OUTLINE FOR LAW WEEK FOR

SONOMA COUNTY HIGH SCHOOLS - April 16-27, 2012

TOPIC: A Primer on Free Speech Under the First Amendment: Selected Topics in the Constitution's First Amendment

MATERIALS

Background materials on the following topics:

- Free Speech in the School Setting **(Tab 1)**
- Fighting Words and Hate Speech **(Tab 2)**
- Obscenity, Indecency and the First Amendment **(Tab 3).**
- Political Speech and the First Amendment **(Tab 4).**
- Free Speech and Religion: The Establishment Clause in the Context of Religious Symbols on Public Land **(Tab 5).**

INTRODUCTION

This year, the Sonoma County Bar Association, in association with the Sonoma County Office of Education ("SCOE"), will present Law Week (actually 2 weeks) 2012. Law Week underscores how law and the legal process have contributed to the freedoms that all Americans share. The theme of this year's program is selected topics relating to the First Amendment to the U.S. Constitution.

Perhaps no other Constitutional amendment has more influence in the daily life of Americans than the First Amendment. The complexity of the issues that have been addressed arising out of this amazingly short memorialization of rights, adopted by the states in 1791, is extraordinary. The entire text of the First Amendment reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Law Week subcommittee sought to focus on two of the rights addressed in the First Amendment- the right of free speech, and the proscription upon the government's "establishment of religion." Both of these areas are rich in case law

jurisprudence, and the opinions have shown how these simple phrases are consistently re-interpreted by the courts as our society changes, and becomes more complex and further removed from life in the Eighteenth Century when the Amendment was first adopted.

Attached to this outline are materials, as identified above, summarizing the five areas on which we have focused. The first four summaries address various aspects of the "free speech" clause of the First Amendment, and the fifth summary addresses the establishment clause. We have provided each teacher whose class is participating in Law Week 2012 with a "menu" listing the five First Amendment areas on which we have provided summaries, and have asked each teacher to select the topic on which they believe their class will be most interested. These choices will be communicated to you when you are assigned to your class.

Presenters in Law Week 2012 should use these materials to create a program for the class. The materials provided are just a guide, and the presenters should not feel compelled to use any or all examples identified in the materials. Most of the materials are summaries/analysis of seminal United States Supreme Court cases. These cases tend to be long and complex, and, given the territory that needed to be covered, no single case has been dissected as completely as we would have liked to have done. Thus, the presenters should feel free to perhaps focus on one or perhaps two cases in any particular area, and "drill down" on the unique facts of those particular cases as a source of material. Alternatively, the presenters may wish to choose a method of presentation which focuses more broadly upon the First Amendment, illustrating for the students the huge range of issues which this succinct combination of clauses raises.

PROCEDURE/INSTRUCTION: Teachers

1. Teachers will be assigned 2 legal professionals (i.e., 2 attorneys or 1 attorney and 1 Superior Court Judge). The legal professionals have been directed to contact teachers prior to presentation; however, teachers may initiate contact, if they have not had a timely contact.

2. Teachers are encouraged to timely return their "menus" after filling in the area in which they believe their students will be most interested.

3. Teachers should review the tabbed materials identified above with students prior to the presentation to help facilitate a meaningful discussion.

PROCEDURE/INSTRUCTION: Attorneys/Judges

1. Each attorney/judge will be assigned a classroom at a specific high school. The majority of the classes will be seniors. The attorney/judge should directly contact the teacher prior to the presentation for additional instructions (i.e., location, specific time, etc.).

2. Attorney/judges should read the materials provided prior to the presentation.

3. Attorney/judges will have approximately 1 hour to make presentation and to facilitate discussions.

4. The lawyer or judge should offer a brief introduction to the First Amendment, when it was first adopted, and the main subject matters which the clauses within it cover.

5. Attorneys/judges should spend a little time, either at the beginning or the end of the presentation, discussing the legal profession and their personal careers.

SUGGESTIONS FOR CLASSROOM INTERACTION:

The presenters should feel free to make the presentation in any manner they deem appropriate after discussion with the teachers. The following is provided for guidance only.

1. Suggested Introduction.

Begin the class by introducing yourself to the students. As you do so, remember when you were this age and what would have been of interest to you. Be sure to provide a brief explanation of why you are in the classroom on this particular day. You might want to consider thinking about how this discussion can have topical relevance to high school seniors, most of whom are graduating within a month, and perhaps weave that into an introduction which will catch their attention and stimulate an interest.

Also please keep in mind that some of the materials for this program raise difficult and provocative issues, especially of religion, obscenity and free speech in the schools. Keep in mind that your audience is high school students, and that these issues must be addressed with sensitivity and thought. Any concerns about content should be vetted, as best as reasonably possible, with the teacher before the presentation.

2. Suggestions for Presentation of the First Amendment materials.

- The presenters may want to go through a number of the clauses in the First Amendment, questioning the students about what they mean, and how they impact the lives of every day Americans.

- The presenters may want to have a "mock" debate between themselves, after setting forth the general legal parameters of the particular clause and issue in question, and after setting forth perhaps a hypothetical situation.

- The presenters may want to do an informative lecture type presentation on a number of the tabbed examples above, and then follow up with a series of questions to the students. However, the more the presenters get the students to participate actively, the more interesting it will be to them.

TAB 1

FREEDOM OF SPEECH IN THE SCHOOL SETTING

Congress shall make no law……abridging the freedom of speech

- First Amendment

The very First Amendment to the Constitution of the United States establishes freedom of speech. That seems easy and straightforward, but the courts have had to define "what is speech" and "who holds that right" as our society has grown in size and sophistication. The original framers of the Constitution could hardly have anticipated the changes in technology since the 18th century which expanded written communication from the hand printing press to the 21st century's embrace of social media and the Internet. While students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults. *Tinker et al. v. Des Moines Independent Community School Dist. et al.* 393 U.S. 503, 506 (1969)[First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate].

Courts have repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to proscribe and control conduct in the schools. See Epperson v. Arkansas 393 U.S. 97, 104 (1968). Thus, the problem lies in the balance of the two considerations, that is, the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. The following cases highlight this tension.

A. Symbolic Speech

The following is the guideline set out the U.S. Supreme Court in 1969 with regard to a student's First Amendment free speech rights while on the school property: A student may express his or her opinions, even on controversial subjects, if he or she does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-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. Tinker et al. v. Des Moines Independent Community School District et al. 393 U.S. 503, 513 (1969)

In Tinker, three members of the Tinker family attended public schools in Des Moines, Iowa. Two of them attended high school. In order to protest the hostilities in Vietnam and their support for a truce, they wore simple black armbands for 2 weeks in December, 1965. The principals of the Des Moines schools, aware of the Tinker's

intentions, met and adopted a policy prohibiting armbands. The Tinkers were suspended from school until they returned without armbands.

The students filed suit, seeking an injunction restraining the school district from disciplining the students. The District Court dismissed the action, holding that the school district's decision was a reasonable act to prevent disturbance of school discipline. The Eighth Circuit Court of Appeals affirmed the dismissal by a divided court.

U.S. Supreme Court Justice Fortas, writing for the majority of Justices, stated that, "neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker et al.. v. Des Moines Independent Community School District et al., Supra. 393 U.S. at 506. However, the Court then also analyzed the case within the framework of the "special characteristics" of the school environment.

