

First Amendment Freedoms: Bulwarks of Our Democracy

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As the Trump presidency takes hold, its opposition has embraced protest as a form of resistance, while the press attempts to fulfill its democratic duty of informing the populace despite being branded “enemies of the people.” The First Amendment freedoms of speech and press are paramount during these perilous times.

According to a [2016 survey funded by the Knight Foundation](#), student support for the First Amendment is at a ten-year high. Ninety-one percent of high school students agreed that “people should be able to express unpopular opinions,” up from 83% in 2004.

Yet only a third of students personally think about First Amendment freedoms, whereas 35% take them for granted and 32% admittedly don’t know much about them. And a majority of students disagree that “people should be able to say what they want if it’s offensive to others...” in public (59.1%) and on social media (65.4%).

Decorum and constitutional protections are an important distinction, but clearly we have our work cut out for us in educating our students about freedom of the speech and the press. The First Amendment is declarative in saying the “Congress shall make no law” respecting the five freedoms: religion, speech, press, assembly, and petition. There is a presumption against prior restraint on speech by government bodies unless it represents a grave danger to national security (see *Near v. Minnesota*, 1931, and *New York Times v. U.S.*, 1971).

However, some speech can be punished after the fact if it falls within one of five categories. This includes “fighting words,” or spoken words that instigate violent reactions (see *Chaplinsky v. New Hampshire*, 1942), and defamation, which in the case of a public figure, must rise to “actual malice.” It constitutes leveling knowingly false charges, or demonstrating a reckless disregard for the truth (see *New York Times v. Sullivan*, 1964).

Speech that incites danger, where there is imminence between a call to action and the act itself is also categorically unprotected (see *Brandenburg v. Ohio*, 1969), as is speech that represents a true threat (as distinguished from political hyperbole; see *Watts v. U.S.*, 1969).

Finally, obscenity is unprotected, which is material that “appears to a prurient interest,” portrays sexual conduct in an offensive fashion according to state law, and has no artistic, literary, political or scientific value. In order to be considered obscene, it must meet all three parts of this test (see *Miller v. California*, 1971).

Assuming speech survives these categorical tests, it falls into three tiers of constitutional scrutiny. In its highest form, “pure speech,” constitutional antennas are raised when government forces the articulation of a certain message, compels disclosure of an issue position, engages in viewpoint- or content-based discrimination, or suppresses expression. In these instances, strict scrutiny is applied, where the government action is presumed unconstitutional until proven otherwise, the government must demonstrate a compelling interest in suppressing speech, and the government intervention must constitute the “least restrictive alternative” (see *Rosenberger v. Rectors and Visitors of the University of Virginia*, 1995).

Middle tier speech is labeled “speech plus,” which combines speech and non-speech elements and there is an intent to convey a message that is likely to be understood by the intended audience (think flag burning at the Republican National Convention; see *Texas v. Johnson*, 1989).

The “O’Brien test” (see *U.S. v. O’Brien*, 1965) first considers whether government regulation of such speech is within its constitutional powers. Next, does it further a substantial government interest? Third, does the regulation suppress expression? And finally, is the incidental impact on expression no greater than necessary? Once more, speech is sustained if each element of this test is not met.

The lowest tier of speech falls under the category of “reasonableness,” where content-neutral time, place, and manner restrictions are permissible in public forums. Restrictions still must be content-neutral, narrowly-tailored, and provide alternative communication channels. Public protests often fall into this category (see *Ward v. Rock Against Racism*, 1989).

Specific to students, they shed some of their First Amendment freedoms upon entering the schoolhouse gate. The landmark *Tinker v. Des Moines* case (1969) gave wide latitude for student-initiated speech in a school setting, enabling a reprimand only in the case of “material and substantial disruption” to the learning environment. This precedent has since been peeled back with a couple of categorical exceptions in the form of vulgar or lewd speech (*Bethel v. Fraser*, 1986) and drug-related speech (*Morse v. Frederick*, 2007).

Finally, in the *Hazelwood v. Kuhlmeier* ruling (1988), the Supreme Court said that school-sponsored speech may be censored for “legitimate pedagogical concerns.” This precedent had a [major impact on student publications](#), and there has been recent movement in neutralizing its impact at the state level. Under guidance from the [Student Press Law Center](#), [ten states have passed laws reversing Hazelwood](#), essentially reverting back to the *Tinker* standard with respect to student publications and other school-sponsored speech.

The First Amendment is alive and well in the Age of Trump, but we have a duty as educators to teach students its specifics and be ever vigilant in its defense. Freedom of speech and the press are nothing less than bulwarks of our democracy.

Sources: Cooke, Molly, “Indiana New Voices Passes House by Wide Margin, Advances to Senate Committee,” Student Press Law Center (2017); Ducat, Mark, “The Three Tiers of Constitutional Scrutiny in Free Speech Cases,” in *Constitutional Interpretation*, 8th Ed (2004); Lamonte, Frank, “Hazelwood at 25,” Education Week (2013); Peltz, Rick, “First Amendment Analysis” (2008); Student Press Law Center, “First Amendment Rights of High School Journalists” (2001); and Vile et al., *Encyclopedia of the First Amendment*, Vols. 1 and 2 (2009).