

FIRST AMENDMENT: GENESIS AND DEBATE

The Bill of Rights, and the First Amendment in particular, did not arise out of nowhere. For decades, many American colonists had been putting up resistance to British authority and asserting their rights as British citizens. Many had come to the New World primarily to be able to freely practice their religion, without the interference of government. And yet, they met with persecution from colonial authorities, who in the early years adhered to a strict set of religious views, resulting in the trial of Anne Hutchinson in the Massachusetts Bay Colony for religious heresy, or forcing Roger Williams, a religious dissenter, to flee Massachusetts and found the state of Rhode Island—where he called for the strict separation of church and state. In Pennsylvania, William Penn authored the Pennsylvania Charter of Privileges, which enshrined the concept of religious freedom and the separation of church and state.

Freedom of speech was also of concern to the colonists. In the 1720s, John Trenchard and Thomas Gordon wrote a series of 144 weekly essays under the pen name Cato, the principled Roman statesman who defied Julius Caesar. These essays, particularly “Of Freedom of Speech,” with their view that restricted speech is a hallmark of tyranny, inspired the U.S. founders and their understanding of free speech. The Virginia Declaration of Rights, written by

George Mason, would ultimately be made part of the state’s constitution; in the meantime, it inspired the Declaration of Independence, the Constitution, and the Bill of Rights with such statements as: “the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.” The 1780 constitution of Massachusetts, the world’s oldest functioning constitution, includes provisions that would become part of the Bill of Rights, including freedom of the press, freedom of religion, and the right to petition the government. In the 1780s, successful efforts were made to “disestablish” the church in Virginia.

After the Founders approved the new U.S. Constitution in 1787, the battle for ratification in the states began. Several states indicated that their ratification of the Constitution hinged on the promise of a bill of rights. Much of the debate turned on the issue of whether the new Constitution needed a bill of rights. In one of the *Federalist* papers, Alexander Hamilton examines the debate. The driving force behind the first ten amendments to the Constitution—the Bill of Rights—was James Madison, who drafted the proposals and submitted them to the nation’s First Congress for approval. The Bill of Rights was ratified by the requisite number of states in 1791.

■ Excerpts from the Massachusetts Bay Colony Trial Against Anne Hutchinson

Date: 1637

Authors: Anne Hutchinson et al.

Genre: court transcript

Summary Overview

Anne Hutchinson is one of the most well known and significant figures in seventeenth century American colonial history and is certainly the most well-known woman. What many usually know of her is that she was a woman who got in trouble for teaching men and, for this crime, was exiled from Massachusetts Bay Colony. While this is true, it is hardly the whole story. As the transcript from Hutchinson's trial shows, she was at the center of a highly complex and contentious political and religious controversy in the young colony. Her crime was not simply that she was a woman who was teaching men. She was a woman whose teachings were prohibited because they threatened to undermine the religious—and, by extension, political—power structure of the colony.

One thing in particular to watch out for when reading these selections from her trial transcript is the high level of determination and logic that Hutchinson expresses in arguing her case with the governor and deputy governor of the colony. At no point does she acquiesce to their power. Rather, she forces them to lay out, explicitly, the charges against her which she then proceeds to refute. Note, also, the point at which she claims personal revelation from God.

Defining Moment

The trial of Anne Hutchinson came amidst a wider conflict within Massachusetts Bay Colony known as the Antinomian Controversy (also sometimes known as the “Free Grace” Controversy). The colony had been founded in 1630 by Puritans from England and the government of the colony was tightly intertwined with the religious hierarchy. There was no freedom of religion in Massachusetts Bay. In order to possess political authority it was necessary to be in good standing with the church. Thus, controversies over religious doctrine had an effect on the civil government and heterodox or heretical ideas were prosecuted and punished as civil crimes.

The controversy itself revolved around several issues. One was the belief that God's grace

(or unmerited favor) was the only thing necessary for salvation, aside from any good behavior (“works”) on the part of a Christian. The Puritans often viewed the benefits that one received from performing good works as an outward sign that a person had received God's grace. The Free Grace advocates believed that the Puritan preachers over-emphasized such works; if God forgave one's sins with His grace, which was arbitrarily given, what difference would it make to do good things? The Puritans furiously objected to this argument, considering its adherents to be “antinomians,” or people who did not believe that any of the laws or doctrines of Christian churches applied to one's life if God forgave sin.