Simple armbands involve "direct, primary First Amendment rights akin to 'pure speech", which is the type of speech most protected by the First Amendment. The court relied on the fact that armbands are a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of the petitioners." In fact, the Court noted, the display of the armbands resulted in no adverse reactions by any students. The Court also pointed out that students in some of the schools within the district wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol-black armbands worn to exhibit opposition to U.S. involvement in Vietnam-was singled out for prohibition. Clearly, the Court concluded that prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

The Court also dismissed the school administrator's fear that there might have been a disturbance caused by the possible adverse reactions of other students. The Justices concluded that any "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." In fact, in order for the State to prevail, it had to show that its action was caused by "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular view." In fact, "the classroom is peculiarly the 'marketplace of ideas', citing Keyishian v. Board of Regents 385 U.S. 589 (1967).

Questions for class:

1. What if the armband had a Nazi swastika on it?

2. What if the armband was rainbow colored in support of the right for gays to marry?

3. Can an armband, by itself, ever be too controversial? What if the armbands caused a non-violent "sit in" at the school prior to the commencement of classes?

4. Would the Court have ruled the same if the Tinker armbands had caused a riot at school?

B. Actual Speech

In Bethel School District No. 403 et al. v. Fraser, A Minor, et al. 478 U.S. 675 (1986), the Court again had to wrestle with the tension between a student's First Amendment free speech rights and the right of a school to maintain discipline and a safe learning environment for minors. In Bethel, the issue was actual speech, rather than the Tinker arm band symbolic speech. As set forth below, the Court held that the restrictions on the actual speech involved did not violate the student's First Amendment free speech rights.

In April of 1983 during a nominating speech for a fellow student at Bethel High School in Pierce County, Washington, Matthew Fraser delivered a speech which the Court characterized as full of "elaborate, graphic, and explicit sexual metaphor(s)." The most relevant portions of the speech are as follows:

> " 'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most ... of all, his belief in you, the students of Bethel, is firm.
>
> " 'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.
>
> " 'Jeff is a man who will go to the very end—even the climax, for each and every one of you.
>
> " 'So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.' "

Two of his teachers had reviewed his nominating speech and told him that its content was inappropriate. He was warned that the delivery of his speech as written would have severe consequences. The high school had a disciplinary rule prohibiting the use of obscene language in school: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." Approximately 600 high school students, many of whom were 14-year olds, attended the school assembly.

Matthew Fraser was suspended for 3 days and removed from a list of eligible graduation speakers. He demanded a grievance hearing, and after a full hearing, including many witnesses, the Hearing Officer sustained the school's actions, finding that the speech was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly."

Matthew sued for an injunction against the school's disciplinary sanctions, claiming a First Amendment free speech violation. The District Court found that the school's obscene language rule unconstitutionally vague and overbroad. The Ninth Circuit Court of Appeals affirmed, holding that the speech in this case was indistinguishable from the black armband worn by the student in the Tinker case. The Ninth Circuit Justices went on to evaluate the School District's obscenity policy, finding that the District's "unbridled discretion" to determine what is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools."

The U.S, Supreme Court reversed and sustained the school's discipline of the student. The Court described the school's role as one of "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system", citing *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979). The Court stated that these fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. 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. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences. Id. at 681.

Distinguishing the "political message of armbands" (Tinker) with Fraser's speech, the majority of Justices focused on the content of the speech and its effect on students at an official student assembly. The Court found that the "pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students –indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of human sexuality." Clearly, the Court was persuaded both by the sexually explicit language used, and by the fact that children under the age of 14 were present. The Court thus held that this "vulgar and lewd speech" could reasonably be regulated. Id. at 685.

The Court also made a point of the fact that the speech was "unrelated to any political viewpoint" Id. at 685.

Justice Brennan concurred with the majority in the ultimate holding, but made it clear he did not think the speech came close to being obscene, that is, speech that has no

First Amendment protections: "...the language respondent used is far removed from the very narrow class of "obscene" speech which the Court has held is not protected by the First Amendment. *Ginsberg v. New York,* 390 U.S. 629, 635 (1968) [ban on sale of "X" rated magazines to minors upheld] ; *Roth v. United States,* 354 U.S. 476, 485 (1957) ["X" rated books and advertisements have no First Amendment protection]. He agreed that "...the State has interests in teaching high school students how to conduct civil and effective public discourse and in avoiding disruption of educational school activities. Thus, the [majority] holds that under certain circumstances, high school students may properly be reprimanded for giving a speech at a high school assembly which school officials conclude disrupted the school's educational mission. Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty.

Finally, Justice Brennan warned that "[T]he authority school officials have to regulate such speech by high school students is not limitless (citation). ("[S]chool officials ... do [not] have limitless discretion to apply their own notions of indecency. Courts have a First Amendment responsibility to insure that robust rhetoric... is not suppressed by prudish failures to distinguish the vigorous from the vulgar"). Under the circumstances of this case, however, Justice Brennan believed that school officials did not violate the First Amendment in determining that respondent should be disciplined for the disruptive language he used while addressing a high school assembly.

Two basic principles may be distilled from this case, as summarized more recently in Morse v. Frederick 551 U.S. 393 (2007). First, it demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Id., at 682. Had the student delivered the same speech in a public forum outside the school context, he would have been protected. See Id., at 682–683. In school, however, his First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker, supra,* at 506. Second, it established that Tinker's mode of analysis is not absolute, in that the court did not conduct the Tinker "substantial disruption" analysis.

Questions for class:

(1) Could Mathew Fraser's speech been protected by the First Amendment if he gave it in a different setting?

(2) Is the Court saying that Tinker political speech (symbolic or actual) is more protected under the First Amendment than Mathew Fraser's speech which involved sexual innuendo?

(3) Is sexual innuendo always more inflammatory or disruptive than political ideas for purposes of First Amendment protection in schools?

C. Written Speech-School Sponsored Publications

The U.S. Supreme Court in Hazelwood School District ET AL. v. Kuhlmeier ET AL. 484 U.S. 260 (1988) addressed the issue of students' First Amendment rights in the publication of a school sponsored newspaper. The Court announced a rule for **school sponsored publications**, which further limited student's First Amendment free speech rights in the school setting.

As part of a journalism class, the students at East Hazelwood High in St. Louis, Missouri wrote the *Spectrum* every 3 weeks for the 4,500 students, faculty, and administration at their school. The total cost of publication was paid by the school board. The class was taught by a faculty member who, near the end of the 1982-1983 school year, abruptly left teaching. A substitute teacher was assigned to the class. The final edition of the *Spectrum* was delivered to the high school principal with only a few days to spare before the end of school for the year. The newspaper contained two controversial articles: One dealt with the impact of family divorce on an unnamed student; the second detailed the stories of three girls with fictitious names who had to deal with teen pregnancy. Concerned that the students might be identified by the text of the articles, and worried that the references to teen sexuality and birth control might be inappropriate for some of the younger students, the principal pulled both articles and published the *Spectrum* without them.

