

How Has Speech Been Both Limited and Expanded, and How Does it Apply to You and Your School?

BACKGROUND ESSAY

Does the First Amendment Create a “Marketplace of Ideas?”

Although the Founders wrote the First Amendment to protect political speech, the words of the amendment do not limit its protections to political speech.

Over the years, speech has become one of the most important parts of what Supreme Court Justice Oliver Wendell Holmes called the “marketplace of ideas.” This metaphor symbolizes the belief that freedom of speech must be allowed as far as possible, and citizens must be free to choose from among competing voices. In the words of Justice Anthony Kennedy, “the First Amendment confirms the freedom to think for ourselves.”

Does the Marketplace Require That All Speech Be Allowed?

Free speech has never been considered an unlimited right. It does not, for example, protect yelling “FIRE!” in a crowded theater if there is no fire, which would likely start a dangerous rush for the door. It also does not protect “fighting words,” or words that cause an immediate breach of peace [immediate illegal action], according to

Chaplinsky v. New Hampshire (1942).

In determining the limits of the First Amendment, the Supreme Court must often weigh the government’s claimed interest in restricting speech against the individual’s right to express himself. Government can pass laws that restrict speech if the law:

- is clearly defined
- limits only unprotected speech (like speech that is meant to encourage immediate illegal action or speech that intentionally spreads false information which harms someone’s reputation);
- limits speech as little as possible
- limits speech for reasons other than just its content

An important case in defining the limits of the First Amendment is *Schenck v. United States* (1919). In this case, Charles Schenck was handing out pamphlets urging people both to petition the government to repeal the World War I draft law and, if drafted, to break the law by refusing to comply. He was arrested for encouraging people to break the law.

The Supreme Court unanimously agreed that the First Amendment did not protect Schenck’s actions. The country’s interest in fighting World War I was more important than Schenck’s right to free

speech. Schenck's actions, the Court concluded, presented a "clear and present danger" to the country. After the Schenck decision, both the courts and the public have adopted the "clear and present danger" test when debating whether or not speech can be reasonably limited.

How has the "Marketplace" Analogy Helped to Expand Speech into Expression?

Since the *Schenck* case, the Supreme Court has broadened the definition of speech. First Amendment protections are now applied to many expressive activities that are "akin [like, similar] to pure speech."

In *Miller v. California* (1973), the Supreme Court ruled that materials that some Americans might find to be "obscene" are protected by the First Amendment if the materials have "serious literary, artistic, political or scientific value." The ruling in *Miller* was expanded even further in *Jenkins v. Georgia* (1973), which said that citizen juries did not have "unbridled discretion" [full power] to determine what qualified as obscene. The internet has further broadened the "marketplace" in this area of the First Amendment. Indecent photos can be legally posted online (*Reno v. ACLU*, 1997). The Supreme Court even ruled that computer-generated child pornography, where no real children are harmed in its production, is protected free speech (*Ashcroft v. Free Speech*

Coalition, 2002).

The spending of money to advocate political causes, or to help candidates get elected, is considered speech in *Buckley v. Valeo* (1976). This was expanded even further in 2010 with *Citizens United v. Federal Elections Commission*. The Court ruled that individuals assembled into corporations and groups, so-called "special interests," are also protected by the First Amendment. This has proven a very controversial ruling, but it was upheld by the Supreme Court in 2012 (*Western Tradition Partnership, Inc. v. Attorney General of Montana*).

An equally controversial form of speech is symbolic speech, or conveying a message through action. Ruling that "one man's vulgarity is another's lyric," wearing clothing that contains an offensive message is protected through *Cohen v. California* (1971). The Court upheld the burning of a U.S. flag as a method of expression in *Texas v. Johnson* (1989). This concept was extended in *Virginia v. Black* (2003), which ruled that cross-burning was protected speech, so long as it was not meant as a form of direct intimidation.

How Does the Marketplace Apply to You and Your School?

Schools have long been considered a "special place" by the Supreme Court. While you do have constitutional protections at school, the Court has drawn a line between your rights and the abilities of school officials to preserve the unique goal of schools.

