

MAKING WAVES

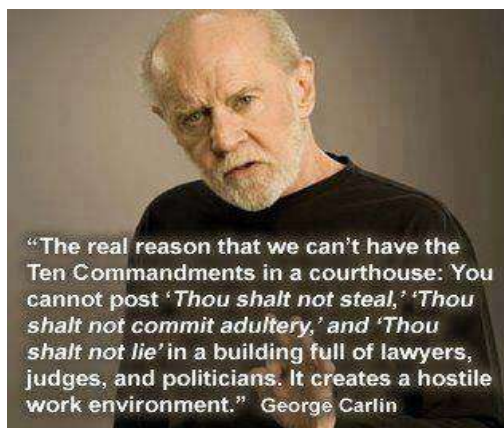
Free Speech on College Campuses: Can They Say That?



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Today's Agenda

- Basic Free Speech Principles
- Analytic Framework
- Recent Cases
- Resources
- Questions



First Amendment

Congress shall make no law [1] respecting an establishment of religion, or prohibiting the free exercise thereof; [2] or abridging the freedom of speech, or [3] of the press; or [4] the right of the people to **peaceably** assemble, and to [5] petition the Government for a redress of grievances.

U.S. Constitution, Amendment I.



5 Rights in the 1Amd

- Speech
- Religion
- Press
- Assembly
- Petition Government

***Association - protection of free speech, assembly, and petition logically extends to include a *freedom of association*; the freedom to associate with others who have similar political, religious, or cultural beliefs.

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5

What does the Supreme Court say about speech on college campuses?

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

Tinker v. Des Moines, 393 U.S. 503 (1969)

State colleges and universities are not enclaves immune from the sweep of the First Amendment.

Healy v. James, 408 U.S. 169 (1972)

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6

The college classroom with its surrounding
environs is peculiarly the marketplace of ideas.

Healy v. James, 408 U.S. 169 (1972)

The mere dissemination of ideas – no matter
how offensive to good taste – on a state
university campus may not be shut off in the
name alone of conventions of decency.

Papish v. Board of Curators of University of Missouri, 410 U.S. 667 (1973)

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7

Speech is powerful. It can stir people to action,
move them to tears of both joy and sorrow, and —
as it did here — inflict great pain. On the facts
before us, we cannot react to that pain by
punishing the speaker. As a nation we have
chosen a different course — to protect even hurtful
speech on public issues to ensure that we do not
stifle public debate.

Snyder v. Phelps, 131 S. Ct. 1207 (2011)

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8

Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express “the thought that we hate.”

Matal v. Tam, 137 S. Ct. 1744 (2017)

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9

Look for State Laws

- A **New University Rule** was required by a law passed in the Texas Legl in 2019
 - Senate Bill **18** (86R-2019)
 - Codified in Texas Educ. Code § 51.9315, *Protected Expression on Campus*
 - Texas A&M University adopted new rule 08.99.99.M1, *Expressive Activity on Campus*

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10

Summary of SB 18

- Requires public universities to adopt a new rule detailing student's rights and responsibilities regarding expressive activity on campus.
- Requires BOR approval.
- **All persons** may peaceably assemble on campus to engage in expressive activity.

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Summary of SB 18

- U must classify “common outdoor areas” on campus as traditional public forums and permit **any person** (not just students, faculty, and staff) to engage in expressive activities in these areas freely as long as the person's conduct is not unlawful, and does not materially and substantially disrupt the function of the university.

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Summary of SB 18

- Must discuss the importance of free expression on campus; and provide that reasonable time, place, and manner restrictions are still authorized.
- Must allow: (1) **any person** to engage in expressive activity on campus*; (2) student organizations and faculty to invite speakers; and (3) individuals to file complaints about non-compliance with the law and require disciplinary procedures for individuals (students and employees) violating this law.