The students filed suit, and the District Court concluded that school officials may impose restraints on students' speech in activities that are " 'an integral part of the school's educational function' "-including the publication of a school-sponsored newspaper by a journalism class-so long as their decision has " '**a substantial and reasonable basis**.' The Court of Appeals for the Eighth Circuit reversed. 795 F.2d 1368 (1986). The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," *id.*, at 1373, but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." The Eighth Circuit Court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when " '**necessary to avoid material and substantial interference with school work or discipline ... or the rights of others**', citing to Tinker.

In Hazelwood School District ET AL. v. Kuhlmeier, the U.S. Supreme Court reversed the Eighth Circuit, and held that the restriction on the publication of the articles in question was not a First Amendment violation. Although the Court started out by acknowledging that students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate", citing to Tinker, the Court nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," citing to Bethel. The Court then explained that a school is not a "public forum" as that term has been used in First Amendment parlance (generally because public schools do not possess all of the attributes of streets, parks, and other traditional public forum characteristics),

unless school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public. Id. at 267.

The Court distinguished the issue in Tinker -whether the First Amendment requires a school to tolerate particular student speech-from the question in Hazelwood-whether the First Amendment requires a school affirmatively to promote particular student speech. This latter question "concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities **that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school**. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." Id. at 270

"Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," Fraser, 478 U.S., at 685 [i.e., lewd student speech at school assembly]-, not only from speech that would "substantially interfere with [its] work ... or impinge upon the rights of other students," Tinker, 393 U.S., at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. Id. at 270-271.

Thus, the Court established a new area of concern: "...school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Accordingly, the Court concluded that the standard articulated in *Tinker* for determining when a school may punish student expression was different than the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. The standard is that "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**."

Questions for class: (1) How would the court address a newspaper published by students, funded by students, and distributed to students? Would such a newspaper be a "school sponsored expressive activity" which "members of the public might reasonably perceive to bear the imprimatur of the school?" (2) Come up with an example of a written publication or theatrical production which arguably is not "school sponsored", yet takes place on school property, and raises actual speech issues arising out of the Bethel and Tinker standard [materially disrupts classwork or involves substantial disorder or invasion of the rights of others].

C. Off Campus Speech

The case of Kowalski v. Berkeley County Schools 652 F.3d 565 (4th cir. 2011) raises the timely question of the difference between "school-related activity and speech," and "private out-of-school speech." To what extent can a school regulate speech which originates outside of the school setting?

A student at a West Virginia high school created a MySpace page named "S.A.S.H." The student claimed that it was an acronym for "Students Against Sluts Herpes". Other students took the letters to mean "Students Against Shay's Herpes", referring to a student Shay N., who was the main subject of discussion on the webpage. The commentary posted on the "S.A.S.H." webpage mostly focused on Shay N, and involved approximately 2 dozen other students from the school, at least one of which participated from a school computer.

The school had a policy which prohibited "harassment, bullying and intimidation." The Policy defined "Bullying, Harassment and/or Intimidation" as "any intentional gesture, or any intentional written, verbal or physical act that" (1) A reasonable person under the circumstances should know will have the effect of: (a) Harming a student or staff member; (2) Is sufficiently inappropriate, severe, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student." The policy also provided that violators would be suspended and that disciplinary actions could be appealed.

The Student Code of Conduct provided, in part, that "All students enrolled in Berkeley County public schools shall behave in a safe manner that promotes a school environment that is nurturing, orderly, safe, and conducive to learning and personal-social development."

School administrators suspended the student who created the MySpace page. The student argued that the page was created off campus and that it did not disrupt the school's work nor create a discipline problem in the school. The student filed a District Court action, claiming that the suspension violated her free speech and due process rights under the First and Fourteenth Amendments. She alleged, among other things, that the School District was not justified in regulating her speech because it did not occur during a "school-related activity," but rather was "private out-of-school speech."

The District Court entered summary judgment in favor of the school, concluding that it was authorized to punish the student because her webpage was "created for the purpose of inviting others to indulge in disruptive and hateful conduct," which caused an "in-school disruption." The 4th Circuit Court of Appeals concluded that in the circumstances of this case, the School District's imposition of sanctions was permissible, in that the student used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority and "compelling interest to discipline speech which "materially and substantially interfere[s] with the requirements of

appropriate discipline in the operation of the school and collid[es] with the rights of others," citing Tinker.

The Kowalski Court cited to a federal government initiative that student-on-student bullying is a "major concern" in schools across the country and can cause victims to become depressed and anxious, to be afraid to go to school, and to have thoughts of suicide. *See* StopBullying.gov, available at www. stopbullying. gov (follow "Recognize the Warning Signs" hyperlink). It further held that schools have a duty to protect their students from harassment and bullying in the school environment, *cf.* *Lowery v. Euverard,* 497 F.3d 584, 596 (6th Cir.2007) ("School officials have an affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place").

The student's argument that the school had no right to regulate her conduct which was performed from her home computer and after school hours was dismissed by the court. As noted by the Court, she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment. She also knew that the dialogue would and did take place among her classmates whom she invited to join the "S.A.S.H." group and that the fallout from her conduct and the speech within the group would be felt in the school itself. Id. at 573.

Other examples cited by the Kowalski Court of speech originating outside the school setting, but which was subject to regulation by the school include:

Boucher v. School Board of School Dist. of Greenfield 134 F.3d 821, 829 (7th Cir. 1998)-student published articles in out of school independent newspaper, but distributed at the school.

Doninger v. Niehoff 527 F.3d 41, 48-49(2nd Cir. 2008)- the Second Circuit concluded that the school could discipline a student for an out-of-school blog post that included vulgar language and misleading information about school administrators, as long as it was reasonably foreseeable that the post would reach the school and create a substantial disruption there.

The Kowalski Court does identify Layshock v. Hermitage 650 F.3d 205 (3rd. Cir. 2011), in which the Court found that the school district did not have the right to regulate speech which originated off campus. The student had created a fake and very derogatory, degrading and demeaning internet profile of the school's principal on his My Space website. Despite the fact that the creation of the profile was arguably in violation of the school's Discipline Code, since the activity originated off campus, and did not disturb the school environment, and was not related to any school sponsored event, the First Amendment prohibited the school from "reaching beyond the schoolyard."

Question for class:

Create a hypothetical which involves the various factors which are relevant to the Courts' determination, including:

(1) the particular school policy in issue,

(2) where the speech originated,

(3) whether it directly impacted activities at the school,

(4) whether it actually disrupted activities at the school sufficient to satisfy the Tinker test, and

(5) whether it was school sponsored or not.

TAB 2

FIGHTING WORDS AND HATE SPEECH

INTRODUCTION

The **First Amendment** to the United States Constitution is part of the Bill of Rights. The Amendment provides that "Congress shall make no law...abriding the freedom of speech..." . One of the constitutionally unprotected areas of speech consists of "fighting words", that is, words that are likely to make the person to whom they are addressed commit an act of violence. **Fighting words or hate speech receive no first Amendment protection**, because, like other unprotected categories (i.e. defamation, obscenity, etc.) they are not normally part of any dialogue or exposition of ideas.

The central balance for an analysis of whether speech is protected is between protecting the individual's right to free speech and the community at large from harm from government censorship. . This summary explores the way in which the courts have treated "fighting words" and "hate speech" in light of the First Amendment.