Just as troubling to the religious establishment was the idea among Free Grace advocates, including Anne Hutchinson, that once saved, a

Christian was literally inhabited by the Holy Spirit and could receive direct revelation from God. In England, John Cotton and John Wheelwright were prominent preachers of these ideas. When they came to Massachusetts Bay Colony in the 1630s, they brought their teaching with them. Hutchinson came with them and became a popular and charismatic teacher at this time as well. A petition was circulated in support of the preachers but in 1637, Wheelwright was exiled from the colony, while Cotton was permitted to stay.

Author Biography

Anne Marbury Hutchinson was born in July 1591. While we do not know her exact date of birth, she was baptized on July 20 in Lincolnshire, England. As the daughter of a priest and teacher, she received a thorough education and, after her marriage to William Hutchinson, began following the ministry of John Cotton, a popular preacher. In 1634, when Cotton left for Massachusetts Bay Colony, Anne and William followed him with their eleven children in tow, settling in Boston.

While Hutchinson worked as a midwife, she also held religious meetings for other women in her home. Soon men began to attend as well, including the current governor of Massachusetts Bay Colony, Henry Vane. The preaching of John Cotton and John Wheelwright began to take root, as more and more colonists accepted that a “covenant of [God’s] grace” was superior to any “covenant of works.” Still being a follower of Cotton and Wheelwright (her husband’s brother-in-law), she began to share their ideas with others in the community. Controversy grew over the course of 1636 and 1637, as the Puritans in the colony—who had established it specifically as a model “city on a hill,” a Protestant community to be emulated by others back in the British Isles—were surprised and aggravated at finding it necessary to defend their religious beliefs and practices on their own territory.

In March 1637, Wheelwright was accused of sedition, the purposeful undermining of the colony’s state structure. Vane lost his reelection bid to John Winthrop, a staunch Puritan, and Wheelwright was sentenced to be banished from the colony. Anne Hutchinson followed him to court, charged with sedition as well.

HISTORICAL DOCUMENT: Excerpts from the Massachusetts Bay Colony Trial against Anne Hutchinson

Gov. John Winthrop: Mrs. Hutchinson, you are called here as one of those that have troubled the peace of the commonwealth and the churches here; you are known to be a woman that hath had a great share in the promoting and divulging of those opinions that are the cause of this trouble, and to be nearly joined not only in affinity and affection with some of those the court had taken notice of and passed censure upon, but you have spoken divers things, as we have been informed, very prejudicial to the honour of the churches and ministers thereof, and you have maintained a meeting and an assembly in your house that hath been condemned by the general assembly as a thing not tolerable nor comely in the sight of God nor fitting for your sex, and notwithstanding that was cried down you have continued the same. Therefore we

have thought good to send for you to understand how things are, that if you be in an erroneous way we may reduce you that so you may become a profitable member here among us. Otherwise if you be obstinate in your course that then the court may take such course that you may trouble us no further. Therefore I would intreat you to express whether you do assent and hold in practice to those opinions and factions that have been handled in court already, that is to say, whether you do not justify Mr. Wheelwright's sermon and the petition.

Mrs. Anne Hutchinson: I am called here to answer before you but I hear no things laid to my charge.

Gov. John Winthrop: I have told you some already and more I can tell you.

Mrs. Anne Hutchinson: Name one, Sir.

Gov. John Winthrop: Have I not named some already?

Mrs. Anne Hutchinson: What have I said or done?

Gov. John Winthrop: Why for your doings, this you did harbor and countenance those that are parties in this faction that you have heard of.

Mrs. Anne Hutchinson: That's a matter of conscience, Sir.

Gov. John Winthrop: Your conscience you must keep, or it must be kept for you.

Mrs. Anne Hutchinson: Must not I then entertain the saints because I must keep my conscience?

Gov. John Winthrop: Say that one brother should commit felony or treason and come to his brother's house, if he knows him guilty and conceals him he is guilty of the same. It is his conscience to entertain him, but if his conscience comes into act in giving countenance and entertainment to him that hath broken the law he is guilty too. So if you do countenance those that are transgressors of the law you are in the same fact.

Mrs. Anne Hutchinson: What law do they transgress?

Gov. John Winthrop: The law of God and of the state.

Mrs. Anne Hutchinson: In what particular?

Gov. John Winthrop: Why, in this among the rest, whereas the Lord doth say honour thy father and thy mother.

Mrs. Anne Hutchinson: [Aye] Sir, in the Lord.

Gov. John Winthrop: This honour you have broke in giving countenance to them.