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Summary of SB 18

- U may not take action against student organizations based on their viewpoints and the expressive activities for which they engage.
- U can only consider 4 factors when determining whether to permit a speaker on campus and the appropriate security fee: the venue, the size of the crowd, the need for security and necessary accommodations, and the history of rule compliance by the group or individual inviting the speaker.
- **U cannot consider and insert additional fees for the anticipated controversy at the event.**

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Look for System Policies & Regulations

- System Regulation 21.99.09
 - *Access to System Property for Sales, Rentals and Soliciting Donations*
 - Commercial speech is still protected speech (just not as much)
 - Each CEO must regulate access by adopting written guidelines
 - TAMU SAP: <https://rules-saps.tamu.edu/PDFs/21.99.09.M0.02.pdf>



Look for University Rules

- SAP 24.99.99.M0.02, External Client Events
 - <https://rules-saps.tamu.edu/PDFs/24.99.99.M0.02.pdf>



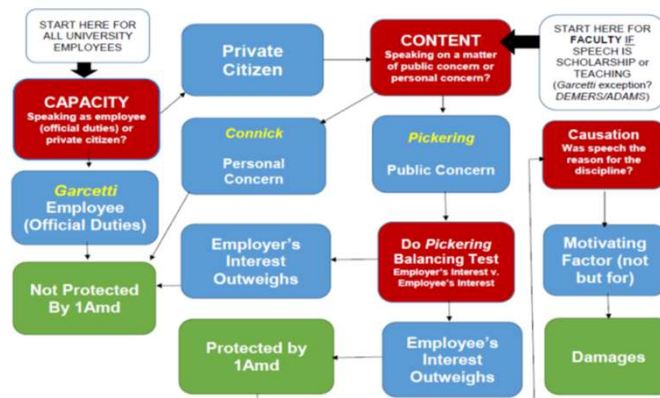
Students' Rights > Employees'

Public employees' speech made pursuant to their official duties receives **no** First Amendment protection from employer discipline. Faculty speech that is "teaching or scholarship" has a different rule.

Garcetti v. Ceballos, 547 U.S. 410 (2006)



Decision Tree



Employer's Interest Outweighs Employee's Interest

- Employer weighs the value of the employee's speech against any detrimental impact on the government's efficient workplace operations to determine if employee can be disciplined. If an employer can establish one of these factors, it can sanction speech even on matters of public concern.
- To meet the burden the employer must be able to show:
 - supervisors would have difficulty maintaining discipline, or
 - harmony among coworkers is substantially adversely impacted, or
 - employee's performance of daily duties are substantially impaired, or
 - regular operation of the employee's business is substantially interrupted.

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19

Barnes v. Zaccari

- 1Amd retaliation and due process case by student expelled in 2007
- \$50,000 personal judgment against (former) president
- \$407,242 in attorney fees to plaintiff
- Case settled (July 2015) for \$900,000 after 8 years of litigation

Barnes v. Zaccari, 592 Fed. Appx. 859 (11th Cir. 2015).

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20

Gibson Bros. v. Oberlin College

- \$44M state court jury verdict, June 2019
- \$11 actual, \$33 punitive, \$6.5 atty fees
- Judgment against college and Dean of Students **Meredith Raimondo** (personally liable)
- Court reduced verdict to \$25M (puni caps)
- Oberlin is a private college in Ohio
- March 31, 2022 COA upheld \$33M damage award; see *Gibson Bros., Inc. v. Oberlin College*, 2022 WL 970347 (2022-Ohio-1079).



ANALYTIC FRAMEWORK

Step One: Identify First Amendment Issues

Step Two: Understand Exceptions to First Amendment Protections

Step Three: Conduct Forum Analysis

The First Amendment on Campus: A Handbook for College and University Administrators. Bird, Mackin, Schuster (NASPA & ASCA 2006, page 54).



Step One

1Amd issues are often disguised to look like a different issue...

