the sustained shut down of a building entrance or major roadway).

If officers do give a dispersal order, they must provide actual notice of the order and allow a reasonable opportunity to comply, which includes sufficient time and an unobstructed exit path. The police may use reasonable force to break up a gathering or to arrest a person who is violating the law. What is "reasonable" depends on all the circumstances.

ENFORCEMENT OF THE LAW

Just because a school administration can take action does not mean that the school should or must take such action. How a school responds is a matter of judgment and policy depending on context, and you know your institution best. Just remember the law does require schools to respond equally to the same activity irrespective of viewpoint.



What Forms of School Discipline Could I Face?

If you are accused of breaking school rules while protesting and charged with conduct that the law does not protect, you may face punishment through your school's disciplinary system. Penalties could include community service, restitution, probation, suspension, or expulsion.

Your university or college may also try to prohibit students from participating in extracurricular activities, holding leadership positions in student groups, or participating in a graduation ceremony. It is also possible that an administration could respond by revoking financial assistance or threatening negative character reviews.

PROTESTING AND IMMIGRATION STATUS

The First Amendment's protections apply equally regardless of a speaker's immigration status.

But noncitizens who are subject to school discipline or arrest may face unique risks that affect their visas or immigration status. You should consult with an immigration attorney about any specific concerns.

If your school accuses you of misconduct, the school is legally required to notify you of the particular charges alleged. Familiarize yourself with your due process rights and the school's disciplinary procedures. Be sure to download and save all communications in a central place, investigate whether your school allows advisors or others to support you in the process, and be careful not to make any incriminating statements without first consulting a lawyer.

KNOW YOUR RIGHTS: DISCIPLINE WHEN ENGAGING IN CAMPUS PROTESTS

For more information about school discipline when participating in free speech activities on campus, see our **Campus Protests and More: Student Discipline at California Colleges & Universities** Know Your Rights guide at WWW.ACLUNC.ORG/KYR-CAMPUS-DISCIPLINE.

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What about Civil Disobedience?

Civil disobedience is the active, public, and nonviolent refusal to comply with certain laws as a form of political protest. People often engage in civil disobedience because they believe that the law they intend to violate is unjust or because they believe that violating the law will focus public attention on other injustices in society—especially if more traditional methods of reaching the public have failed. Open rebellion or riots are not considered civil disobedience because they are not peaceful attempts to focus attention on injustice or unfair policies.

If you're planning to stage a sit-in in a campus lobby, block an intersection, or conduct some other act that is not protected by law, take time to learn about the practical consequences of an arrest. There is no First Amendment right to engage in civil disobedience, but you still have other constitutional rights, such as due process, the right to be free from unreasonable force by law enforcement, and the right to not self-incriminate.

Your Rights on Arrest

Law enforcement officers are authorized to make an arrest only if they have probable cause to believe you are engaged in some unlawful conduct. So, if you're exercising your right to free speech lawfully and peacefully, you should not be arrested.

In the context of protests, officers most often make arrests if they declare an assembly unlawful and allege that a person failed to disperse, disturbed the peace, engaged in a riot, resisted arrest, trespassed, committed an act of vandalism, destroyed property, or were non-compliant with applicable traffic and vehicle safety rules.

KNOW YOUR RIGHTS GUIDES

For more information on interacting with police, you should review **Know Your Rights: Free Speech, Protests & Demonstrations** and **Know Your Rights: Police Interactions** at WWW.ACLUNC.ORG/KYR.

FILMING THE POLICE

The First Amendment generally protects your right to openly film officials conducting official duties in a public place. This practice can be a valuable tactic in protecting your right to free speech and for holding law enforcement accountable if something goes wrong.



It is important to record openly and to maintain a safe distance. You must not obstruct or interfere with an officer's legitimate aims. ACLU's **Mobile Justice App** can be a useful tool for recording these interactions.

Upon arrest, you may have to state your name and address, but you do not have to answer—and should not answer—any questions about your immigration status or about the incident leading to your arrest. You have the right to remain silent. Use it. You also have the right to legal counsel.