Mrs. Anne Hutchinson: In entertaining those did I entertain them against any act (for there is the thing) or what God has appointed?

Gov. John Winthrop: You knew that Mr. Wheelwright did preach this sermon and those that countenance him in this do break a law.

Mrs. Anne Hutchinson: What law have I broken?

Gov. John Winthrop: Why the fifth commandment.

Mrs. Anne Hutchinson: I deny that for he (Mr. Wheelwright) saith in the Lord.

Gov. John Winthrop: You have joined with them in the faction.

Mrs. Anne Hutchinson: In what faction have I joined with them?

Gov. John Winthrop: In presenting the petition.

Mrs. Anne Hutchinson: Suppose I had set my hand to the petition. What then?

Gov. John Winthrop: You saw that case tried before.

Mrs. Anne Hutchinson: But I had not my hand to [not signed] the petition.

Gov. John Winthrop: You have councelled them.

Mrs. Anne Hutchinson: Wherein?

Gov. John Winthrop: Why in entertaining them.

Mrs. Anne Hutchinson: What breach of law is that, Sir?

■ The First Amendment on Campus 2020 Report: College Students' Views of Free Expression

Date: 2020

Author: Knight Foundation/Gallup

Genre: survey results

Summary Overview

The Knight Foundation, in collaboration with the Gallup polling company, conducts yearly surveys to assess beliefs about free speech and free expression on college campuses. Presented here are the highlights from the 2020 survey. To conduct the survey, 3,000 students were interviewed online and another 1,000 students were interviewed by telephone. The survey measures student support of free expression as well as support for possible limitations on free expression on campus. Additionally, the survey examines racial and gender gaps in attitudes on these matters and assesses the extent to which students see their First Amendment rights as secure. Finally, the survey examines the impact of social media on campus discourse.

Defining Moment

No particular defining moment led to the production of the survey. The survey is conducted each year as a means of measuring shifting attitudes to the issues about which it asks students. That said, interest in the survey in the 2010s and beyond was fueled by the belief that free speech and free expression have become hot-button issues on college campuses. Interest in these issues intensified because of a widespread perception that too many colleges too often suppress free speech for a number of reasons, or perceived reasons. One is the belief that college faculty are overwhelmingly liberal in their political orientation, turning conservatives on campus as rarities, if not almost pariahs; a 2020 survey by the National Association of Scholars concluded that Democrats outnumber Republicans nine to one on college faculties. The result, it is believed, is that conservative viewpoints—on gender issues, lesbian, gay, bisexual, and transgender (LGBT) issues, race issues and diversity, presidential politics, religion, police

practices, military responses to terrorism, and a host of other issues—are stifled. Outside speakers whose views are conservative are often the targets of vocal protest and are shouted down. Students who wear Reserve Officers' Training Corps (ROTC) uniforms to class are mocked.

It is often asserted that a climate of “political correctness” dominates campus discourse. The term is usually used ironically to refer to the belief that there is a received set of views and opinions that one has to hold in order to be accepted as part of the community; any divergent view is not “politically correct,” or “PC.” Meanwhile, protest and petitioning have often been restricted to small, out-of-the-way “free speech zones” or “free expression areas,” on campus. Administrators argue that these zones are necessary to prevent protest from disrupting classes, but organizations such as the American Civil Liberties Union (ACLU) and the Foundation for Individual Rights in Education see them as limiting the ability of students to engage in speech that might be controversial. Religious speech is often being regarded as a form of “hate speech”:

A person who openly advocates, for example, Christian viewpoints can be seen as threatening or offensive to those of other faiths, or no faith, and campus organizations that have a religious purpose are sometimes forced to be open to anyone because of the college's nondiscrimination policies. Further, speech codes, which prohibit any kind of speech that could be considered offensive, were instituted at hundreds of colleges and universities. The problem, of course, is that "offensive" is a slippery concept, and people can disagree, often passionately, about what is offensive. At one eastern university, a speech code, which was struck down by a federal court, cited as violations of its speech policy "inappropriately directed laughter" and "conspicuous exclusion from conversations and/or classroom discussions." These and other policies sometimes became fodder for late-night comedians and even *Saturday Night Live* skits.

Race and gender, it is believed, have become flashpoints for issues involving free speech. A person who opposes "diversity training" or diversity efforts in faculty hiring and student recruitment can feel forced to stifle that point of view out of fear of retaliation. Halloween costumes are scrutinized for offensive stereotypes. With regard to gender, any speech that can be regarded as sexist or misogynistic can lead to severe repercussions, and allegations of criminal sexual misconduct can lead to extrajudicial hearings that deny to the accused fundamental constitutional rights.

