

The First Amendment in Schools: Free Speech and the Safe Space Generation

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adidas

IF I WAS BLACK
I'D BE PICKING
COTTON, BUT I'M
WHITE SO I'M
PICKING U 4 Prom?

Generational Cultural Norms on Free Speech

“The survey found that 40 percent of American millennials, or people from ages 18 to 34 at the time, said “the government should be able to prevent people from saying offensive statements about minority groups” in some circumstances.”

Generational Cultural Norms on Free Speech



AGENDA

- (1) Refresher on the First Amendment
- (2) Overview of the First Amendment in Schools
- (3) Student Civil Rights-Harassment & Discrimination Laws
- (4) First Amendment vs. Title VI and Title IX
- (5) Questions/Discussion

FIRST AMENDMENT 101

Speech Regulation & The Marketplace of Ideas

***Abrams v. United States*, 250 U.S. 616, 630 (1919)(J. Holmes, dissent)** : "the ultimate good...is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

THE FIRST AMENDMENT
CONGRESS SHALL MAKE NO LAW RESPECT-
ING 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.
PROTECT THE FIRST AMENDMENT, SUPPORT THE CBLDF

1st Amendment 101: Gov. Regulation vs. Social Sanction



First Amendment 101: Strict Scrutiny

Government can regulate the content of speech but only if they have a compelling reason and regulation is the least restrictive means to accomplish interest.



First Amendment 101: Six Categories of Unprotected Speech

- Incitement
- Fighting Words
- Obscenity
- Child Pornography
- Defamation
- Fraud
- Threats

First Amendment 101: Protected Categories

- Hate Speech-See *Eg. Matal v. Tam*, 137 S.Ct. 1744 (2017)
- Vulgar Language-See *Eg. Cohen v. California*, 404 U.S. 876 (1971)
- Speech that causes emotional distress-See *Eg. Snyder v. Phelps*, 562 U.S. 443 (2010)



First Amendment in Schools

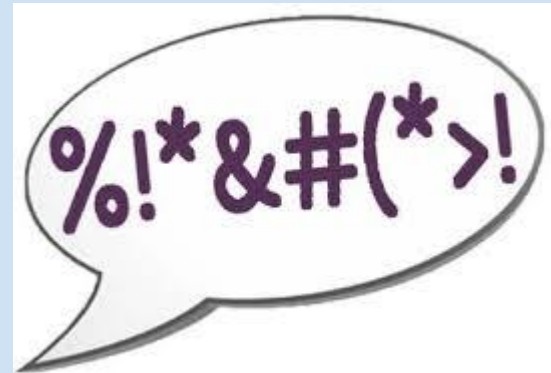
Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969)

- “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- Standard for content-based regulation:
 - Substantial Disruption--more than just an “undifferentiated fear or apprehension of a disturbance”
 - Interfere w/ Rights of Others



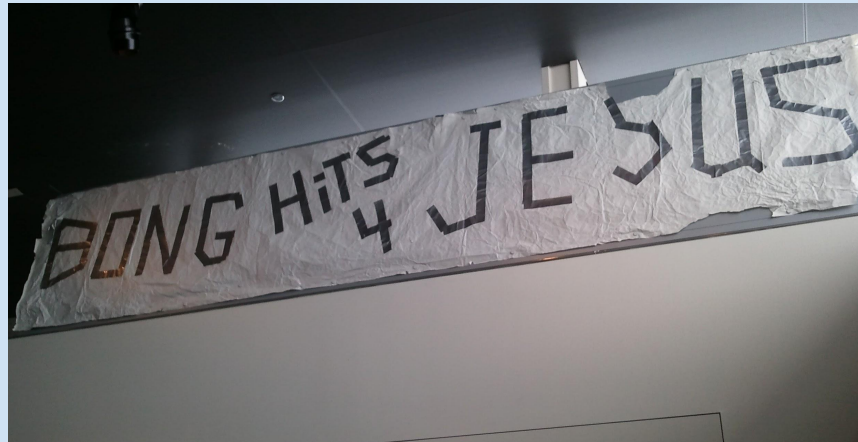
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)

- Regulation of vulgar or lewd speech does not violate the First Amendment
- No extensive analysis of disruption
- J. Marshall Dissent