Just because you are arrested does not mean that charges will actually be filed against you. What happens next will depend on many factors specific to your case.

Surveillance of Student Activists

California's Constitution includes the right to privacy, which prohibits state and local officials from maintaining unnecessary information about you. But depending on your school's surveillance and privacy policies, you should be mindful that you could have less privacy protection while on campus. Most institutional email accounts, for instance, can be monitored and Wi-Fi networks may not be secure or private. You should also evaluate your own privacy and location tracking settings on social media and be aware of the potential harms that can arise from bystander posts and facial recognition surveillance.

HOW TO DEAL WITH DOXXING?

Taking a public position on a controversial topic may expose you to scrutiny from media outlets as well as other advocacy organizations. This scrutiny can be frightening, especially if the attention comes with threats of physical harm, doxxing, or privacy invasions.

To protect yourself, check out this guide by the Electronic Frontier Foundation:
<https://www.eff.org/deeplinks/2020/12/doxxing-tips-protect-yourself-online-how-minimize-harm>



Searching Phones and Electronic Devices

To protect yourself at a protest, consider leaving your electronic devices at home, or at a minimum, installing password protections on all your devices. If an officer asks to look at your device, say “no” and invoke your rights under the Fourth Amendment and California’s Electronic Communications Privacy Act, which most people refer to as “CalECPA.”

While your phone may be confiscated during an arrest, law enforcement officers—absent your permission—may not search it unless they have a warrant issued by a judge based on “probable cause” that the device contains evidence of a crime. The search warrant must describe with some specificity the type of information and parts of the phone that may be searched. (Heads up: search rules are different if you’re on probation or parole.)

What about Student Journalists?

Under California law, members of the media, including student journalists, have special access rights to observe and report on protests. You should wear something that clearly shows you to be a member of the press and, if an officer detains you while reporting at a protest, say: “I am press. Penal Code section 409.7 requires that you immediately call in a supervisor.”

When should I contact the ACLU?

- Your speech is being treated differently from speech of the opposite view.
- Your speech is restricted or punished even though you think you’ve followed all the relevant campus rules.
- You’re forced to leave a lawful protest for reasons that don’t seem fair or reasonable, or you’re being held responsible for acts by other protesters that you did not do.
- You’re arrested for failing to follow an unclear dispersal order, or because you didn’t have enough time to comply with the order.
- You experience aggressive “crowd control” tactics, like tear gas or rubber bullets.
- Your property is taken by an official during a protest, and you are having trouble getting it back.



RESOURCES

Student associations on campus and student services offices may be able to provide or refer you to student advisors. The following organizations may also be of assistance:

ACLU OF NORTHERN CALIFORNIA

www.aclunc.org ♦ (415) 621-2488

ACLU OF SOUTHERN CALIFORNIA

www.aclusocal.org ♦ (213) 977-5253

ACLU OF SAN DIEGO AND IMPERIAL COUNTIES

www.aclu-sdic.org ♦ (619) 232-2121

LOCAL PUBLIC DEFENDER

If you're facing state criminal charges, contact the Public Defender's Office in the county where you were arrested to see if you qualify for free legal representation.

NATIONAL LAWYERS GUILD

The NLGSF (www.nlgsf.org) may be able to help with both criminal and campus disciplinary proceedings in the Bay Area. It also has an online form to request legal support for a demonstration.

In southern California, contact the NLG LA Chapter for legal support and civil disobedience training at www.nlg.org/los-angeles or (323) 653-4510.

CENTER FOR PROTEST LAW

www.protestlaw.org

THE RUCKUS SOCIETY

www.ruckus.org

Disclaimer: The information provided herein is meant to be a general overview.

For more specific information related to your speech on campus, please review your school's policies on demonstrations, free speech, and use of space.

Additionally, if you're planning a campus protest, you should review any local or state ordinances related to demonstrations that could be applicable.