These contentious matters, in an atmosphere where vocal, usually intelligent people are likely to have strong opinions, have resulted in consid-

erable commentary on the state of free speech on college campuses—and to assertions that free speech is endangered.

Author Biography

The Knight Foundation is an American nonprofit based in Miami, Florida. The organization began in 1940 as the Knight Memorial Education Fund, but in 1950 it was incorporated in Ohio as the Knight Foundation, then in 1993 in Florida as the John S. and James L. Knight Foundation. The purpose of the foundation was to support journalism, primarily by making grants to journalism students and to organizations that promoted the journalism profession. More recently, the foundation grew active in the support of First Amendment rights, funding surveys that gauged attitudes about freedom of speech in schools and colleges. The foundation created the Knight First Amendment Institute at Columbia University to "preserve and expand First Amendment rights in the digital age through research and education, and by supporting litigation in favor of protecting freedom of expression and the press."

The name Gallup is likely to be familiar to most Americans. Founded by George Gallup in 1935, the company is the leading provider of public opinion polls in the country. Most Americans have been exposed to the results of Gallup polls regarding a range of issues, from the state of the economy to the likely outcome of elections. Although the company is best known for its Gallup Poll, the bulk of its revenue comes from research and management consulting.

HISTORICAL DOCUMENT: The First Amendment on Campus 2020 Report: College Students' Views of Free Expression

Key findings of the study include:

College students broadly support free speech, yet increasingly favor restrictions on speech—particularly speech that targets minority groups.

- Close to 7 in 10 college students (68%) regard citizens' free speech rights as being "extremely important" to democracy. Nearly the same percentage (69%) believe an inclusive society that is welcoming to diverse groups is "extremely important."
- Eighty-one percent of students widely support a campus environment where students are exposed to all types of speech, even if they may find it offensive.
- Nearly three-quarters believe colleges should not be able to restrict expression of political views that are upsetting or offensive to certain groups.
- But 78% of college students favor colleges providing safe spaces, or areas of campus that are designed to be free from threatening actions, ideas or conversations.
- Also, growing majorities of college students believe colleges should be able to restrict the use of racial slurs (78%, up from 69% in 2016) and costumes that stereotype certain racial or ethnic groups (71%, up from 63% in 2016).
- Most college students believe efforts at diversity and inclusion "frequently" (27%) or "occasionally" (49%) come into conflict with free speech rights.

Racial and gender gaps exist in the extent to which students see the First Amendment as a safeguard and on whether colleges should protect students from certain speech.

- Nearly 9 in 10 college students agree that the First Amendment protects people like themselves, including 44% who strongly agree. Male and non-Hispanic white students are more likely to strongly agree than female or racial and ethnic minority students.
- Women are twice as likely as men (23% vs. 11%), and black students are nearly twice as likely as white students (28% vs. 15%), to prefer that colleges protect

students by prohibiting certain types of speech rather than exposing them to all types of speech.

- An increasing proportion of students—38%, up from 25% in 2017—say they have personally felt uncomfortable because of something someone said on campus. Students who felt uncomfortable are most likely to report that the offending comments referenced their race or gender.
- One in eight students report something they have heard on campus has left them feeling unsafe. Female, non-Hispanic black and Asian students are most likely to say comments they have heard made them feel uncomfortable or unsafe.

College students see free speech and free press as less secure than they did in 2016.

- Fifty-nine percent of college students believe free speech rights are secure, down from 73% in 2016 and 64% in 2017.
- Sixty-five percent think free press rights are secure, which remains down from 81% in 2016 but is up slightly from 60% in 2017.
- Students believe free speech is less secure than other First Amendment rights. Most students believe their campus climate can deter free speech.
- Sixty-three percent of students agree that the climate on their campus deters students from expressing themselves openly, up from 54% in 2016.
- Students continue to perceive that conservative students are less able than other campus subgroups to express their views freely and openly on campus.
- The majority of college students say they personally are comfortable expressing dissenting opinions in class — but students who identify politically as Democrats are more likely than independents and Republicans to say this.

Students continue to regard social media as the central forum for campus discussion, but say the discourse online is getting worse.

- Fewer students now (29%) than in 2016 (41%) say discussion on social media is usually civil. More students than in the past agree that social media can stifle free speech—both because people block those whose views they disagree with

(60%, up from 48% in 2016) and because people are afraid of being attacked or shamed by those who disagree with them (58%, up from 49% in 2016).