FIGHTING WORDS:

The fighting words doctrine originated in Chaplinsky v. New Hampshire 315 U.S. 568 (1942), where Chaplinsky, a Jehovah's Witness, was distributing their literature on the streets of Rochester, New Hampshire. He was verbally denouncing all other religions as "a racket". He began drawing an angry crowd, requiring police intervention. As the officer was escorting him he encountered a Marshal who had warned him earlier of the crowd's restlessness regarding his remarks. When Chaplinsky saw the Marshal, he said to him, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." He was arrested and convicted of violating a local law prohibiting a person from addressing another person in a public place with any "offensive, derisive or annoying word....nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business or occupation."

Chaplinsky appealed and the court laid out the following basic test to determine if such speech by Chaplinsky was protected speech, or rather, unprotected "fighting words:" "Would men of common intelligence understand the words to be likely to cause or incite an immediate breach of the peace, or would their utterance inflict injury." Id. at 571-573.

The "fighting words" doctrine was designed to permit punishment of extremely hostile personal communication likely to cause immediate physical response, "no words being 'forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed'." Id. at 573. The Court concluded that this narrow restriction did not subvert free expression, and upheld the conviction, saying the New Hampshire statute punished specific conduct lying within the

domain of state power, ie. the use in a public place of words likely to cause a breach of the peace.

The Court further fine-tuned this test seven years later with Terminiello v. Chicago 337 U.S. 1 (1949), where they added that it was no longer enough that the speaker's words made the listeners angry. Rather, an incitement to violence was now required. Terminiello had made a speech to a crowd in public that consisted of vicious and criticizing statements about some political and religious groups. The crowd was upset by his words and the police were unable to control the crowd. The Court overturned his conviction claiming:

> Free speech is supposed to incite dispute and it is often provocative and challenging while it presses for acceptance...The most valuable expression may well be that which, because it is provocative and challenging, produces these emotions (337 U.S. 1, 4)

In Cohen v. California 403 U.S. 15 (1971) the Supreme Court restated the description of "fighting words" as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." (403 U.S. 15, 20) See also Texas v. Johnson 491 U.S. 397, 409 (1989) [fighting words are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace."] In Cohen, the California statue proscribed maliciously and willfully disturbing the peace and quiet of a neighborhood by offensive conduct. Mr. Cohen wore a jacket to the courthouse which stated "Fuck the Draft' on the jacket (presumably Vietnam war protest). In finding that wearing that jacket cannot justify a violation of his first amendment protections, the court held that no individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult.

The fighting words exception is very limited because it is inconsistent with the general principle of free speech recognized in our First Amendment jurisprudence. Sandul v. Larion 119 F.3d 1250, 1256 (1997, 6th Cir.) [act of person yelling 4 letter word to abortion protesters, with no apparent evidence that anyone was offended, nor any face to face contact with protestors, simply did not rise to the level of "fighting words" as set forth in Chaplinsky].

A good example of the limited scope of the "fighting words" exception is in Skokie v. National Socialist Party (1978) 373 N.E. 2d 1, in which the Court overturned an ordinance aimed at preventing a neo-Nazi march in a predominantly Jewish town, disallowing a "fighting words" rationale even in circumstances of extreme provocation and targeted insult, that is, use of swastikas. The court also refused to support prior restraint on the defendants' "symbolic speech" The Court held "[T]he display of the

swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of those who display it. It does not, in our opinion, fall within the definition of 'fighting words.'"

Finally, in Snyder v. Phelps (2011) 131 S.Ct. 1207, the Supreme Court found First Amendment protection for words which the Court acknowledges caused great emotional pain. The congregation of the Westboro Baptist Church had been picketing military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military. The church's picketing had also condemned the Catholic Church for scandals involving its clergy. Fred Phelps, who founded the church, and six Westboro Baptist parishioners (all relatives of Phelps) traveled to Maryland to picket the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. The picketing took place on public land approximately 1,000 feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers. The picketers peacefully displayed their signs-stating, *e.g.,* "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell"-for about 30 minutes before the funeral began. Matthew Snyder's father (Snyder), petitioner here, saw the tops of the picketers' signs when driving to the funeral, but did not learn what was written on the signs until watching a news broadcast later that night. The group then followed the picketing up with posting an online account of the picketing activities.

Lance Corporal Snyder's father brought suit for intentional infliction of emotional distress in state court. The majority upheld the Church's First Amendment free speech defense. Given that Westboro's speech was at a public place on a matter of public concern, the Court held that the speech was entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557, 574, (1995).

Justice Alito, the lone dissenting justice, however, saw this speech as the equivalent of unprotected fighting words, as first defined in Chaplinsky v. New Hampshire. Justice Alito eloquently recalled that the Supreme Court in Chaplinsky had long ago held that words may "by their very utterance inflict injury" and that the First Amendment does not shield utterances that form "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Snyder, at 1223).

Thus, the Snyder v. Phelps case presents a very interesting juxtaposition- the same speech is seen by the majority as worthy of "special protection", while at least one justice sees the same speech essentially as unprotected fighting words.

HATE SPEECH:

1. Content Based Restrictions

The First Amendment generally prevents government from proscribing speech because of disapproval of the ideas expressed. Content-based regulations are, therefore, presumptively invalid. R.A.V. v. City of St. Paul 112 S. Ct. 2538 (1992). The government may not regulate use based on hostility or favoritism towards the underlying message expressed. Frisby v. Schultz 487 U. S. 474,

In R.A.V. v. City of St. Paul, supra, the Court looked at laws that aimed at "expression" versus conduct. In that case, R.A.V. and his teenage friends burned a cross in the front yard of a black family. They were charged with violating a St. Paul Bias-Motivated Crime Ordinance ["One who places on public or private property a symbol...including ...a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger...in others on the basis of race, color, creed religion or gender commits disorderly conduct and shall be guilty of a misdemeanor"]. . The Court found that the law restricted speech determined as "fighting words" on the basis of the speech's content. In other words, the law was "content discriminatory". Justice White concurred, finding the law "overbroad". Laws can't restrict speech based purely on the "content" of the speech, even if the content of the speech is highly offensive to certain groups of people.

For further example, burning a flag in violation of an ordinance against outdoor fires could be punishable, and does not offend the First Amendment, whereas burning a flag in violation of an ordinance against dishonoring the flag would violate First Amendment rights to free speech. See *Johnson*, 491 U.S., at 406-407. Similarly, the Supreme Court has upheld reasonable "time, place, or manner" restrictions, but only if they are "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) (noting that the *O'Brien* test differs little from the standard applied to time, place, or manner restrictions).

2. Conduct Based Restriction

Contrast R.A.V. with the case of Wisconsin v Mitchell 113 S. Ct. 2194 (1993), where Mitchell appealed a sentence for aggravated battery that was enhanced due to the fact that he intentionally selected his victim based on the victim's race. It resulted in a higher penalty for his crime. The statute provided that whenever the defendant in a

battery "intentionally selects the person against whom the crime is committed because of race, religion, color, disability, sexual orientation, national origin or ancestry of that person", the penalty for their crime can be increased.

The Court distinguished R.A.V., reasoning that while the conduct/speech in that case (burning cross) was protected because St. Paul's law violated the Court's content-based restriction, here the statute was aimed at a person's ***conduct*** (not expression) and this is unprotected by the First Amendment. The Court ruled that this statute was not unconstitutional and Mitchell's enhanced sentence was carried out, citing that the State has an adequate explanation to redress the perceived harms of bias-motivated crimes likely to inflict emotional harm for its victims. Moreover, the Court found that community unrest is an adequate explanation for the penalty-enhancement provision.