The Supreme Court applied the principles of expression in *West Virginia v. Barnette* (1943). In this case a group of Jehovah's Witnesses refused to participate in reciting the Pledge of Allegiance, remaining seated and silent. Their silence was not "speech," but it was a form of expression, they argued. The Supreme Court agreed, and upheld a student's right to express himself through non-participation.

In the majority opinion, Justice Robert Jackson noted that an important aspect of our constitutional rights is that government officials are not allowed to force people to express views about politics, religion, or other matters.

The most famous case of student speech in school came with *Tinker v. Des Moines* (1969). In *Tinker*, the Supreme Court ruled that wearing black armbands to protest the Vietnam War was protected by the First Amendment. In ruling that students do not lose their "rights to freedom of speech or expression at the schoolhouse gate," the Supreme Court found that a school could not restrict the expressive rights of students unless it could show that a "substantial disruption" would occur as



The Supreme Court has upheld a student's right to express himself through non-participation.

a result of the expression.

The Court has refined its ruling in *Tinker* since 1969. In *Bethel School District No. 403 v. Fraser* (1986), the Court ruled that a student's speech nominating a classmate to student government containing "vulgar and offensive" language was not protected expression. The Court found that the First Amendment did not require school officials to allow such speech. In doing so, the Supreme Court drew a line between the type of political speech protected in *Tinker* with other forms of speech that schools are free to prohibit.

Similarly, in 2002, 18-year old Joseph Frederick hung a banner reading "Bong Hits 4 Jesus" on public property across the street from the school during a school-sponsored, outside event. His banner was taken down by the school

principal, and Frederick was suspended. Citing the school's interest in preventing students from advocating illegal drug use, the Supreme Court ruled that Frederick's speech was not protected in *Morse v. Frederick* (2007). While the speech might have contained a political message, the Court ruled that the special goal of the school to protect students from dangerous behavior outweighed Frederick's right to express himself.

In short, you DO have the right to express yourself in school. That right, however, is not unlimited and your school may reasonably limit it in ways that might not be acceptable in general society. School administrators have fairly broad discretion to limit or punish student speech that either violates school rules or might interfere with educational or disciplinary goals, like classroom learning and student safety.



Comprehension and Critical Thinking Questions:

1. What is the "marketplace of ideas", and how does this concept help us understand the importance of free speech?
2. When can the government pass laws that restrict speech?
3. What types of "expressive activities" have come to be protected by the First Amendment?
4. How has free speech in schools been treated differently than in the rest of society?
5. In 2-3 sentences, respond to the quote, "If freedom of speech means anything, it means a willingness to stand and let people say things with which we disagree, and which do [bother] us considerably." (2-3 sentences))

B

What Do I Believe About the Freedom of Expression?

Directions: Read each statement with your partner and decide whether you agree, disagree, or might agree. If you want to explain your decision, write your reasoning under “Explanation.” You do not need to agree with your partner, but discuss your thoughts about freedom and what kind of expression should be protected while you answer.

I BELIEVE...	AGREE	DISAGREE	MAYBE
1. I believe that the protections of the First Amendment are important ways we maintain a free society of self-governing individuals. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. I believe the First Amendment should protect as many forms of expression as possible. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. I believe that there are times when government can reasonably limit what people say or the ways in which they express themselves. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. I believe that things that some or many people find offensive or inappropriate should be protected by the First Amendment. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

I BELIEVE...	AGREE	DISAGREE	MAYBE
5. I believe that sexually explicit material, including pornography, should be protected expression. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. I believe that the things I say or do online should be as protected by the First Amendment as the things I say or do in "real life." EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. I believe that strong anti-bullying laws or policies are important, even if they restrict what people say or do online or in school. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. I believe that burning an American flag or a cross as a method of protest should be protected expression. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. I believe that the message someone is trying to communicate always deserves protection, even if they do it in ways that are very offensive to others. EXPLANATION:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>



Student Code of Conduct

Directions: The following excerpts are taken from a real school's Student Code of Conduct booklet. Your school's Code of Conduct may differ, but it may contain similar language. Carefully read the excerpts, then answer the questions below.

Student Rights

"There is an urgent and growing need for school administrators to provide strong leadership in the area of [individual] rights. [Individual] rights accrue to all people simply because they are human. One's [individuality] cannot be denied because of temporary status as a student; nor should students be denied the opportunity to learn about, and practice, [individual] rights behavior in the school setting.

