



## Student Rights/Free Speech

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### Background

Sixty years ago, when the U. S. Supreme Court decided its first free speech case involving students and the public schools, the idea that students had any right to free speech would have been considered laughable at best, dangerous at worst. At that time, school was considered a privilege to attend, and rules or regulations the school sought to enforce were untouchable. This generalization was collectively true at the elementary, secondary and college levels of education.

Student rights to free speech did not really become an issue until the Vietnam War, when more and more students found themselves at opposite ends of the political spectrum from their teachers and school administrators. The Supreme Court's 1969 decision in *Tinker v. Des Moines Independent School District* opened the floodgates to school free speech [LITIGATION](#), and while court decisions have certainly gone back and forth between the right to free speech and the need to impose discipline and respect the feelings of all students, there has never been any attempt to go back to the strict free speech restrictions of the pre-Vietnam War era.

Public school free speech rights for students can be divided into those applying to elementary and secondary students and those dealing with college issues. Since college students are adults, the First Amendment situations dealt with are substantially different. Analyzing student free speech rights in this way can give a cohesive picture of those rights for students today.

### Free Speech Rights in Public Schools

Free speech rights in public elementary and secondary schools have undergone a remarkable transformation in the past 30 years, from nonexistence to a perpetual tension between those rights and the need for schools to control student behavior in order to preserve the sanctity of the learning environment. Today, it would be most accurate to say that public schools students have some First Amendment rights in schools, but certainly not as many as adults do in the real world. Although *Tinker v. Des Moines Independent School District* was the landmark case that set forth the standards which current student free speech cases are judged, the first case that suggested students had some First Amendment rights was decided much earlier—during World War II, to be exact.

### ***West Virginia State Board of Education v. Barnette***

This 1943 case marked the first time the Supreme Court ever conceded students had First Amendment rights. During World War II, the West Virginia State Board of Education passed a law requiring all students to salute the flag and recite the Pledge of Allegiance. Several students and their parents who were members of the Jehovah's Witnesses challenged the policy, arguing their religion prevented them from swearing allegiance to anyone but God, and so they could not recite the Pledge of Allegiance. The Supreme Court decided the students were in the right, and on First Amendment grounds struck down the West Virginia [ORDINANCE](#) as violating the right of free expression.

" Educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual," said the Court, "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." The Court determined that students had the right not to be coerced by school administrators to doing something that disagreed with their religious beliefs. Free speech in this case meant the right not to say something, in this case, the Pledge of Allegiance.

### ***Tinker v. Des Moines Independent Community School District***

After *Barnette*, the student First Amendment rights front was quiet in the courts, until the case of *Tinker v. Des Moines Independent Community School District* in 1969 shattered the peace and made sure there would be controversy for a long time to come. The Vietnam War was raging full force when the students at a Des Moines, Iowa, high school decided to wear black armbands to school one day to protest what they saw as an unjust struggle. The school administrators learned of their plan and passed a rule banning black armbands from the school and suspending any student caught wearing one. The students wore the armbands anyway, and as a result were suspended. They sued the school district.

In writing in favor of the students for the majority, Justice Abe Fortas wrote these iconic words: "It can hardly be argued that either students or teachers shed their constitutional rights to [FREEDOM OF SPEECH](#) or expression at the schoolhouse gate... School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect... In the absence of specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views."

But Fortas added an important [CAVEAT](#): conduct that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." In other words, not all student conduct is First Amendment protected, only that which does not disturb the classroom environment or invade the rights of others. This standard, also known as the "material and substantial disruption test," has basically remained the standard in which the school's right to prescribe free speech is examined at the secondary rank as well as at public colleges and universities.

After *Tinker*, a host of cases were brought at the lower court level litigating public school free speech issues. Many of these came down on the side of freedom of expression for students. Many lower courts found themselves asking, after *Tinker*, what student speech can in fact be regulated.