POINTS OF DISCUSSION

FIGHTING WORDS

1. What does this test look like today in the forum of the internet and Social Media Networks like "My Space", "Well Spring" and "Facebook"? Is internet social media a public forum that would prohibit speech that would incite violence or disturb the public peace? If so, how? What do you think the Supreme Court would say to such a case?

2. The facts of the Snyder case are extreme, and the majority and dissent see the issue very differently. That case is an excellent starting point for discussion of the intense tension between the right to free speech, especially on a topic of public interest, in a public forum, vs. the right of a family, like the Snyders, to the respect of burying their son killed in the line of serving his country, in a quiet and respectful manner.

HATE SPEECH

1. The facts of Mitchell are helpful to run by a class without telling them it is the actual case. They are as follows:

A group of black men and boys, including Mitchell, gathered at an apartment building in Kenosha, Wisconsin. Some members of the group discussed a scene from the movie "Mississippi Burning" where a white man beats a praying black man. Mitchell proceeded to ask the group "Do you all feel hyped up to move on some white people?" Shortly thereafter, a young white boy approached the group on the opposite side of the street. Mitchell said "You all want to fuck somebody up? There goes a white boy; go get him." The boys then ran at the boy and beat him severely and stole his sneakers. The boy was rendered unconscious and remained in a coma for 4 days.

2. Should those words be used as evidence of "fighting words" or hate motivated speech?

3. What is so different from burning a cross in a black family's yard and what Mitchell said to his cohorts? Why is one protected and the other is not?

TAB 3

OBSCENITY, INDECENCY AND THE FIRST AMENDMENT

The Shifting Definition of "Obscenity" in The Early Cases

The First Amendment to the Constitution protects freedom of speech, but that freedom of speech is not completely without limits. "Obscenity" is a category of speech that is not protected by the First Amendment. The definition of obscenity, however, has changed and shifted over time.

In the English case Regina v. Hicklin (1868) LR 3 QB 360, the court formulated the following definition and test for obscenity: "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

It was not until Roth v. U.S. (1957) 354 U.S. 476, that the United States Supreme Court formally rejected the Hicklin Rule, and held that the Hicklin Rule inappropriately judged a work by its influence on the most susceptible readers (i.e., children or the weak-minded) and also allowed a publication or book to be judged based only on isolated passages of the work taken out of context, rather than the work taken as a whole. Instead, the Supreme Court gave the following test for obscenity: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

In Memoirs of a Woman of Pleasure v. Massachusetts (1966) 383 U.S. 413, the Supreme Court found that the famous English novel Fanny Hill, or Memoirs of a Woman of Pleasure, written about a prostitute in 1879, was not obscene. The Court used a three part test:

1. The *Roth* test [whether the work taken as a whole appeals to the prurient interest];

2. Had to be patently offensive; and

3. Had to be utterly without redeeming social value.

The Current Test for Obscenity

Today, the courts utilize the test formulated in Miller v. California (1973) 413, U.S. 15 to determine whether material is obscene. In *Miller*, a man was convicted of mailing unsolicited sexually explicit material in violation of a California statute that essentially incorporated the language of the test laid out in the *Memoirs* case. The Supreme Court rejected the Memoirs test and formulated a new, three-part test for obscenity:

1. Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals

2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

In reaching its decision, the Supreme Court recognized that the States have a legitimate interest in prohibiting the dissemination or exhibition of obscene material, especially if the manner of distribution carries a danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. However, the Court acknowledged that it was very difficult to agree on a standard definition of "obscenity" because in the area of freedom of speech the courts "must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." This is why the Court has adopted the use of contemporary community, rather than national, standards. The Court recognized that juries will reach inconsistent results in similar cases, depending on where those cases are venued, but "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."

Possible Discussion Questions:

1. Many obscenity cases have involved famous works of art or literature, such as the cases involving the Fanny Hill novel or James Joyce's novel, Ulysses[1]. Is there any consistent or fair way to judge what is art and what is obscenity?

2. Is it a good idea to use contemporary community standards rather than a national standard? What do you think contemporary community standards really means?

3. The Supreme Court in the *Miller* case rejected the *Memoirs* test because material could not be deemed obscene if it had any redeeming social value, while the Miller test labels a work as obscene if, taken as a whole, the work lacks "serious" value. Which test is better?

Indecency and the FCC

While the First Amendment provides no protection to "obscenity," it does protect other categories of potentially objectionable speech, including "indecent" speech. Legally, indecency refers to words or images or acts that are protected under the First Amendment and yet may still be objectionable in certain contexts, for example, in the presence of children, or in open public situations, or broadcast. Thus, although indecent

[1] *United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2nd Cir. 1934)

speech cannot be banned entirely, it can be restricted.[2] Most cases involving indecency in the United States have largely been in the area of broadcast indecency as regulated by the Federal Communications Commission ("FCC").

The FCC is the entity responsible for formulating and enforcing regulations on the broadcasting of indecency and obscenity.[3] The FCC defines material as indecent "if, in context, it depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium."[4] In each separate case, the FCC must determine whether the material describes or depicts sexual or excretory organs or activities and, if so, whether the material is "patently offensive."[5] To determine whether material is "patently offensive," context is critical, and the FCC looks at three primary factors:

1. Whether the description or depiction is explicit or graphic;

2. Whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs;

3. And whether the material appears to pander or is used to titillate or shock. No single factor is determinative. The FCC weighs and balances these factors because each case presents its own mix of these, and possibly other, factors.[6]

Congress and the courts have instructed the FCC only to enforce the indecency standard between the "safe harbor" hours of 6 a.m. and 10 p.m., local time, when children are more likely to be in the audience. As a consequence, the Commission does not take action on indecent material aired between 10 p.m. and 6:00 a.m. In this way, constitutionally-protected free speech rights of adults are balanced with the need to protect children from harmful content.

The Current FCC Cases on Fleeting Expletives

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[2] There is a fine line between "restriction" and "censorship." Although the FCC has the power to regulate indecent speech, the FCC does not have "the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U.S.C.A. § 326.

[3] The FCC's policing of "indecent" speech stems from 18 U.S.C. § 1464, which provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." This has historically been interpreted to apply to radio and television broadcasters, and has never extended to cable operators, such as HBO. Because cable and satellite services are subscription-based, viewers of these services have greater control over the programming content that comes into their homes, whereas broadcast content traditionally has been available to any member of the public with a radio or television. See http://www.fcc.gov/guides/obscenity-indecency-profanity-faq.

[4] See *FCC v. Pacifica*, 438 U.S. 726, 732 (1978); see http://www.fcc.gov/guides/obscenity-indecency-and-profanity.

[5] See *FCC v. Pacifica*, 438 U.S. 726, 732 (1978).

[6] See http://www.fcc.gov/guides/obscenity-indecency-profanity-faq.