Hazelwood & Frederick-School-Sponsored Standard

- *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988)
- *Morse v. Frederick* 551 U.S. 393 (2007)



ANTI-DISCRIMINATION STATUTES

Title VI of the Civil Rights Act of 1964

- Prohibits discrimination on the basis of race, color, or national origin in program receiving federal assistance (i.e. public schools)
- Discrimination includes harassment
- Uses the same framework as Title VII (employment discrimination law)



Title IX of the Civil Rights Act

- Prohibits discrimination on the basis of sex in federally funded education program
- Discrimination includes harassment
- School can be liable for student on student harassment--*See Eg. Davis v. Monroe Co. Bd. of Educ.*, 526 U.S. 629 (1999)



Reasonable Person Standard-Discrimination/ Harassment Law

- Social context and cultural norms determine what would be severe or pervasive to a reasonable person in plaintiff's position-See *Eg. Oncale v. Sundowner*, 523 U.S. 75 (1998)
- Subjective standard of what is harassment-*Id.* at 82
- One racial slur or extremely offensive comment may be sufficient to prove severe harassment if not adequately addressed
- Weekly race or sex-based offensive comments over course of several months may be sufficient to establish pervasive harassment

How do schools balance First Amendment Rights and Title VI/Title IX obligations?

West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2006)

- Applied *Tinker*
- Backdrop of racial hostilities, including fights, in the district
- District had reasonable apprehension of disturbance



Harper v. Poway, 445 F.3d 1166 (9th Cir. 2006)

- Public students have a right to be free from harassment on the basis of core identifying characteristics;
- *Tinker* allows regulation of speech that impinges on rights;
- School can regulate speech that is disparaging towards sexual minorities;
- Social context
 - Research that bullying harms educational development of minority students
 - “Some of us are unaware or have forgotten what it’s like to be young, belong to a small minority group, and be subjected to verbal assaults”-J. Reinhardt

Harper (Kozinski, J. dissenting)

- “Any speech code that has at its heart avoiding offense to others gives anyone with thin skin a heckler’s veto”
- “If interference with the learning process is the keystone to the new right, how come it’s limited to those characteristics that are associated with minority status?”



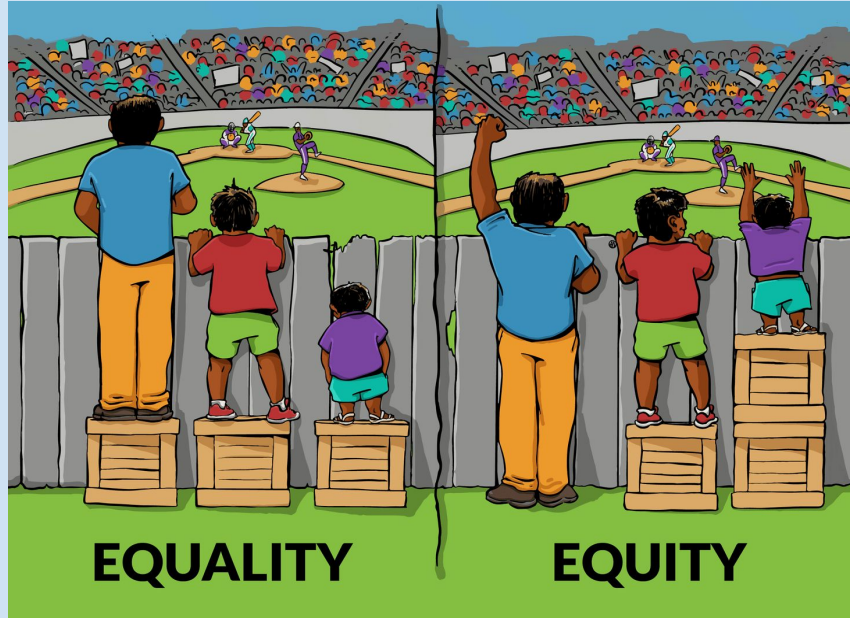
Marketplace of Ideas-regulation v. counter-protests



Can Schools Meet Title VI and Title IX obligations by “Opening” the Marketplace?



Does the marketplace provide the same platform for marginalized groups?



Conclusion & Questions

