

McCormick Foundation Civics Program

2010 First Amendment Summer Institute

Freedom of Speech: Student Speech and the Five Freedoms' Future in School

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Freedom of Speech

- **First Amendment:** “Congress shall make no law...abridging...the freedom of speech...”
- **Students’ First Amendment Rights:** Students in public schools enjoy First Amendment protections depending on the type of expression and their age. The Court has distinguished between elementary and secondary schools and public colleges and universities.
- **Evolving Case Law:**
 - *Minersville School District v. Gobitis* (1940): Constitutionality of a local Pennsylvania school board’s directive for students and teachers to salute the flag upheld
 - *West Virginia State Board of Education v. Barnette* (1943): West Virginia followed suit with a mandatory flag salute law, threatening expulsion, treatment as a delinquent, and parental prosecution.

Student Speech

○ Evolving Case Law:

- *West Virginia State Board of Education v. Barnette* (1943): “If there is any fixed star in our constitutional constellation, it is that no official can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”—Justice Jackson
- *Tinker v. Des Moines* (1969):
 - Facts of the case
 - Issues/ decisions
 - Reasoning
 - Separate opinions
 - Discussion
- *Bethel v. Fraser* (1986): Schools may go beyond the maintenance of order in censoring student speech. Expression that is offensive of inappropriate may be censored and punished because elementary, middle, and high school students are not adults, attendance is compulsory, and they constitute a captive audience.



Student Speech Continued

○ Evolving Case Law:

- *Bethel v. Fraser* (1986): “The First Amendment does not prevent school officials from determining that to permit a vulgar or lewd speech...would undermine the school’s basic educational mission.”- --Chief Justice Warren Burger
- *Hazelwood v. Kuhlmeier* (1988): A St. Louis area principal directed the removal of two pages of the high school student newspaper because they contained articles on teenage pregnancy and divorce.

-”A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the ‘real world.’”

- “...Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”—Justice Byron White



Student Speech Continued

○ Evolving Case Law:

- *Morse v. Frederick* (2007): Do schools have the right to punish students for drug-related speech that occurs at off-campus events?
 - "Schools may take steps to safeguard those entrusted to their care from speech that can be reasonably regarded as encouraging illegal drug use."
 - Frederick's "Bong Hits" banner was "potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use."



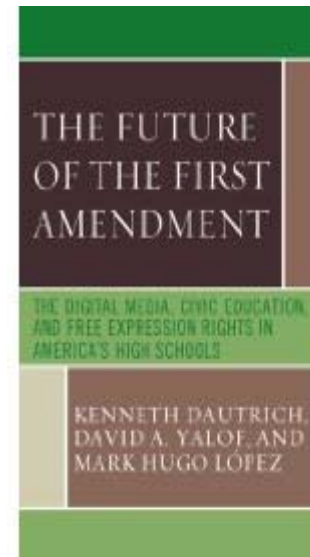
Student Speech Continued

Partner Exercise:

1. Brainstorm real-life or hypothetical First Amendment scenarios in a public school setting
2. Select two of these scenarios, one for each partner
3. Apply existing First Amendment jurisprudence to these scenarios
4. Begin developing a model school policy for this scenario that balances students' First Amendment rights with administrators and teachers' pedagogical and safety concerns
5. Report your findings to the class

Schools and the Future of the Five Freedoms

- “...Those high school students who take classes with First Amendment or media and society content are more likely to support the exercise of free expression rights.”
- The same holds true for users of digital media tools like social networking sites and blogs.
- Overall, student support for the First Amendment is lower than that of adults, including their teachers and administrators.
- However, First Amendment rights in application attract stronger support, including music censorship and prior review of student newspapers.



Five Freedoms' Future Continued



Teen Use of Social Media: Pew Internet and American Life Project, Dec. 19, 2007

- 59% of teens 12-17 have participated in one or more content-creating activities on the Internet. This includes...
 - 39% share their own content creations online, including artwork, photos, stories, or video
 - 28% have created their own online journal or blog, while 33% work on web pages or blogs created by others
 - 27% maintain their own personal web page

Five Freedoms' Future Continued

Teen Use of Social Media:

● Blogs:

-28% of teens blog, and this figure doubled between 2004 and 2008.

-Girls are more frequent bloggers: 35% of teenage girls blog to boys 20%.

● Social Networking Sites:

-55% of online teens have profiles on social networking sites like Facebook and MySpace.

-42% of those using social networking sites also blog, and 70% report reading the blogs of others.