### ***Bethel School District No. 403 v. Fraser***

The Supreme Court finally attempted to set some limits on student First Amendment rights in the 1986 case of *Bethel School District No. 403 v. Fraser*. Matthew Fraser made a speech at an assembly full of obscenities and innuendoes. When school officials attempted to discipline him for his speech, he sued. The Supreme Court sided with the school.

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The Court found that Fraser had failed the "substantial disorder" part of the Tinker test. CHIEFJUSTICE Warren Berger, writing for the majority, said that schools have a responsibility to instill students with "habits and manners of civility as values." The effect of Fraser's speech, suggested Berger, was to undermine this responsibility; therefore, he did not receive First Amendment protection for it. Not only can schools take into account whether speech is offensive to other students, said Berger, "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the **BOUNDARIES** of socially appropriate behavior." Bethel served notice that the Supreme Court saw limitations on student free speech rights. The next big school First Amendment case decided by the court served to emphasize that point.

### ***Hazelwood School District v. Kuhlmeier***

The school newspaper at Hazelwood East High School in Missouri was courting controversy when it decided to publish an article on pregnancy among students naming names, as well as an article on students of divorced parents. The principal of the school censored both articles from the school paper. The student editors of the newspaper sued.

In 1988, the Supreme Court handed down its decision: a complete defeat for the students. The majority of the court claimed Tinker did not apply to this case, since the school newspaper was a school-sponsored activity. According to the Court, when an activity is school sponsored, school officials may censor speech as long as such **CENSORSHIP** is reasonably related to legitimate educational concerns. The Court went on to define these concerns broadly, stating that school officials would have the right to censor material that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences, or inconsistent with shared values of a civilized social order."

Hazelwood did distinguish between school-sponsored publications and other activities, and publications and activities that were not school sponsored, which the Court suggested would be given greater free-speech leeway. Nevertheless, the Hazelwood decision was clearly a defeat for student free speech rights. School officials were now allowed to censor school newspapers, as well as other school sponsored activities such as theatrical productions, in "any reasonable manner."

### ***Elementary and Secondary Student Rights Since Hazelwood***

Since Hazelwood, the Supreme Court has not tackled a non-religious free speech issue involving a public elementary or high school. Lower courts that have dealt with these issues have tended to follow Hazelwood's ruling pretty closely: if a free speech case involves a school sponsored activity, school officials are given wide latitude. Since all but a few student free speech cases involve a school-sponsored activity, the effect has been that most free speech cases have gone against students, with some minor exceptions.

Lower courts have also determined that school officials have broad discretion at the elementary school level in controlling student speech, ruling in several cases that Tinker does not apply. However, most legal commentators believe that despite these developments, Tinker still remains in force, at least for high school students. School administrators are still required to show "material and substantial disruption" before limiting student speech in non-school sponsored activities.

## **Higher Education Free Speech Issues**

Institutions of higher education have generally been held to have less control over student free speech rights than elementary and high school teachers and administrators. In part, this position reflects the fact that college

students are adults. However, there have still been areas of controversy in post-secondary student free speech rights, generally having to do with funding issues. The latest area of controversy has been with so-called "hate codes," which ban certain types of speech considered offensive from college campuses.

### ***Recognizing Student Groups***

One way in which colleges and universities have traditionally imposed free speech restrictions on students is by determining which student groups they will recognize. Such recognition traditionally allows these groups to share in mandatory fees and receive space for offices and to hold meetings on college campuses. Generally speaking, colleges are held to have made available a "limited public forum" to such groups, and as such are limited in the restrictions they can impose.

In the 1973 case of *Healy v. James*, the Supreme Court established that a college or university could not refuse to recognize an organization simply because university officials had an unproven fear of school disruption. Healy applied the material and substantial disruption test of *Tinker* to the college environment and found that unless the school had a compelling reason to believe that a group, in this case, Students for a Democratic Society, would seriously interfere with learning on the campus environment, it could not deny recognition.