"Of equal importance is the right of school authorities, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. The difference between the freedoms expected by the students and the necessary restrictions of their actions in the rules set down by the school to maintain good order can be bridged by appropriate conduct on the part of both."

Freedom of Expression

"Students have the right to assemble and express themselves by speaking, writing, distributing, wearing or displaying symbols of ethnic, cultural, or political values such as buttons, badges, emblems, and armbands; or through any mode of dress or grooming style; or through any other medium or form of expression. The principal, or designee, however, may regulate expression, provided the regulation is based on legitimate educational concerns, there is a factual basis for believing a specific form of expression by a specific student is causing or will cause substantial disruption of school activities, or the expression constitutes a health or safety hazard. Students shall also have the right to refrain from expressing themselves in these student originated activities."

1. Referring to **Handout A**, which Supreme Court cases regarding schools and the First Amendment are reflected in this Code of Conduct?
2. According to the Code of Conduct, in what ways, and for what reasons, may students express themselves in school?
3. According to the Code of Conduct, for what reasons may school administrators “regulate expression”?
4. The First Amendment reads, in part: “shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government.” To what extent do you think that this Code of Conduct is faithful to the protections of the First Amendment? If you went to this school, do you believe you’d be very free to express yourself? Somewhat free? Not very free?

D

Schools and the Marketplace of Ideas—4 Scenarios

Directions: Read and discuss each of the following scenarios. As you work through each scenario, you will want to refer to the First Amendment as well as **Handout B: Student Code of Conduct** and the ways in which you answered the questions. Apply your interpretation/understanding of both documents as you formulate your answers to the questions below, doing so from your perspective as a student.

SCENARIO 1

War has always been a political issue that causes debate in the United States. While World War II, for example, was very popular with most Americans, a great number of Americans during the 1960s and 1970s strongly opposed the Vietnam War. The Vietnam War was particularly unpopular with young Americans. As the draft let the government force young men who were 18 or older to go to war, the possibility of being sent to war left many students nearing the age of 18 uncertain about their future.

Siblings John and Mary Beth belonged to a pacifist family and believed all wars are wrong. They decided they would protest as part of a larger, community demonstration against the Vietnam War. Together with a friend, John and Mary Beth agreed to wear plain black armbands to school to mourn the dead and quietly show their opposition to the

war. Hearing rumors of the planned protest, their school district created a policy that banned the wearing of armbands in school. The school district threatened to suspend any students who violated the policy.

The students continued with their plans and deliberately wore their armbands to school despite the policy. They remained quiet and orderly during their protest, but refused to remove their armbands when told to do so by the principal. Some students made hostile [unfriendly or violent] statements to the trio, but no one threatened them or committed any violence. School principals suspended all three students, arguing that their protest and its message might cause trouble in school due to disagreements about the Vietnam War.

1. What forms of expression are in this scenario? Is the expression protected by the First Amendment? Is the expression protected by the Student Code of Conduct?

2. Are school officials justified in limiting the expression or limiting how it was expressed? Explain your answer.

3. Pretend you are on the Supreme Court. Complete the chart below to list the reasons you might say the speech was protected or not protected.

REASONS THIS EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT	REASONS THIS EXPRESSION IS NOT PROTECTED BY THE FIRST AMENDMENT

SCENARIO 2

Since the Supreme Court's decision in *Roe v. Wade* (1973) legalized, in most circumstances, abortion [purposely ending a pregnancy] across the United States, the issue has caused fierce public debate on both sides. The sharp moral, religious and individual rights questions involved with this sensitive topic have at times caused violence.

In 1984, President Ronald Reagan made the third Sunday of each January to be a national "Sanctity [goodness or sacredness] of Human Life Day." The day has become important for those on the pro-life [anti-abortion] side of the debate. The day is usually marked by protests against the Supreme Court's *Roe v. Wade* decision. Citizens on the pro-choice (in favor of legal abortion being available) side engage in similar activity annually, typically coinciding with the anniversary of *Roe*.

