

**Unpopular Speech and the Heckler's Veto
(and Social Media)**

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Introduction

This CLE seeks to answer the question:

What do local governments need to know about the Heckler's Veto?

Answering that question requires that we further consider these questions:

What is the Heckler's Veto?

What role do local governments play?

Where does social media fit into this situation?

Foundational Values

First Amendment protects our freedom of speech.

Unpopular Speech?

Unpopular with whom?

Marketplace of Ideas

Holmes described this in his dissent in *Abrams v. U.S.*

Silence!

Protestors use various means to silence those with whom they disagree.

Recent Examples of the Heckler's Veto

1. **Jim Webb/US Naval Academy** (women graduates protested over 38-year-old magazine article → declined to accept award)
2. **Condoleezza Rice/Rutgers** (student and faculty protest over Bush 43 and Iraq war → voluntarily withdrew from commencement address)
3. **Milo Yiannopolous/UC Berkeley** (violent protest with projectiles, bricks, rocks, fireworks, and setting fires → cancellation)
4. **Ann Coulter/UC Berkeley** (threats of violence → cancellation)
5. **Milo Yiannopolous/University of Alabama** (near cancellation over fee dispute, but resolved → event went forward)
6. **Multnomah County Republican Party/Rose Festival Parade (Portland, Oregon)** (email threat of disruption → cancellation)

Government suppression of speech

Government complicity in suppressing protected speech undermines the First Amendment. How might this happen? Here are several ways.

What does it take to silence a speaker?

1. **Municipal Involvement by Police Response**
 - a. **Arresting the speaker**
Feiner v. New York, 340 U.S. 315 (1951)
 - b. **Silencing the speaker by threat of arrest**

Netherland v. Eubanks, 302 Fed. Appx. 244 (5th Cir. 2008)

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992)

Ovadal v. City of Madison, Wisconsin, 416 F.3d 531, 537 (7th Cir. 2005) (“*Ovadal I*”) (citing *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir.1993))

Frye v. Kansas City, Missouri, Police Dept., 375 F.3d 785, 793 (8th Cir. 2004) (Beam, J., Dissenting) (citing *Reno v. ACLU*, 521 U.S. 844, 880 (1997))

Ovadal v. City of Madison, Wisconsin, 469 F.3d 625, 627 (7th Cir. 2006) (“*Ovadal II*”)

Bible Believers v. Wayne County, Mich., 805 F.3d 228, 240 (6th Cir. 2015).

2. **Municipal Involvement by Anti-Harassment Policies**

(Campus speech codes were held to be unconstitutional, but they have reappeared in the form of anti-harassment policies.)

(Critical race theorists challenge the marketplace of ideas.)

Does the “fighting words” concept pose a challenge to the “marketplace of ideas” concept?

Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)

D.C. Metro sign: “IF IT’S UNWANTED, IT’S HARASSMENT.”

(Do we have a right to safety? If so, upon whom does it impose a duty to fulfill that right? Does that encompass a right to be free from harassment? What is the source of that right? Or is it a privilege? Do we have a right not to be offended?)

People in Interest of R.C., 411 P.3d 1105, 1109 n.3 (Colo. Ct. App. 2016) (internal citations and quotation marks omitted) (juvenile disorderly conduct case).

3. Municipal Involvement by Denial of Parade Permits

Burk v. Augusta-Richmond County, 365 F.3d 1247, 1257 (11th Cir. 2004).

Beckerman v. City of Tupelo, Miss., 664 F.2d 502, 509 (5th Cir. 1981)

Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart, 934 F.2d 318 (Table) at *2 (4th Cir. 1991).

Iranian Muslim Org. v. City of San Antonio, 615 S.W.2d 202, 206-07 (Tex. 1981)

Steffan v. Aspin, 8 F.3d 57, 69 (D.C. Cir. 1993) (internal citations omitted) (describing prohibition of heckler's veto), judgment vacated by order for en rehearing Jan. 7, 1994, substitute opinion sub nom. *Steffan v. Perry*, 41 F.3d 577 (D.C. Cir. 1994).

4. Municipal Involvement Through Security Fees

Forsyth County v. Nationalist Movement, 505 U.S. 123, 124 (1992).

Morascini v. Comm'r of Pub. Safety, 675 A.2d 1340, 1349-50 (Conn. 1996)

What does this have to do with Social Media?

Is social media a de facto public forum?

Has the City created a designated public forum?

Who gets to control the content on social media?

Does calling something "hate speech" justify removing it?

Conclusion

Municipalities must balance the interests and constitutionally protected rights of speakers with those of protestors and must maintain the peace while avoiding an endorsement of the heckler's veto.