- Students say discussion of ideas at their college is more likely to take place online via social media than face-to-face on campus.

Document Analysis

The document presented here is the executive summary of the survey's findings; the entire report drills down into the data presented here to provide a detailed look at what college students think about the state of First Amendment rights on their campuses. In and of itself, the data requires little in the way of analysis: It provides percentage figures about the number of students who hold a particular belief or attitude. Any analysis would entail what a reader concludes from the data. The survey tries to provide answers to such questions as: Do students support free speech on campus? Do they favor any restrictions on free speech, particularly any speech that involves minority groups? Do they think that students on their campus are exposed to a variety of viewpoints? Should potentially upsetting political speech be proscribed? Should "safe spaces" free from potentially threatening ideas or conversations be provided? What do students think about diversity and inclusion efforts? To what extent do minority and white students think differently about free speech issues? Is there a gap in men's and women's views on free speech issues? Do students believe that their First Amendment rights are secure? How do students perceive the impact of social media on free speech on their campuses?

Some of the results of the survey might come as a surprise to those who believe that free speech is under threat. The survey concluded that 81 percent of students believed that they should be exposed to all forms of speech, even

if it is offensive, and nearly 75 percent believe that colleges should not be allowed to restrict potentially upsetting or offensive political views. Nevertheless, 78 percent support the creation of "safe spaces." Most believe that diversity and inclusion efforts can come into conflict with free speech rights.

Not surprisingly, perhaps, the survey concluded that male and non-Hispanic white students are more likely to strongly agree than female or racial and ethnic minority students that the First Amendment protects people like themselves. And perhaps also not surprisingly, the survey concluded that women are twice as likely as men and black students are nearly twice as likely as white students to prefer that colleges protect students by prohibiting certain types of speech. Nearly four in ten students say they have personally felt uncomfortable because of something someone on campus said, and one in eight reported feeling unsafe because of something they heard on campus. Female, non-Hispanic black, and Asian students are most likely to have felt unsafe at some point.

One perhaps disturbing trend is that the percentage of students who believe that free speech rights are secure declined from 73 percent in the 2016 survey to 59 percent. Overall, students believe that free speech rights are less secure than other First Amendment rights, such as freedom of the press, and that their campus climate can deter free speech: Sixty-three percent agree that the climate on their campus deters students from expressing themselves openly, up from 54 percent in 2016. Students also

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■ Web Resources

Constitution Annotated

<https://constitution.congress.gov/browse/amendment-1/>

This government website breaks down the First Amendment into all of multiple the legal issues that arise from its various clauses. It then provides expert commentary on that issue, along with references to key Court cases that had a bearing on it.

The First Amendment Encyclopedia

<https://mtsu.edu/first-amendment/page/first-amendment-encyclopedia>

This comprehensive resource boasts an extensive library of entries on the First Amendment—more than 1,500. The entries are searchable and provide information on virtually any First Amendment issue, including key figures, court cases, laws, and the like. The site includes a chronology of important dates and events.

The Fire

<https://www.thefire.org/first-amendment-library/>

“Fire” stands for Foundation for Individual Rights in Education. The organization maintains a First Amendment Library that includes Supreme Court cases, historical timelines, overview essays, a glossary, banned and challenged books, academic discussions, and other resources bearing on the U.S. culture of free speech.

Freedom Forum Institute

<https://www.freedomforuminstitute.org/first-amendment-center/>

The institute’s First Amendment Center is a treasure trove of articles, research materials, court cases, information about organizations, and other resources bearing on the First Amendment. Its “State of the First Amendment Survey” provides up-to-date information on First Amendment issues as they arise.

The Constitution Center

<https://constitutioncenter.org/interactive-constitution/amendment/amendment-i>

This website provides interactive resources for studying the First Amendment. Included are resources for teachers, including videos, podcasts, and lesson plans. “The Drafting Table” takes users back to the genesis of the First Amendment, with historical documents, early drafts, proposals regarding the provisions of the amendment, and exploration of the deliberations and compromises that led to the final text.

Bill of Rights Institute

<https://billofrightsinstitute.org/resources/freedom-of-speech-general>

The Bill of Rights Institute offers thousands of resources and dozens of opportunities to support history and civics students. Among these are the We the Students Essay contest, which gives a cash prize; the Constitutional Academy, a Washington, DC summer program for students; and a Resources Library with 4,000 resources, including 650 lessons, 300 essays, and more than 300 videos.

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