- Any component of expression in the activity?
 - Pure speech (spoken words)
 - Speech-Plus (speech and conduct like a rally or protest)
 - Symbolic speech (conduct (armband, button, t-shirt) not words)
 - Performance/Entertainment/Skit
 - Advocacy/Articles/Op Ed pieces
 - Association
- Political and religious (highly protected), newspaper, radio/TV, social media, posters/banners/flags
- Groups-protest, sit-in, rally



Step Two

Understand Exceptions to First
Amendment Protections



Exceptions

1. Defamation
2. Obscenity
3. Disruption to the Academic Environment
4. True Threat of Violence
5. Imminent Lawless Action
6. Fighting Words (use with caution)
7. Invasion of Privacy
8. Harassment



Apply Exceptions Narrowly

If there is a question as to whether the exception should apply, it will not apply unless there is *substantial* evidence to support the exception.



Step Three

Conduct Forum Analysis



Four Forums

1. Traditional Public
2. Designated Public
3. Limited Public
4. Nonpublic



Traditional Public

Definition: places which, by long tradition or by governmental default, have been devoted to public assembly or debate.

Examples: campus mall, public streets through campus, public sidewalks. **Ability to regulate:** *content-neutral* time, place, and manner limitations; however, the limitation is subject to the “strict scrutiny” standard. Any limitation must serve a compelling state interest; be narrowly tailored so the limitation does not burden more expression than necessary to meet the compelling interest; and leave open ample alternative channels of communication. College *cannot* require a reservation *unless* the activity is expected to bring a crowd of more than 25 people. See *Roberts v. Haragan*, 346 F.Supp.2d 853 (ND Tex. 2004, no writ).



Designated Public

Definition: areas on campus specifically assigned by the college to serve as a traditional public location. **Examples:** designated free speech areas such as gazebos, green space, campus mall areas, and main walkways through campus. **Ability to regulate:** same as traditional public. TAMU examples: Rudder Fountain (sound), Sul Ross Statue (no sound), West Campus Mall Area (no sound). See Appendix XI to Student Rules.



Limited Public

Definition: locations that the college has opened for expressive activity with a content-neutral purpose/topic/subject. **Examples:** auditoriums, meeting rooms for student organizations, athletic facilities during events. **Ability to regulate:** must be governed by a written-use policy that includes the stated purpose of the location and any limitations (which must be enforced consistently). Regulation may be stricter and must only be reasonable and viewpoint-neutral. Limitations must still be narrowly-tailored and must not restrict more expression than is necessary to achieve the interest. Colleges may give priority for space to college groups over non-college groups.



Nonpublic

Definition: locations not open to the general public by tradition or designation. **Examples:** class rooms, campus administrative and faculty offices, residence hall rooms. **Ability to regulate:** If the expression in question is incompatible with the purpose of the location, that expression may be limited. If the purpose/topic/subject is location-appropriate, the content/viewpoint/opinion may not be limited. Regulations must take into account the purpose and nature of the location, as well as the circumstances.



RECENT CASES

- The Cheerleader Case
- The Flag Case
- The Colleague Criticism Case
- The Pronouns Case
- The Harassment Policy Case



The Cheerleader Case

Mahanoy Area Sch. Dist. v. B. L. by & through Levy, 141 S. Ct. 2038 (2021).

- **Facts:** Student posts rant against cheer program on her social media while off-campus.
- **Issue:** To what extent may a public K-12 school regulate/punish speech that occurs off campus and outside of school hours without violating the First Amendment?
- **Answer:** A public K-12 school has similar interests in off-campus speech as it does in on-campus speech (see *Tinker*), however, the interests are **greatly diminished** due to the geographical/temporal limitations, as well as the school's own counter-vailing interest in promoting a robust marketplace of ideas. Making successful regulation very unlikely.



The Court specifically listed the following areas where the school's interest **may** be sufficient to permit regulation:

- Serious or severe bullying or harassment targeting particular individuals;
- Threats aimed at teachers or other students;
- Failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and
- Breaches of school security devices, including material maintained within school computers.