In 2002, a small group of girls at a suburban high school chose to participate in the "Sanctity of Human Life Day." Days before, the girls gathered to make shirts that communicated their message. One of the girls suggested that the front of shirt display the text "It's a life, not a 'choice,'" and that the back of the shirt contain an image of an aborted fetus. The group agreed, and located a graphic online image to communicate their message. They made their shirts and wore them to school. The girls quietly entered the building as normal, and went to their first class. Several students complained to the teacher, and the teacher asked them to change their shirts, saying the class could not continue with such a disruptive message. The girls refused and were sent to the office where the principal suspended them for refusing to change their clothes.

1. What forms of expression are in this scenario? Is the expression protected by the First Amendment? Is the expression protected by the Student Code of Conduct?

2. Are school officials justified in limiting the expression or limiting how it was expressed? Explain your answer.

3. Pretend you are on the Supreme Court. Complete the chart below to list the reasons you might say the speech was protected or not protected.

REASONS THIS EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT	REASONS THIS EXPRESSION IS NOT PROTECTED BY THE FIRST AMENDMENT

SCENARIO 3

One of the primary goals of education in America is to prepare students for citizenship in a republic. The principles of liberty and responsibility are essential in a free society. The American government system will not function well if young people do not have opportunities to learn and practice these principles. One common way schools educate students about government and citizenship is through student government. Student government is meant to give students some choice in how their school operates as well as practical experience in voting, representation, and other republican principles like the art of compromise.

In 1983, Matthew, a Washington state high school student, gave a speech supporting a classmate's election to student government. He gave this speech in a school assembly with about 600 students, teachers, and staff in the audience. The speech referred to

the candidate in ways that were full of obvious sexual innuendo (words that suggest inappropriate or obscene behavior).

Prior to giving the speech, Matthew discussed what he wanted to say with two teachers, who both advised him not to give it. They said that the speech was inappropriate, and that he might face "severe consequences" if he gave it. As Matthew spoke at the assembly, some students in the crowd made graphic gestures portraying the sexual activities suggested in the speech. Others yelled and cheered, and a counselor saw that plenty of other students appeared embarrassed and uncomfortable. The morning after his speech, Matthew was called into the principal's office. After admitting that he intentionally wrote the speech to include sexual innuendo, Matthew was suspended for three days for giving an obscene and offensive speech.

1. What forms of expression are in this scenario? Is the expression protected by the First Amendment? Is the expression protected by the Student Code of Conduct?

2. Are school officials justified in limiting the expression or limiting how it was expressed? Explain your answer.

3. Pretend you are on the Supreme Court. Complete the chart below to list the reasons you might say the speech was protected or not protected.

REASONS THIS EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT	REASONS THIS EXPRESSION IS NOT PROTECTED BY THE FIRST AMENDMENT

SCENARIO 4

Immigration has always been a part of American life. Our nation was founded on principles that welcome all who wish to live freely, and millions of immigrants have come to America since the country's founding. Immigration has faced challenges, however, as people of different religions, cultures, and languages have sometimes conflicted.

In recent decades, a major source of immigration to America's western and southwestern states has come from Mexico. In many cities in this region, Cinco de Mayo is a cause for celebration.

Similar to other cultural holidays honored in America, Cinco de Mayo is a day for those of Mexican descent [people with Mexican family or ancestors] to celebrate their history and pride.

In 2010, students of Mexican descent at a largely Hispanic California high

school wore symbols, clothing and the colors of the Mexican flag to school in celebration of Cinco de Mayo. Five Caucasian students responded, on the same day, by wearing shirts showing the American flag. Because there had been past Cinco de Mayo conflicts between Mexican American and Caucasian students, the principal told the students with the American flag shirts to either turn them inside out, or be sent home. All five of the students admitted to the principal that they had already encountered hostility from other students, and agreed they might be in danger.

Still, two students refused the principal's order and were sent home for the day, though they were not actually suspended. Similar demands were not made to students wearing the Mexican flag or its colors.

1. What forms of expression are in this scenario? Is the expression protected by the First Amendment? Is the expression protected by the Student Code of Conduct?

2. Are school officials justified in limiting the expression or limiting how it was expressed? Explain your answer.

3. Pretend you are on the Supreme Court. Complete the chart below to list the reasons you might say the speech was protected or not protected.

REASONS THIS EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT	REASONS THIS EXPRESSION IS NOT PROTECTED BY THE FIRST AMENDMENT