In 1981, the Court went further in the case of *Widmar v. Vincent*. Involving the decision by the University of Missouri to refuse to recognize and grant access to university property to a religious group, the Court ruled that the University's decision to do so, while allowing access to several secular based groups, violated the First Amendment. The Court's decision in *Widmar* effectively meant that any decision by a college to deny recognition to a particular group was going to be analyzed with strict scrutiny and most likely struck down.

While none of these cases has reached the Supreme Court, one of the most litigated issues of the past thirty years involving recognition of student groups has involved recognition of homosexual groups. Generally speaking, nearly all attempts by colleges to refuse to recognize gay groups have been held to violate these groups First Amendment rights.

### ***Mandatory Student Fees***

Mandatory student fees constitute another area in which colleges and universities have faced free speech issues. These fees are generally collected by colleges as part of student tuition, and then distributed to a wide variety of groups.

Colleges usually do not impose restrictions in terms of ideology on which groups receive these fees, but they have in the past denied funding to groups promoting a religious viewpoint. However, in 1995 in *Rosenberger v. Rector of the University of Virginia*, the Supreme Court struck down these restrictions at the University of Virginia and ruled the University could not silence the expression of selected viewpoints by denying the groups student fee money. The *Rosenberger* decision stated colleges have to be rigidly neutral in distributing student fee money and cannot discriminate on the basis of content or viewpoint without violating the First Amendment.

A related issue concerning mandatory student fees has been whether it violates a student's First Amendment rights to be forced to pay fees that fund groups with which the student disagrees. In 2000, in the case of *Board of Regents v. Southworth*, the Supreme Court determined that it does not, as long as the money is distributed in a viewpoint neutral fashion, and does not favor one viewpoint over another.

## **Hate Speech Codes**

The most recent free-speech issue to hit college campuses involves so-called hate speech codes. These are codes passed by colleges that restrict speech considered offensive to other groups on campus, particularly speech that is believed to be racist or sexist.

While a case involving these hate speech codes has not yet reached the Supreme Court, lower courts have been undecided about allowing them to stand. For example, in *Doe v. University of Michigan*, in 1993, the United States Court for the Eastern District of Michigan struck down a policy passed by the University of Michigan regulating hate speech. The court found the policy overbroad and unconstitutionally vague. The university could not regulate speech "because it disagreed with the ideas or the messages sought to be conveyed," said the court, "nor because the speech was found to be offensive, even gravely so, by large numbers of people." Added the court: "These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission." This has been the fate of speech codes that have been litigated, and as of this writing, not one has passed muster at the federal court level.

## **Additional Resources**

*"The First Amendment and Higher Education Students: Part I: The Religion Cases."* Zirkel, Perry, West Education Law Reporter, December, 1999.

*"The First Amendment and Higher Education Students: Part II: The Secular Cases."* Zirkel, Perry, West Education Law Reporter, April 2000.

*"How Free is the Speech of Public School Students?"* Rohr, Marc, Florida Bar Journal, June 2000.

*"Injustice In Our Schools: Students' Free Speech Rights are not Being Vigilantly Protected."* Lloyd, Heather K., Northern Illinois University Law Review, Spring, 2001.

*The Law of Schools, Students and Teachers.* Alexander, Kern, M. David Alexander, West Group, 1995.

*"What's Next for Wayne Dick? The Next Phase of the Debate Over College Hate Speech Codes."* Ohio State Law Journal, 2000.

## **Organizations**

### ***Coalition For Student And Academic Rights (COSTAR)***

Post Office Box 491  
Solebury, PA 18963 USA  
Phone: (215) 862-9096  
Fax: (215) 862-9097  
URL: <http://www.co-star.org/index.html>

### ***Freedom Forum First Amendment Center***

1207 18th Ave. South  
Nashville, TN 37212 USA  
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### ***Student Press Law Center (SPLC)***

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Primary Contact: Mark Goodman, Executive Director

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