The FCC's policy on indecency changed in 2004 in response to an incident during the 2003 Golden Globe Awards broadcast, in which U2's lead singer, Bono, won an award and said, "This is really, really fucking brilliant. Really, really, great." Subsequently, the FCC declared for the first time that a single, nonliteral use of an expletive – a so-called "fleeting expletive" – could be actionably indecent.[7] In doing so, the FCC overruled all previous decisions in which the fleeting use of an expletive was held *per se* not indecent.[8]

In 2012, U.S. Supreme Court will address the issue of whether the FCC's policy restricting "fleeting expletives" is a violation of the First Amendment. This case, *Fox Television Stations, Inc. v. Federal Communications Commission*, stems from a 2006 order issued by the FCC in which the FCC found that the following four program were "patently offensive" under FCC regulations because the material was explicit, shocking and gratuitous:

- **2002 Billboard Music Awards:** In her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."
- **2003 Billboard Music Awards:** Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."
- **NYPD Blue:** In various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead."
- **The Early Show:** During a live interview of a contestant on CBS's reality show Survivor: Vanuatu, the interviewee referred to a fellow contestant as a "bullshitter."

In a later order, the FCC reaffirmed its finding that both Billboard Music Awards programs were indecent. However, the FCC reversed its findings against the Early Show and dismissed on procedural grounds the complaint against NYPD Blue.[9] The FCC reversed its findings on the Early Show because the expletive occurred in the context of a "bona fide news interview" and stated that "it is imperative that [the FCC] proceed with the utmost restraint when it comes to news programming."

Subsequently, Fox Television (the broadcaster of the Billboard Music Awards) moved for review of the FCC's orders. This year, the Supreme Court will address whether the FCC's scheme for regulating speech, including its fleeting expletives ban, is

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[7] See FCC March 3, 2004 Memorandum and Order; http://transition.fcc.gov/eb/Orders/2004/FCC-04-43A1.html.

[8] This new policy has led to a huge increase in FCC fines. In 2003, the FCC imposed $440,000 in fines. In 2004, it imposed a record $8 million in fines.

[9] The Commission dismissed the complaint against NYPD Blue because the only person who complained of the material resided in the Eastern time zone, where NYPD Blue aired during the "safe harbor" period after 10pm.

unconstitutionally vague in violation of the First Amendment.[10] The Court of Appeals for the Second Circuit has already held that the indecency ban, as it currently exists, is impermissibly vague in violation of free speech.[11] Essentially, the Court of Appeals concluded that there was no rhyme or reason behind the FCC's decision that the words "fuck" and "shit" were patently offensive and presumptively indecent while the use of "dick" and "dickhead" in a television series were not. Under such a scheme, broadcasters have no practical notice of how the FCC would apply their three-factor test in the future, and what content would be deemed indecent.[12]

Other Pending FCC Cases

The FCC issued a $550,000 fine to CBS for airing Janet Jackson's "wardrobe malfunction" during the Super Bowl Halftime show in 2004, in which her nipple was briefly exposed. A federal appeals court has found that the FCC improperly imposed a penalty on CBS for violating a previously unannounced policy. After review by the Supreme Court, the lower court affirmed its decision that the fine was imposed arbitrarily and capriciously in late 2011.[13]

Possible Discussion Questions:

1. Is the FCC's three-prong test a good test for defining indecency?

2. Do you think any of the above-listed "violations" are really indecent, or should be considered indecent?

3. Is the single use of a curse word on an awards show more or less indecent than the repeated use of violence and expletives in movies such as "Saving Private Ryan"?[14]

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[10] In an earlier 2009 opinion, the Supreme Court did not address the First Amendment and made the narrower finding that the FCC's "fleeting expletives" ban was not arbitrary or capricious under the Administrative Procedure Act. *F.C.C. v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (U.S.,2009).

[11] *Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317.

[12] A law or regulation is impermissibly vague/void for vagueness if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Fox Television Stations, Inc. v. F.C.C.*, 613 F.3d 317, 328 (C.A.2,2010).

[13] *CBS Corp. v. FCC*, 663 F.3d 122 (C.A.3, 2011).

[14] The FCC has found that "Saving Private Ryan" was not patently offensive under contemporary community standards and that the expletives were integral to a fictional movie about war, but that the use of expletives spoken by real-life musicians in a documentary was indecent because the educational purpose of the documentary "could have been fulfilled... without the repeated broadcast of expletives." Yet the use of the word "bullshit" on The Early Show was deemed not to be indecent because it was said in the context of a "bona fide news interview."

TAB 4

POLITICAL SPEECH AND THE FIRST AMENDMENT

The First Amendment to the United States Constitution mandates:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

But this broad guarantee of the "freedom of speech" does not specify the precise contours of speech protected. What constitutes speech? Is speech *always* protected? Is there any speech *not* protected? What did the Framers of the Constitution mean, precisely, when they enacted this all-important amendment to the Constitution? These are the very questions dealt with by lawyers and judges every day, with regard to every law.

Lies

For example, what types of speech, exactly, are protected? Certainly, we can all agree that statements meant for political purposes are protected. But what if those statements are outright lies? Are those statements protected? The United States Supreme Court has just been asked to address this issue but has yet to issue a decision. The Ninth Circuit Court of Appeals, however, decided that lies were, in fact, protected speech. What do you think? How should the Supreme Court rule?

United States v. Alvarez, 617 F.3d 1198 (9th Cir. 2010) – Petition for Writ of Certiorari to the United States Supreme Court Granted – Awaiting Decision

In this case, Xavier Alvarez had recently won a seat on a local Water District Board as one of the directors. The problem was, he was an outright liar. He would continually tell people various fabrications, such as that he had been responsible for saving a U.S. Ambassador during the Iranian Hostage Crises, that he had played hockey for the Detroit Red Wings, or that he was secretly married to a very famous Mexican actress. The issue before the court, however, arose due to Congress's passing of the Stolen Valor Act of 2005. According to this statute, is a crime to falsely represent oneself as having received any U.S. decoration or medal. If convicted, a criminal defendant may be imprisoned for up to six months. In this case, one of the many lies told by Mr. Alvarez was that he had received the Congressional Medal of Honor. Certainly, he was guilty under the law, but could Congress make this statement a crime? Did this statement constitute protected speech?

According to the Ninth Circuit, the statement constituted protected speech. The Ninth Circuit did not assert a constitutional right to tell a lie. *Id.* at 12056. "However," according to the court, "the right to speak and write whatever one chooses—including, to

some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment." *Ibid.* Thus, in evaluating whether given speech was protected by the First Amendment, the Ninth Circuit took the view that it was better to protect distasteful and false speech than to risk chilling valid and protected speech:

> In other words, we presumptively protect *all* speech against government interferences, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection (in this case, for some other reason than the mere fact that it is a lie). Though such an approach may result in protection for a number of lies, which are often nothing more than the 'distasteful abuse of the First Amendment privilege', it is constitutionally required because the general freedom to engage in public and private conversations without government injecting itself into the discussion as an arbiter of truth, contribute to the 'breathing space' the First Amendment needs to survive.

Id. at 1205-1206.

The Ninth Circuit then reviewed other classifications of non-protected speech, such as defamation, fraud, or perjury, and determined that the defendant's speech did not fit in any of them due to the strict requirements necessary for each classification of non-protected speech. Ultimately, however, the court made its decision based upon broad policy factors. According to the court, "there can be no doubt that there is affirmative constitutional value in at least some knowingly false statements of fact. Satirical entertainment such as the Onion, The Daily Show, and the Colbert Report thrives on making false statements of fact." *Id.* at 1213. Such media outlets, considered the court, are worthy of protection, and if the government can prohibit one lie, what would stop it from prohibiting all lies? Is that a worthy goal? Why? Why not?