Five Freedoms' Future Continued: What Are the Limits?

- **Deleting Online Predators Act (DOPA)**

- Passed House 410-15 on July 26, 2006;
Reintroduced on February 16, 2007
- Requires blocking of MySpace, other social networking sites, blogs, and bulletin boards

- **Protecting Children in the 21st Century Act**

- Similar to DOPA, but more expansive
- Includes stiffer penalties for failure to report child pornography, requires the labeling of sexually-explicit material, and restricts the sale of children's personal information
- Passed by the Senate on May 22, 2008

What Are the Limits?

Origins of Internet Filters

- **Communications Decency Act of 1996:**
Congress criminalized “indecent” and “patently offensive” communication online, invalidated by the Supreme Court on First Amendment grounds one year later.
- Turn to mechanical filters relying on mechanical blocking of key words and phrases. Valuable information concerning health, sexuality, women’s rights, gay and lesbian issues blocked.
- Called “third-party rating,” and highly subjective.



What Are the Limits?

Children's Internet Protection Act (CIPA)

- Signed by President Clinton in 2000, requires schools and libraries receiving federal financial assistance for internet access to install filters on all computers used by adults as well as minors
- Must block “visual depictions” that are:
 - “obscene”
 - “child pornography”
 - “harmful to minors”
- Blocking decisions essentially relegated to private companies, expanding the scope of censorship
- Wealthy schools able to forgo federal aid, no so for middle and lower income schools



What Are the Limits?

Children's Internet Protection Act (CIPA)

- By 2005 an estimated 90% of K-12 school districts were using filters in accordance with CIPA
- In 2001 the ACLU and ALA challenged CIPA's library provisions, struck down by three-judge panel on First Amendment grounds
- Government appeal to Supreme Court resulted in reversal in plurality decision (Rehnquist)
 - Filtering no different than book selection
 - Government aid allows limits to scope of internet access
 - Librarians may disable filters upon request from an adult



What Are the Limits?

Deleting Online Predators Act (DOPA)

- Similar principles of CIPA applied to social networking sites
- “(Students) are posting very personal information: the names of their school, ...their friends, the stores they like to shop at, along with photos of themselves—it’s become a virtual catalog of children for child predators lurking on the internet.”
 - Bill sponsor Rep. Michael Fitzpatrick (R-PA)
- Specifically limits access to “commercial social networking websites and chatrooms”



What Are the Limits?

Deleting Online Predators Act (DOPA)

- Might impact instructional use of web blogs, class-constructed “wikis”, and Web.CT, a distance learning program also used for class forums
- Also affects an evolving communication network where non-participants emerge unprepared and are denied the right to participate in constitutionally protected discourse
- Filters that currently block access to social networking sites and others are often undermined by “proxies”





Five Freedoms' Future Continued: Students' Use of Social Media

What About Student Blogging and Creating of Social Networking Sites?

- Past precedent applies to school-sponsored venues, including *Tinker*, *Bethel*, and *Hazelwood*.
- Supreme Court has yet to weigh in on student speech issues in the Digital Age
- Lower court rulings to date are laden with inconsistencies, as many have struggled with the issue of jurisdiction.
 1. Did student intend to cause harm?
 2. Was offending site accessed at school?
 3. Is there a “buzz” among students about the posting?

Five Freedoms' Future Continued: Students' Use of Social Media

Recent Case Law

-3rd Circuit:

1. Student posts sexually-explicit material (described as pedophile and sex addict) along with her principal's photo (fake name) on a MySpace page.
2. Student creates parody of principal, alleging marijuana usage and storing of beer behind his desk.

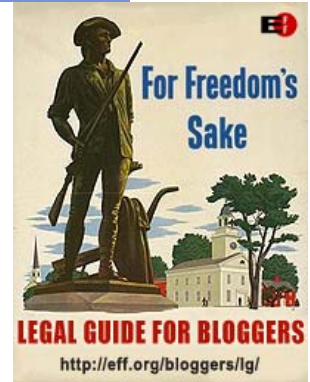
-Florida:

3. Student created a Facebook group devoted to her English teacher titled "Ms. Sarah Phelps is the worst teacher I've ever met!"

Five Freedoms' Future Continued: Blogger's Bill of Rights

Can I criticize my teacher on my personal blog?

- Mere insults, even invoking vulgar language, are probably protected
- Physical threats to other students, teachers, or administrators are not and school-based punishment is constitutionally permissible
- Defamatory comments may lead to punishment both at school and in a civil suit



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Questions?