The Flag Case

Shurtleff v. City of Boston, Massachusetts, 2022 WL 1295700 (U.S. May 2, 2022).

- **Facts:** City of Boston denied a Christian organization's request to fly Christian flag along side the US and Mass. flag despite a policy of allowing flags to be flown on a flag third pole related to events taking place in front of city hall.
- **Issue:** Did the refusal violate the First Amendment?
- **Answer:** Yes, the City established a public forum with its all-comers policy for use of the third flag pole and denying the request represented impermissible viewpoint discrimination.



The Colleague Criticism Case

Houston Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253 (2022).

- **Facts:** Board of Trustees publically reprimanded member for criticizing other members and filing lawsuits against the board.
- **Issue:** Was the reprimand retaliation for protected speech?
- **Answer:** No. Government bodies have a long history of censoring their members since the founding of this country.

- **CAUTION:** The Court noted, “We do not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim. It may be, for example, that government officials who reprimand or **censure students, employees**, or licensees may in some circumstances materially impair First Amendment freedoms.”



The Pronoun Case

Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021).

- **Facts:** Public college punished a professor for failing to use a student’s preferred pronoun due to the professor’s sincerely held religious belief. The professor offered several solutions, including not using any pronouns for the student in question, but the college rejected his efforts and punished him for violating its anti-discrimination policy.
- **Issue:** Did the college violate the First Amendment?
- **Answer:** Yes, not only his free speech rights but also his free exercise of religion rights.



The Harassment Policy Case

Is the following anti-discrimination policy constitutional?

Policy XYZ – Prohibiting Discrimination on Campus

This policy prohibits verbal, physical, electronic, or other conduct based on identities such as, but not limited to, religious or non-religious, gender identity, genetic information, and political affiliation.

The policy applies to ***any conduct*** that ***unreasonably alters*** another student's participation in a university program or activity.



This harassment may take ***many forms***—including verbal acts, name-calling, graphic or written statements or other conduct that ***may be humiliating***.

This policy applies a totality of known circumstances approach to determine a violation.

This policy prohibits students not only from committing the specified acts, but also from ***condoning, encouraging, or failing to intervene*** to stop them.



According to the 11th Circuit Court of Appeals. . . it is NOT constitutional. A policy at the University of Central Florida was found overly broad on its face and represented an impermissible restriction based on content and view-point. *Speech First, Inc. v. Cartwright*, 2022 WL 1301853 (11th Cir. 2022).

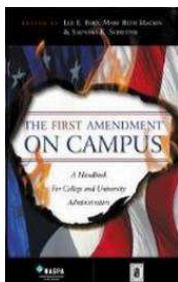


“By depriving itself of academic institutions that pursue truth over any other concern, a society risks falling into the abyss of ignorance. Humans are not smart enough to have ideas that lie beyond challenge and debate. A discriminatory-harassment policy that assumes the most popular idea or the idea that least ‘interferes with, limits, deprives, or alters the terms or conditions of education’ is the correct one is plainly at odds with the First Amendment and our notion of free speech.”

Speech First, Inc. v. Cartwright, 2022 WL 1301853, at *14 (11th Cir. 2022)(J. Marcus Concurring).

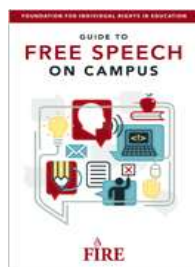


RESOURCES



http://www.theasca.org/store_product.asp?prodid=7

Written by administrators, for administrators.
Ch. 6 has a great ACTION PLAN example.



<http://thefire.org/article/14671.html>

Written from the perspective of
advocates for faculty and students.





[Spinning Into Butter Movie - Amazon Link](#)

A race incident on campus tests the university's preparedness for handling a high-profile free speech issue.



QUESTIONS



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47