The Ninth Circuit, however, held that the defendant's speech, though vile, was protected and that he could not be prosecuted under the Stolen Valor Act. The United States Supreme Court shall decide the issue shortly. What do you think? Was the Ninth Circuit correct? How should the Supreme Court decide?

Dangerous (Political) Speech

Certainly, not all speech can be protected. For example, as noted by one of the most famous Supreme Court Justices in history, even "the most stringent protection of free speech would not protect a man from falsely shouting fire in a theater and causing a panic." Schenk v. United States, 249 U.S. 47, 52. But what are the limits of this restriction? In *Schenk*, the Supreme Court first enunciated what later became known as the "Clear and Present Danger Test":

> The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that the United States Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.

What do you think about this test? Do you agree with the Court's reasoning? What are some of the problems that this type of reasoning may pose? Can you think of reasons why this test is a good one? What type of test would you propose?

The following are specific cases in which this test has been applied.

***Schenk v. United States,* 249 U.S. 47 (1919)**

Charles Schenck was the Secretary of the Socialist Party of America. Opposed to the draft initiated during World War I, he distributed over 15,000 leaflets advocating opposition to the draft. These leaflets contained statements such as "Do not submit to intimidation", "Assert your rights", "If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." He claimed that military conscription constituted involuntary servitude, which was prohibited by the Thirteenth Amendment. Because of these actions, he was indicted and convicted for violating the Espionage Act of 1917.

In a unanimous decision, the United States Supreme Court affirmed the conviction. According to the Court, because the nation was at war, greater restrictions on speech were available to the government to aid in the war effort.

***Dennis v. United States,* 341 U.S. 494 (1951)**

In this case, similar to Schenk, the United States Supreme Court upheld the conviction of several individuals for conspiracy to organize the Communist Party of the United States as a group to teach and advocate the overthrow of the Government of the United States by force. The Supreme Court upheld the particular statute, noting that it's obvious purpose was "to protect existing government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution, and terrorism."

***Howards v. McLaughlin,* 634 Fed. 1131 (10th Cir. 2011),, Cert. Granted by *Reichle v. Howards*, 132 S.Ct. 815 (2011)**

This case involves an arrest of a man (Mr. Howard) for assault upon then Vice President Cheney at a shopping center in Beaver Creek, Colorado. Mr. Howard was

overheard by secret service agents on his cell phone indicating to a friend that he was going to ask the Vice President "how many kids he's killed today," referring to the war in Iraq. The man then told Mr. Cheney his "policies in Iraq are disgusting." Mr. Howard then touched Mr. Cheney's shoulder as he walked away. Mr. Howard was arrested by the secret service agents, for assaulting Mr. Cheney. He sued the Secret Service agents who arrested him after the District Attorney dismissed the assault charges.

The Tenth Circuit held that he stated a valid claim for retaliation for exercising his First Amendment rights of free speech, showing that (1) plaintiff was engaged in constitutionally protected activity, (2) the government's action caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct.

This case was argued before the U.S. Supreme Court on March 21, 2012, and tests the tension between, on the one hand, government agents' rights to protect an important public figure like the Vice President, and on the other hand, an individuals' First Amendment right to free political speech.

Money

Is money speech? In a recent, and contentious decision, the United States determined that, in fact, it was. What do you think? Is money speech? Should the government be able to limit how much money you can give to a political candidate? Can it say who can give money and who can't? What should the limitations be?

Citizens United v. Federal Election Commission, 558 U.S. 08-205 (2010), 558 U.S. —— –, 130 S.Ct. 876 (January 21, 2010)

The Bipartisan Campaign Reform Act of 2002 (known as McCain–Feingold Act) modified the Federal Election Campaign Act of 1971, and prohibited corporations and unions from using their general treasury to fund "electioneering communications" within 30 days before a primary or 60 days before a general election.

Citizens United, a non-profit corporation, sought to run television commercials during the 2008 primary campaign to promote its political documentary *Hillary: The Movie* and to air the movie on pay per view television. The movie was critical of Hillary Clinton. In January 2008, the United States District Court for the District of Columbia ruled that the television advertisements for *Hillary: The Movie* violated the McCain-Feingold Act restrictions of "electioneering communications" within 30 days of a primary.

Justice Kennedy's majority opinion, which was joined by Chief Justice Roberts, Justice Scalia, Justice Alito, and Justice Thomas, found that the prohibition of all independent expenditures by corporations and unions violated the First Amendment's protection of free speech. The Court considered the financing of *Hillary: The Movie* to be

protected speech. Justice Kennedy also noted that since there was no way to distinguish between media and other corporations, these restrictions would allow Congress to suppress political speech in newspapers, books, television and blogs. The Court overruled Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), which had held that a state law that prohibited corporations from using treasury money to support or oppose candidates in elections did not violate the First and Fourteenth Amendments. The Court also overruled the part of McConnell v. Federal Election Commission, 540 U.S. 93 (2003), that upheld the Act's restriction of corporate spending on "electioneering communications." The Court's ruling effectively removed the limit on the amount corporations and unions can spend on "electioneering communications."

A dissenting opinion by **Justice Stevens** was joined by **Justice Ginsburg**, **Justice Breyer**, and **Justice Sotomayor**. The dissent argued that the Court's ruling "threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution." According to Stevens, the majority did not rely on established constitutional principles but on personal opinions shared by few "outside of the majority" of the Supreme Court.

EFFECT OF HOLDING ON POLITICAL ACTION COMMITTEES:

Restore Our Future is a political action committee supporting presidential candidate Mitt Romney. As of February, 2012, Restore our future had $16,000,000 in cash, and has raised $36,800,000. Seven contributors have given $1,000,000. Forty-two donors gave between $250,000 and $1,000,000. Of the $36,800,000 raised, $22,950,000 was donated by these forty-two donors. Within the 42 donors, there were eleven corporate donors, including:

Eli Publishing Inc.	$1,000,000	This company from Provost UT does not have any known business purpose and has the same address as F8 LLC.
F8 LLC	$1,000,000	No known business purpose.
Rooney Holdings, Inc.	$1,000,000	Through its subsidiaries, this company engages in general building and construction management, specialized construction, insurance, and contract electronics manufacturing businesses.
Oxbow Carbon, LLC	$750,000	Oxbow Carbon distributes petroleum coke to customers worldwide, primarily in the cement, utilities, steel, and home heating industries.
MBF Family Investments	$500,000	Healthcare private equity firm.

W/F Investment Corp.	$275,000	Private debt and equity firm in Los Angeles.
The Villages Of Lake Sumter Florida	$250,000	Retirement Community developer in Florida.
Glenbrook, Inc.	$250,000	Business unknown. New York Times article claims to have traced the funds to Jesse Rogers and his wife. Mr. Rogers is a co-founder of a private equity firm in Palo Alto, and a former executive at Bain.
Jenzabar Inc.	$250,000	Software developer that specializes in higher education.
Melaleuca, Inc.	$1,000,000	Producer of cleaning products.
Paumanok Partners, LLC	$250,000	No known business. Reports indicate the LLC was established to donate to the PAC by William Laverack Jr., chairman and chief executive officer of Laverack Capital Partners, a private investment firm.

TAB 5

FREEDOM OF RELIGION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

- First Amendment

The first 16 words of the First Amendment deal with freedom of religion. The placement of these words at the beginning of the Bill of Rights reflects the deep concern the founders of our nation had about the relationship between church and state, and about the right of individuals to practice their religion freely. Religious freedom is protected by two clauses in the amendment: the establishment clause and the free exercise clause.

The **establishment clause** forbids the government from setting up a state religion. It also prohibits the government from preferring one religion over another or from passing laws that aid or promote religion. The **free exercise clause** protects the right of individuals to worship or believe as they choose. In other words, the First Amendment forbids religious activity that is sponsored by the government but protects religious activity that is initiated by private individuals.

Taken together, some people believe that the two clauses require the government to be neutral toward religion. This means that the government should not favor one religion over another or religion over non-religion in its actions or its laws. Others believe that the First Amendment requires the government to accommodate religious belief and practice, as long as it does not establish a state religion.

America is a religious country, and many Americans are religious people. Many of our national traditions have religious overtones. For example, our money includes the words "In God We Trust." The Pledge of Allegiance contains references to God.[1] And many state legislatures, Congress, and the Supreme Court begin their sessions with a brief prayer.[2] Although these traditions are criticized by some people as violating the First Amendment, they have been upheld by the courts.[3]

Religious Symbols on Government Property

This summary will focus on the establishment clause and, in particular, how it has been interpreted in cases involving religious displays on government land.

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[1] See *Newdow v. Rio Linda Union School District* (9th Cir. 2010) 597 F. 3d 1007; and *Freedom from Religion Foundation v. Hanover School District* (2010) 626 F.3d 1.

[2] *Marsh v. Chambers* (1983) 463 U.S. 783.

[3] *Zorach v. Clauson* (1952) 343 U.S. 306, 313; repeated with approval in *Lynch v. Donnelly* (1984) 465 U.S. 668, 675; *Marsh v. Chambers* (1983) 463 U.S. 783; *McCreary County v. ACLU* (2005) 545 U.S. 844, 889.

The establishment clause forbids both state and federal governments from setting up churches and from passing laws aiding one or all religions, or favoring one religion over another. In addition, the establishment clause forbids the government from passing laws barring or requiring citizen attendance at church or belief in any religious idea.

Thomas Jefferson once referred to the establishment clause as a "wall of separation between church and state."[4] In America, there is a wall of separation, but it is not complete. Churches are indirectly aided by government in many ways. For example, churches do not have to pay real estate taxes, even though they receive government services such as police and fire protection.[5]

Cases involving the establishment clause have been among the most controversial to reach the Supreme Court. These cases tend to be very fact driven. The Court has relied on several tests. One of these, the *endorsement test*, asks whether the challenged law or government action has either the purpose or the effect of endorsing religion in the eyes of members of the community.[6] When using this test, the Court will analyze whether the government has sent a message to nonbelievers that they are outsiders and not full members of the political community.[7]

In addition to the endorsement test, the Court also uses the following three-part test from a case decided in 1971 to determine whether government law or action meets the requirements of the establishment clause:[8]

1. The challenged law or government action must have a secular (nonreligious) purpose.

2. The primary effect of the law or action must be to neither advance nor inhibit (hold back) religion.

3. The operation of the law or action must not foster excessive entanglement of government with religion.[9]

Few issues in this area spark more debate than crosses, Commandments and other religious symbols on public property.

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[4] Jefferson used this phrase in a letter to the Danbury Baptist Association in 1802. The original text reads: "... I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."

[5] Act of August 27, 1894, § 32, 28 Stat. 556. Following passage of the Sixteenth Amendment, federal income tax acts have consistently exempted corporations and associations, organized and operated exclusively for religious purposes, from payment of the tax. Act of Oct. 3, 1913, § IIG (a), 38 Stat. 172. See Int. Rev. Code of 1954, § 501 et seq., 26 U. S. C. § 501 et seq.

[6] *County of Allegheny v. ACLU* (1989) 492 U.S. 573.

[7] *Id.*

[8] *Lemon v. Kurtzman* (1971) 403 U.S. 602 (referred to as the "Lemon Test").

[9] *Id.*

In Montana, a Jesus statute erected in 1955 on federal forest land by veterans is being challenged as a violation of the Establishment clause.[10] What statue supporters see as an historic monument, opponents viewed as government endorsement of religion. Similarly, in Giles County, Virginia, the American Civil Liberties Union is challenging a display of the Ten Commandments in a local high school.[11] Here again, what is history to one side is state promotion of religion to the other.

The guidance provided by the Supreme Court in this area has been convoluted. On the same day in 2005, the high court struck down a Ten Commandments display in a Kentucky courthouse,[12] but upheld a Ten Commandments monument in a park on Texas Statehouse grounds.[13] However, it ducked the opportunity to clarify the issue when it declined to hear an appeal of a 10th Circuit Court of Appeals decision ordering the removal of roadside crosses honoring fallen state troopers in Utah.[14] Although the 12-foot tall crosses were donated by a private group, they bear the Utah Highway Patrol official symbol and are mostly on public land. According to the 10th Circuit, a "reasonable observer" would conclude that "the state of Utah is endorsing Christianity."[15]

Thus, folks in Montana and Virginia who are determined to keep their religious symbols in public spaces are scrambling to prevail under current, murky Supreme Court establishment-clause jurisprudence.

Montana Congressional leaders have announced that they will introduce legislation proposing a land-swap between the National Forest System and a local resort, thereby putting the statute on private land. If it passes, the bill could end the debate since the Supreme Court recently upheld a similar arrangement.[16]

Meanwhile, Giles County school officials are hoping to save the Ten Commandments display by surrounding the Commandments with a variety of historical documents. They are looking to the Supreme Court's holiday-display decisions that allow government-sponsored holiday displays to include some religious symbols if the overall message is secular.[17]

The following cases provide an excellent summary of how the Ninth Circuit Court of Appeals views the Establishment Clause issue in the context of religious symbols on government property:

Buono v. Norton 371 F.3d 543 (9th Cir. 2004)-a cross in the Mojave National Preserve found to violate the Establishment Clause

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[10] http://www.nytimes.com/2011/11/25/us/in-montana-jesus-statue-is-focus-of-legal-battle.html
[11] http://thenewamerican.com/usnews/constitution/9009-aclu-suing-school-district-for-ten-commandments-display
[12] *McCreary County v. ACLU* (2005) 545 U.S. 844.
[13] *Van Orden v. Perry* (2005) 545 U.S. 677.
[14] *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.* (2011) 132 S. Ct. 12.
[15] *Am. Atheists, Inc. v. Duncan* (2010) 637 F.3d 1095.
[16] *Salazar v. Buono* (2010) 130 S. Ct. 1803.
[17] *Lynch v. Donnelly* (1984) 465 U.S. 668.

Trunk v. City of San Diego 629 F.3d 1099 (9th Cir. 2011)- 43 foot Latin cross atop Mt. Soledad in La Jolla, California found to violate Establishment Clause